Date: 14-02-2012

Students' Society of McGill University

Judicial Board

Zachary Newburgh and Brendan Steven (petitioners)

v.

Rebecca Tacoma, in her capacity as Chief Electoral Officer of SSMU Elections (respondent)

and

Quebec Public Interest Research Group McGill (intervener)

CKUT McGill (intervener)

Carol Fraser, in her capacity as VP Clubs and Services SSMU (intervener)

CORAM: Chief Justice David Parry and Justices Jean-Philippe Herbert and Raphael Szajnfarber

REASONS: TheTThe following judgement was delivered by

THE JUDICIAL BOARD --

A. Overview

[1] Student groups play an important role on university campuses. They provide services to students, afford them opportunities to get involved in worthwhile activities, and raise awareness of pressing issues both on and off campus.

[2] Fees levied on students are essential to the adequate financing of student groups, and referenda are an important means of regulating these fees. Given this importance, referenda are tightly-regulated activities to ensure fairness towards all sides.

[3] The Students' Society of McGill University (hereafter "SSMU") has addressed this need by establishing a system of checks and balances. First, the SSMU Constitution sets out strict requirements for referenda. Second, the SSMU Legislative Council has passed *By-law I-1 Election and Referenda Regulations*. Third, SSMU Elections was created to oversee all referenda and which is headed by a Chief Electoral Officer (hereafter "CEO") with the power to issue sanctions. Fourth, the SSMU has vested the Judicial Board (hereafter "J-Board") with authority to hear, as a neutral arbiter, any disputes arising from referenda.

[4] The present case implicates this system of checks and balances in two ways. First, whether Quebec Public Interest Research Group of McGill's (hereafter "QPIRG-M") fall 2011 referendum question is constitutional. Second, whether the CEO exercised sufficient due diligence in her handling of the fall 2011 referendum period.

[5] This case has made considerable headlines at our university. It is clear to us that the broader context surrounding this case and the potential consequences of its outcome are of considerable interest to the McGill student community.

[6] With this in mind, and out of fairness to the parties and interveners involved, the J-Board decided to expedite the release of this decision. However clear and instructive we have attempted to be, there was a need to balance those goals with strict time constraints. Even if we do not address in writing all of the arguments and angles presented to us, they were all duly considered.

[7] For the reasons that follow, the J-Board has decided to:

(1) Invalidate QPIRG-M's referendum question on the grounds that it deals with two issues, instead of one as required by the Constitution.

(2) Uphold the respondent's decisions with respect to her supervisory role of the fall 2011 referendum period.

B. Facts

[8] QPIRG-M is a student-initiated organization founded in 1989 at the downtown campus of McGill University. Since this date, QPIRG-M has collected a fee from all members of SSMU to finance its activities and services.

[9] Up until 2007, the fee had always been refundable in person at QPIRG-M's office on University Street. In 2007, the McGill University administration created a mechanism

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[17] On December 7, 2011, the J-Board agreed to hear the case on its merits, and provided Rebecca Tacoma, in her capacity of CEO of Elections SSMU (hereafter "respondent"), until January 17, 2012 to complete her factum. The extension was provided to allow all parties the time to focus on their studies during exam period.

[18] On December 17, 2011, the J-Board held a preliminary hearing with the parties and their advocates. After a brief discussion about the case, proceedings were stayed (suspended) until the second semester.

[19]

[24] The activities of the J-Board were suspended between January 27th and February 2nd, at the request of SSMU's Board of Directors in order to ensure that the Corporation and its J-Board were in compliance with Quebec corporate law.

[25] The hearing took place on February 6th and lasted approximately 5 hours.

C. Issues

[26] The principal issues that fall under the jurisdiction of the J-Board are as follows:

(1) Was QPIRG-M's referendum question constitutional pursuant to ss. 25.2 and 25.3 of the SSMU Constitution?

(2) Did the respondent fulfill her duties under *By-law I-1 Election and Referenda Regulations* with due diligence?

D. The Role of J-Board

[27] Before delving into an analysis of the substance of these issues, some words about the J-Board and its role in the McGill student community is warranted.

