

29-04-2014

Students' Society of McGill University

Judicial Board

Mr. Tariq Khan (Petitioner)

v.

Mr. Benjamin Fung in his capacity as the Chief Electoral Officer of the Students' Society of McGill University (respondent) and

David Koots in his capacity as Deputy Electoral Officer (co-respondent)

Advocate for the petitioner: Ms. Kiran Ross

Advocate for the respondent: Ms. Catherine Hamill

QUORUM: Three Judicial Board voting members

PRESENT AT HEARING: Chief Justice Bennet Misskey and Justices Kiara Kaminski, Marwan Al Attar, and Roman Ivanov

Date of hearing: 29 April 2014

Date of judgment: 29 April 2014

FINAL JUDGEMENT:

The following judgment was delivered orally by
Chief Justice Bennet Misskey---

I. Introduction:

[1] Since the events of this dispute transpired late in the semester and just before the Winter 2014 examination period, today is the first available day that the Judicial Board has been able to schedule and hold a hearing. Today also happens to mark the last day of the Winter 2014 term. Since Articles 28.4 and 28.5 of By-law Book I-1 provide that all appeals regarding the conduct of elections must be heard and adjudicated in the semester in which they are launched, the Judicial Board has been compelled to reach a decision on this matter by midnight. Due to time constraints, the reasons are being delivered orally and a written copy will be submitted to the Board of Directors by noon tomorrow in anticipation of their meeting to decide upon ratification.

II. Analysis:

[2] The Judicial Board is a dispute resolution body empowered under the Constitution to hear appeals regarding any matter within its jurisdiction to ensure that Society actions and decisions are made in accordance with the SSMU Constitution and the by-laws. Its mandate is not to act as a policy-making or political body but strictly to ensure that all decisions that it reviews are legal. Where the law is silent or ambiguous, the Judicial Board is bound to interpret the legality of Society activity in accordance with principles of natural justice, including equity and fairness.

[3] Article 28 of By-law Book I-1 expressly grants a right of appeal to the Judicial Board regarding the conduct of Elections and Referenda.

[4] The Constitution provides that the Judicial Board has the power to make the following determinations:

- 1.1. The Judicial Board may recommend rulings to the Legislative Council with respect to the following matters:
 - 1.1.1. to declare invalid any act of Council, the Executive Committee or the General Manager which violates this Constitution and Bylaws;
 - 1.1.2. to declare invalid any act of a Society activity, club or functional group which violates this Constitution and Bylaws or its own constitution;
 - 1.1.3. to declare invalid any referendum or election that violates this Constitution and Bylaws;
 - 1.1.4. to order the placing of a referendum question on a ballot in cases of undue procedural delay.

[5] The Chief Electoral Officer, together with the Deputy Electoral Officer ("DEO") is given substantial powers under the SSMU Constitution and By-laws. He is appointed by the Society and is responsible for the general conduct and execution of Elections and Referenda. Articles 3.9, 16, and 27 of By-law Book I-1 confer the CEO with significant regulatory and enforcement powers to ensure that candidates comply with electoral by-

laws in order to maintain the integrity and spirit of a fair campaign. The scope of the CEO's discretion is illustrated in Articles 16.5 and 16.5.1:

16.5. The CEO has the discretion to disqualify, withhold reimbursement or deposit from, or officially censure a candidate or referendum committee in addition to declaring an election or referendum invalid for any infraction of the electoral by-laws, depending on the severity of the offence.

16.5.1. The CEO may at his/her discretion provide for other sanctions.

[6] With respect to the standard of review for factual determinations and sanctions imposed by the CEO, the Judicial Board made the following remarks in *Sabapathy v CEO Elections*:

[14] A deferential standard of reasonableness will typically apply for matters concerning questions of fact, policy decisions, and questions where application of the law to the facts at issue is inseparable. Deference also usually applies where the nature of the question falls within the specialized expertise of the decision-maker. In addition, by-laws that require an administrative decision-maker to balance competing policy objectives or the interests of various stakeholders will also tend to attract greater deference.

[15] Article 16.5 By-Law of Book I-1 confers a wide measure of discretion on the CEO as to the appropriateness of sanctions to be issued based on the severity of the infraction. In addition, the decision to issue a particular sanction according to the severity of the infraction is fact-sensitive in nature and demonstrates a situation in which the law and facts are inseparable. The CEO must also consider the facts of each infraction and issue sanctions with a view to the policy objective of upholding the spirit of a fair campaign. These duties are highly polycentric in nature and weigh in favour of a standard of reasonableness.

[16] The standard of reasonableness is based on the principle that certain questions do not lend themselves to a single result. While assessing reasonableness is primarily concerned with the justification, transparency and intelligibility of the decision making process, it also inquires into whether the decision falls within a range of reasonable outcomes supported by facts and applicable law. Deference therefore involves a measure of respect for the choice of SSMU Council to delegate some matters to administrative decision makers such as the CEO.

[7] The Judicial Board sees no reason to depart from the standard of reasonableness applied to the CEO in this case.

[8] The question to be determined is therefore whether, in the exercise of his capacity as CEO and in consideration of the evidence before him, the CEO's decision to disqualify Mr. Khan as the successful Presidential elect was one that no reasonable decision-maker acting with due diligence would have made.

A. The Reasonableness of the evidence:

[9] The Judicial Board has reviewed the parties' respective Declarations, the Constitution, the by-laws, and all the un-redacted evidence that the CEO used to arrive at his decision.

[10] The Petitioner's case rests predominantly on the assumption that the post-election collaborated effort to bring down Tariq Khan's election amounted to bias and that the evidence produced was tainted.

[11] To this effect, it was submitted that the respondent's method of assessing bias- the so called metric of "two degrees of separation"- was not sufficient to adequately sort out biased testimony from reliable testimony. However, the J-Board's review of all the un-redacted evidence together with the submissions in the respondent's declaration indicates that even after use of this metric, evidence detected to have potential bias was given proportionately less weight in the balance of probabilities. The respondent also recognized that the mere presence of bias does not lead inexorably to the conclusion that the testimony is false. It must be considered in relation to corroborating evidence and the circumstances of the case. This indicates that Elections SSMU acted impartially and with a high standard of diligence in its evaluation of the viability of the evidence.

B. The reasonableness of the sanction imposed:

[12] With regards to the decision to invalidate the election of Mr. Khan, the CEO invoked Article 27 of By-law Book I-1. The full provision reads as follows:

27.1. In the case of any grave violation of the Constitution, By-laws, or Policies on the part of a candidate, candidate's campaign team or referendum committee, the CEO shall invalidate the election or referendum if, in his/her determination, a violation of the Constitution, By-laws, Policies or electoral decisions by the CEO has adversely affected the outcome of the election or referendum. In making this decision, the CEO may consider the conduct of the parties and the seriousness of the violations.

[13] This article confers the CEO with the discretion to decide, in his determination, whether grave violations of the Constitution, by-laws, or policies on the part of a candidate or his campaign team have been committed when he determines that they have adversely affected the outcome of the election. It permits the CEO to consider the evidence and circumstances *as a whole* in making this assessment. The evidence indicates that the CEO made this decision not on a single infraction but through his finding of multiple infractions that had the potential to adversely affect the outcome of the election.

III. Conclusion and disposition:

[14] Since the Judicial Board has found the CEO has acted with the due diligence required of his office in his factual determinations, together with arriving at conclusions that satisfy the standard of reasonableness, the Judicial Board has decided to uphold the CEO's decision to invalidate the election of Mr. Khan.