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Docket: 12/86
Citation: *Memorial University of Newfoundland Students’
Union v. St. John’s (City)*, 2013 NLCA 50

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

MEMORIAL UNIVERSITY OF
NEWFOUNDLAND STUDENTS’ UNION APPELLANT

AND:

CITY OF ST. JOHN’S RESPONDENT

AND:

MEMORIAL UNIVERSITY OF
NEWFOUNDLAND INTERVENOR

Coram: Welsh, Rowe and Barry JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
 Trial Division (G) 201001T2693

Appeal Heard: May 22, 2013

Judgment Rendered: July 25, 2013

Reasons for Judgment by Rowe J.A.

Concurred in by Welsh J.A.

Dissenting Reasons by Barry J.A.

Counsel for the Appellant: Raman Balakrishnan

Counsel for the Respondent: Linda S. Bishop

Counsel for the Intervenor: Christopher J. Forbes

Rowe J.A.:

[1] This appeal relates to municipal taxation of undertakings operated by the Memorial University Students' Union (the "Students' Union"). At trial, two forms of taxation were involved: property tax and business tax. Four undertakings were involved: the Breezeway bar, the Copy Centre, the Attic (a used bookstore) and the Students' Union offices.

[2] The City assessed the Students' Union for:

- (a) property tax in respect of the Breezeway, and
- (b) business tax in respect of all four undertakings.

ASSESSMENT FOR BUSINESS TAX

[3] Business tax was assessed by the City on the four undertakings pursuant to s. 12 of the *City of St. John's Municipal Taxation Act*, SNL 2006, c. C-17.1 (the "*Taxation Act*"). (Section 12 is now repealed.)

(1) The council may impose an annual tax to be known as "the business tax".

(2) The business tax shall apply and be assessed and imposed notwithstanding an assessment and taxation of real property for another tax or an exemption from that assessment or taxation under this Act.

[4] The Students' Union concedes on the appeal that the Trial Division judge did not err in concluding that each of the four undertakings was "liable for the prescribed business tax levied by the City" (2011 NLTD(G) 77, at paragraph 86).

ASSESSMENT FOR PROPERTY TAX

[5] The Breezeway operates in premises leased from the University; the other three undertakings operate in premises under licence from the University. The City of St. John's (the "City") concedes that by virtue of s. 43 of the *Memorial University Act*, RSNL 1990, c. M-7 (the "*University Act*") the Students' Union is exempt from property taxation for undertakings operated on premises under licence from the University. This includes the

Students' Union offices, the Attic and the Copy Centre. Property tax is not claimed in respect of these. Accordingly, this appeal is concerned only with whether the trial judge erred in concluding that the Students' Union is liable for property tax in respect of the Breezeway.

THE TRIAL DIVISION

[6] The City assessed the Breezeway for property tax pursuant to the following provisions of the *Taxation Act*:

3. The council may impose an annual tax to be known as "the real property tax" on owners of real property within the city, including docks, quays, wharves and structures touching the boundary of the city.
6. The tenant of real property that is not subject to the real property tax shall, where rent or other valuable consideration is paid by him or her in respect of that real property, pay the real property tax as if he or she were the owner of the real property and the real property were subject to that tax.

[7] The Students' Union argued that it was exempt from property taxation by virtue of s. 43 of the *University Act* in that it is a "college or other institution affiliated with the university". The Students' Union also argued that the Breezeway was exempt from property tax by virtue of s. 8(1)(d)(iii) of the *Taxation Act*, which, if authorized by a by-law, exempts real property "held and occupied as a public college or school or for other public educational purposes, including ... recreational facilities ...". Section 43 reads:

The property, real and personal, vested in the university shall not be liable to taxation for provincial, municipal or school purposes, but shall be exempt from taxation until disposed of by sale, lease or otherwise; and real property so vested which is disposed of by lease to a college or other institution affiliated with the university shall, so long as it is held for college or institutional purposes, continue to be entitled to the exemption from taxation provided in this section.

[8] Section 8(1)(d)(iii) reads:

8(1) The following real property is exempt from the real property tax:

...

- (d) real property which may be exempted from the real property tax by the council by by-law that is

...