[28] The J-Board's mandate is limited to answering questions asked of us in the most

interest that this case has generated among the student body, it is clear that democracy within the McGill student community is alive and well.

[30] The J-Board is part of the society's democracy, but only as one component of the checks and balances in student civil society on campus. It is our duty to act in an apolitical manner, mindful of our place as a forum of last resort on perceived excess. Therefore, it is our role to focus on the legal aspects of the questions before us, irrespective of who brought them and how.

[31] The corollary is that the J-Board participates in our community's democracy in the same manner that any court should: primarily as an impartial arbiter and, when

E. The Alleged Petitioners' Motives

[33] With this context in mind, we would like to address from the outset arguments put

Whereas QPIRG provides vital resources, funding and meeting space that enable students and community groups to conduct research and launch a diversity of environmental and social justice initiatives;

Whereas QPIRG connects campus and community through annual event series for McGill students (e.g. Rad Frosh, Culture Shock, Social Justice Days) and through numerous working groups (e.g. Greening McGill, Campus Crops, Women of Diverse Origins);

Whereas McGill students voted to grant QPIRG its initial levy in 1988, and QPIRG subsequently created its own fee refund process for students who wanted to "opt-

G. Analysis

(1) Constitutional question

[38] All parties agree that ss. 25.2 and 25.3 of the SSMU Constitution require referendum questions to be "clear" and to "deal with one, and only one, issue." The agreement ends there. A constitutional analysis on this point raises three distinct issues.

[39] The first issue is the standard of review. The J-Board has effectively been asked to review the CEO's decision to approve the referendum question based on the argument that it is constitutionally invalid. Specifically, as per s. 25.3 of the SSMU Constitution, the CEO is solely charged with approving the constitutionality of student-initiated referendum questions. We must first determine what standard must be used in assessing the respondent's decision to approve the question and whether she is owed any deference in exercising this responsibility pursuant to s. 25.3 of the Constitution.

[40] The second issue is whether QPIRG-M's referendum question deals "with one, and only one, issue" aj ET Q q 9h sesscs25.3 , sPIRGsution.

[42] Both the second and third issue raise the preliminary question of what the guiding perspective ought to be when assessing constitutional validity under ss. 25.2 and 25.3.

a) Standard of review to apply

[43] We believe that a correctness standard is appropriate in assessing the CEO's approval of a referendum question.

[44] The petitioners submit that because the "one issue" requirement is constitutional in nature, the standard of correctness should be applied. Under this line of argument, the J-Board would not owe deference to the CEO and Council as to the question's constitutional validity. The respondent, by contrast, urged us to give deference to her decisions for both policy and practical reasons. She argued that she alone is best placed to interpret the by-laws. If this is true, the standard of review would be reasonableness.

[45]

[46] We agree with the respondent that, as a general rule, where an administrator with a level of expertise is making a decision within his or her jurisdiction, the decision must be given a high level of deference. Nevertheless, this general rule does not cover certain questions of law. The constitutional validity of a referendum question is one of those questions of law. The reasonableness standard is principally used to allow deference to an officer's actions. This standard is concerned mostly with the existence of justification, transparency and intelligibility. But it is also concerned with whether the decision falls within a range of possible and acceptable outcomes. Given the higher stakes with regards

This is imported from the US state of California, having been developed as a test which is deferential to voters' judgement in order to enforce the single-subject rule.

[53] We believe that the philosophical connectedness test is the correct approach. While we

philosophically connected if it would be possible to vote “yes” with respect to one issue and “no” with respect to another issue.

2. Application

[57] The petitioners argue that the referendum question is unconstitutional because the issues of QPIRG’s existence (the “existence question”) and the current online opt-out mechanism (the “online opt-out question”) were not sufficiently philosophically connected. On the other hand, the respondent and interveners argue that the reasonably informed average voter would find that these issues are sufficiently philosophically connected because the question effectively deals with only one issue: the continued existence of QPIRG-M.

[58] We are persuaded by the petitioners’ argument. The issues of QPRIG-M’s continuing existence and whether to change the current online opt-out mechanism are distinct enough such that a reasonably informed average voter could vote “yes” in favour of QPIRG-M’s continued existence and “no” to changing the online opt-out. Indeed, such a voter could feel compelled to vote in favour of the referendum question to show support for the continued existence of QPIRG-M even if he/she had reservations about eliminating the online opt-out mechanism.