- (iii) held and occupied as a public college or school or for other public educational purposes, including student residences and playing fields and other recreational facilities owned by them, but not including other residences or apartments.

...

[9] The Trial Division judge dealt with these arguments in paras. 30-74 of his decision. He held that the Breezeway, operated by the Students' Union, did not come within the meaning of the passage from s. 43 of the *University Act*. He also held that the Breezeway was not "held and occupied as a public college or school or for other public educational purposes, including ... recreational facilities ...", nor was there a by-law in place as required by section 8 of the *Taxation Act*. In the result, he held the Breezeway was subject to property tax.

THIS APPEAL

[10] In this appeal, the Students' Union reiterated the submissions that it had made before the Trial Division judge regarding property tax and the Breezeway.

[11] I have reviewed the submissions of the Students' Union, as well as the analysis of the Trial Division judge concerning these submissions. I am in substantial agreement with and would adopt the Trial Division judge's analysis.

[12] In summary, I agree with the Trial Division judge that "college or other institution affiliated with the university" in s. 43 means an educational institution, which the Students' Union is not. As well, I agree with the Trial Division judge that the Breezeway is not a "recreational facility", nor does it operate for "public educational purposes" within the meaning of s. 8(1)(d)(iii) of the *Taxation Act*, nor was a by-law in place as required by the legislation.

CONCLUSION

[13] The appeal is dismissed. Each party will bear their own costs.

M. H. Rowe J.A.

I Concur: _____

B. G. Welsh J.A.

Dissenting Reasons by Barry J.A.:

[14] With respect I disagree with my colleagues' interpretation of subsection 8(1)(d)(iii) of the *Taxation Act*. I conclude the Breezeway falls within the property exempted from the real property tax by this subsection because it may properly be regarded as real property held and occupied as a recreational facility for a public educational purpose within the meaning of the *Taxation Act*.

[15] At paragraph 63 of his decision the trial judge concluded:

... Even on the requisite broad and purposive approach, a bar cannot be said to serve an educational purpose, even if drinking alcohol is a form of recreation for some students...

With respect, I believe this conclusion is in error and arises from too narrow a view of the true role of a university.

[16] University education involves more than "book learning". Discussion, debate, and, yes, even argument with fellow students assist in fully understanding the societal significance of instruction provided in the classroom. While alcohol may not at all times promote rational analysis, the forum provided by a bar such as the Breezeway does encourage the social interaction helpful for a proper appreciation of the viewpoint of others on various issues. One need only point to the pubs of Oxford and Cambridge, the beer gardens of Heidelberg, the Mory's Temple Bar of Yale and Domus Legis of Dalhousie [now Schulich] Law School, to find examples of bars

which by encouraging such social interaction have contributed significantly to the education of university students.

[17] In the 2006 discussion paper prepared for the Centre for Renewal in Public Policy, “The Role of Political Correctness in the Decline of Liberal Education”, by Professor Peter C. Emberley, we find a good explanation of the significance of conversation for the education of university students. Professor Emberley, at pages 7-9, begins with a description of the complex backgrounds and demands of students and discusses how they seek at university, in addition to job skills, other forms of personal satisfaction important for “intellectual knowing” and “moral doing”:

Every fall, one hundred thousand new students arrive at Canada’s universities. They are curious and intellectually hungry; they have known or are hoping to know love; they fear or revere or are indifferent to their gods; many have seen or heard about death; individually, they are tasting of that absolute freedom which is given to human beings to enjoy; they have all suffered some injustice at the hands of the stronger; they have encountered mercy and charity and forgiveness; they have nearly all appreciated in one form or another the essential mystery of being. Their longings are beautiful, inchoate, passionate and sometimes dark.

Many of these students come to acquire job skills and equip themselves to become productive and informed members of society. ...

Contrary to what many advocates for students say however, expectations of future prosperity and social well-being do not exhaust what students long for. It is essential to recognize that these young men and women, troubled with the anomie of their times and with the personal horrors that modern life has brought to visibility, also arrive with needs more enduring and potent than those arising from the contingencies of their personal and social lives. Their sense of drift and meaninglessness, their apparent inability to see the importance of meaningful personal and social relations, and the gulf between their interior lives and public institutions, while real and widely observed, obscure other vibrant needs. For, lying dormant in their consciousness are layers of historical culture and legend, nascent intimations of spiritual adventures, primordial fears and hopes, incipient conceptions of justice and charity, and anticipations of wholeness. Indeed these other, and often much more important, forms of understanding are what the university is best at cultivating and maturing, even when it does so imperfectly.