[59] The first issue of QPIRG-M’s continued existence asks the voter to continue the status quo, and the second issue of the online opt-out asks the voter to do something

different, namely change the status quo vis-à-vis the online opt-out mechanism. Asking the voter to do two things in this manner violates the SSMU Constitution.

[60] The two issues also have different legal effects: the existence question concerns QPIRG-M's capacity to negotiate a new Memorandum of Agreement with McGill, whereas the online opt-

[63] The reasonably informed average voter also is not privy to the information and in-depth knowledge that QPIRG-M has on this issue. Failure to use the reasonably informed average voter standard would place an undue burden on the average student voter to make inquiries.

[64] We would like to add that, from the evidence, we believe that QPIRG-M was trying to draft a fair question. Moreover, QPIRG-M has shown that it has legitimate concerns about the impact of the online opt-out system on its continued existence. Its place on campus is valued by many students. However, this does not make its question

extensive research into these issues. The reasonably informed average voter, however, does not benefit from anything of the sort.

(2) The CEO's actions

[67] The petitioners also asked the J-Board to quash, retroactively, a number of decisions made by the respondent in her capacity as CEO. In order to do so, we must: i) determine what standard of review we should apply to her decisions and; ii) determine whether the CEO exercised sufficient due diligence in her handling of the fall 2011 referendum period

a) The proper standard of review

[68] We believe that a reasonableness standard should be used to assess the appropriateness of the CEO's decisions during the fall 2011 election period.

[69] The petitioners submit that while a large degree of discretion should be granted to the CEO, no discretion should be untrammelled. The respondent and, to a lesser extent the interveners, were clear that the standard should be reasonableness and that the CEO must be owed deference to interpret the by-laws she was hired to uphold.

[70] We agree with the respondent. The first reason has already been provided. As previously stated, where an administrator with a level of expertise is making a decision within his or her jurisdiction, the decision must be given a high level of deference. The

second reason is that it is unrealistic to assume that a CEO, a student, with the help of a few staff members, can be everywhere at once. Nobody would want to be the CEO if every decision they took in good faith could be overturned based on a standard of correctness. This would be impractical and unfair.

b) The reasonableness of the CEO's conduct

[71] The petitioners submit that the fall 2011 referendum period was full of a long list of campaign irregularities, among others, illegal campus endorsements and external support, and that the CEO's decisions should be overturned because they were unreasonable. The petitioners suggest that the respondent CEO did not fulfill her duties with due diligence. By contrast, the respondent argued not only that she is owed deference in interpreting her by-laws, but also that she did so with the utmost respect for the principles of impartiality and her understanding of her role within the context of the student society

[72] We agree with the respondent. It suffices to say that, based on all of the evidence before us, including the written and oral arguments, as well as the testimonies, the respondent's decisions seemed justified, transparent and intelligible. They were, therefore, reasonable.

[73] To take it one step further, the CEO seems to have conducted herself in forthright and commendable manner throughout the referendum period.

H. TV McGill

[74] Contrary to the petitioners' contentions, we find that TV McGill (hereafter "TVM") has no duty to comply with s. 16.9 of *By-law Book I-1*. We agree that TVM is listed as a service of the SSMU and as an accredited Media organization, per Schedule A of *By-law Book III-1* and *By-law Book III-2*. Similarly to the *The McGill Tribune* and *The McGill Daily*, TVM must be free to present various opinions on controversial campus issues, which it would not be able to do without benefitting from media accreditation and an exclusion from art. 16.9.

I. Conclusions and Disposition

[75] Petition accepted in part. Fall 2011 referendum concerning QPIRG-M invalidated.

Advocate for the petitioners: Carmen Barbu

Advocate for the respondent: Gabriel Joshee-Arnal

Advocate for QPIRG-M: Faiz Lalani

Advocate for CKUT McGill: Vladimira Ivanov

Advocate for Carol Fraser: Tomas Van Der Heijden