...

[18] Professor Emberley, at pages 9-10, points out that the university has a responsibility not only to satisfy the intellectual curiosity of students but also

to help them mature and develop moral attitudes and a sense of common good:

... a balanced assessment of the priorities of the university must recognize that folded within the scholarly culture's commitment to the intellectual life lies a moral responsibility to mature the needs of students. Those needs are often inchoate prior to an engagement with the scholarly culture. When students arrive at a university, they often have only an elusive sense that the scholarly culture offers opportunities to satisfy their deepest longings. In a seminal manner – simply through awareness of the evident experience of living – they are acquainted with the world of imagination and poetic creativity, the soul-leading quality of genuine conversation, the “aha” – experience of understanding, true friendship and the exercise of civic virtues. But acquaintance with the scholarly culture, in an environment that promotes leisure and intellectual trust, cultivates and refines these experiences.

[19] Professor Emberley discusses how historically the university was designed to promote both the students' desire to know and their desire to do good in the world. He notes, at page 13, how universities continue to endorse “the Socratic emphasis on conversation ... as a vehicle of understanding”.

[20] By making a lease available for the Breezeway at a one dollar rental, Memorial University encourages the bar's operation on campus. It does this I believe because, like Professor Emberley, it recognizes the importance of social interaction and conversation in the process of public education within the university. I believe the Breezeway bar, by promoting conversation and the exchange of ideas as a vehicle of understanding, serves a public educational purpose. It qualifies for exemption, therefore, on this basis under the *Taxation Act*.

[21] It is worth noting that student bars have been exempted from taxation in some other provinces. See, for example, *British Columbia Assessors, Areas No. 1 & 10 v. University of Victoria*, 2010 BCSC 133, 68 M.P.L.R. (4th) 36, where the case revolved around a hair salon, dentist's office and travel agency but a pub had been accepted by the tax assessor as exempt. Ballance J., at paragraph 68, noted:

... student societies play an important role in assisting universities in recruiting students by contributing to a student's enjoyment of university life in a variety of ways. To that end, 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. ...

See also, *University of Alberta v. Edmonton (City)*, 2005 ABCA 147, 9 M.P.L.R. (4th) 108, involving the provision of food and beverage services by an independent contractor to students and faculty.

[22] Although both the Student Union and the City in the present case took the position that subsections 8(1)(a) through (e) of the *Taxation Act* provide for automatic exemptions from real property tax without the need for a by-law, the trial judge concluded this was an incorrect interpretation of the *Taxation Act*. The Student Union pointed out that the practice of the City for a number of years has been to treat the properties of people and institutions as automatically tax exempt if they fit into an exemption, even though no by-law has been put into place. This practice has been applied, for example, to other properties recognized in Section 8 such as those of religious institutions and charitable organizations. In these unusual circumstances, where the passing of a by-law is treated by the City as merely an administrative technicality and the statutory language permits this interpretation, the Student Union is entitled to be treated like other tax payers and in fairness should not lose the exemption allowed others without a by-law. From the City's brief on this issue it is safe to assume that the City would automatically pass a by-law to confirm the exemption once the Breezeway bar has been found by this Court to fall within the category of property used for a public educational purpose. Indeed, the failure to enact such a by-law could bring the City afoul of the principle that municipalities should not arbitrarily discriminate in the application of taxation provisions. See, *Pelley v. Town of Springdale*, 2007 NLCA 70, 272 Nfld. & P.E.I.R. 157; *Eastern Demolition and Recyclers Ltd. v. Town of Long Harbour and Mount Arlington Heights*, 2005 NLCA 16, 246 Nfld. & P.E.I.R. 200; and *Labatt Brewing Company Limited v. St. John's (City)*, 2011 NLCA 75.

[23] For the above reasons I would declare that the Breezeway bar falls within the category of property held "for other public educational purposes" within the meaning of s. 8(1)(d)(iii) of the *Taxation Act* and allow the appeal.

L. D. Barry J.A.