Date: 13-01 2012

SSMU Judicial Board

McGill University

Newburgh and Steven (petitioners)

v.

Tacoma, Chief Electoral Officer Elections McGill (respondent)

CORAM: Chief Justice Parry and Justices Gallant, Herbert, Nowlan and Szajnfarber.

MAJORITY REASONS: Justice Herbert (Parry and Szajnfarber concurring)

DISSENTING REASONS: Justices Gallant and Nowlan

DECLARATORY JUDGEMENT

The judgement of Parry CJ, Herbert, Szajnfarber JJ was delivered by

JUSTICE HERBERT --

This is an unofficial translation of the French judgment

1- Introduction

The present declaratory judgment concerns the admissibility of the petition challenging the QPIRG referendum question (hereinafter "Petition"). Its purpose is first to establish and then to clarify the facts that led to the dispute concerning the prescription of the petition. Next, the relevant procedures and regulations will be applied to the facts. It will

be concluded that the petition meets the admissibility criteria for of an application to the Judicial Board because of the unique facts surrounding this case.

The Judicial Board invited the parties to submit their respective written submissions on this issue. These arguments were received and carefully analyzed.

2- The facts

In the 2011 fall semester, students from McGill University were called upon to answer a referendum question. 5245 students did so. The referendum period ran from November 4, 2011 to November 10, 2011 at 9: 00. The results were released the same day.

On November 11, 2011, Zachary Newburgh and Brendan Steven (hereinafter the "Petitioners") lodged a notice of appeal to the Director of McGill's Student Advocacy Program (hereinafter "the Director" and "Program"). As evidenced from his electronic correspondence with the Petitioners, the Director told the Petitioners that “the factum can come in a few days, and it is not required to be with the petition now.”[1] The Director then informed the Petitioners that they should send in their completed declaration on or before November 29. This instruction was repeated a few days later, on November 17, 2011.

On 12 November, the Petitioners duly completed and signed Form P-1, also called "SSMU Judicial Board - Petition for hearing." This form, P-1, was submitted on November 14, the following Monday. It is relevant to note that the P-1 Form includes a section on the contents of a complete declaration, entitled "Declaration guidelines (declaration should accompany petition)."

[1] Correspondence on Friday, November 11.

On the 12th of November, the Petitioners received a copy of the Judicial Board's procedures from the Student Advocacy office. This copy will later be referred to as Procedures (2), since it is probably an old version of the procedures. The Petitioners ultimately received a copy of Procedures (1) on November 17, 2011, after the Director of the Program received a copy himself. The versions differ in some respects. The provisions relevant to this dispute in both Procedures are reproduced under subtitle 3.

On the 15th of November, a law student, working with the Service, became the representative of the petitioners.

The full declaration was submitted on November 29, 2011. The respondent was notified the same day.

On December 7, 2011, the Judicial Board agreed to hear the case on its merits.

3- Pertinent regulatory provisions and procedures

a) Constitution of the Students Association of McGill University, section 30.2 (hereafter "the Constitution")

> 30.2 The Judicial Board shall follow the principles of natural justice, including equity and good conscience. (…)

b) ByLaws, Book I-1 on Election and Referenda Regulations, sections 32.1 to 32.3 (hereinafter "the Regulations")

> 32.1 All appeals to the Judicial Board regarding the conduct of an election or referendum must be made no later than five (5) days after the written announcement of election results or any official announcement made by Elections McGill. 32.1
>
> 32.2 All petitions to the Judicial Board regarding elections or referenda that are made more than five (5) days after the written transmission of the official results of elections or referenda to the General Manager shall be deemed absolutely prescribed and equitably stopped.

33.3 [sic] The Judicial Board shall not have jurisdiction to examine, try or hear any action that is submitted more than five (5) days after written results are transmitted to the General Manager.

c) SSMU Judicial Board Procedures, article 5. (Procedures (2))

The Director of Student Advocacy shall act as neutral secretary to the Judicial Board. All communication shall be made through him/her.

d) SSMU Judicial Board Procedures

Preliminary procedures

12. Unless expressly indicated otherwise, petitions to the Judicial Board must be made no more than ten (10) days after:
a. the event that is the cause for the petition
b. learning of the event that is the cause for the petition

The Petitioner

13. The Petitioner must submit:
a. a copy of all relevant documents in their entirety (except the Constitution and SSMU By-Laws); A completed version of the Form P-1: Petition for Judicial Board – Short Form (see Appendix A);
b. a declaration containing the written arguments of the petitioner conforming to the following format

e) SSMU Judicial Board Procedures, Title III, sections 9 et 10 (Procedures (1))

III. *Preliminary Procedures*

A. Petitioner: Filing a Petition

9. Unless expressly indicated otherwise, petitions to the Judicial Board must be made no more than ten (10) days after:
a. the event that is the cause for the petition
b. learning of the event that is the cause for the petition

10. The petitioner must fill out Judicial Board Form P-1 "Petition for Hearing" and complete all requested information, attaching additional typed sheets as necessary.

The petition shall include:

a. a written and signed statement from each of the witnesses to be called by the petitioner, providing the details of their testimony;
b. a copy of all relevant documents in their entirety (except the Constitution and SSMU By-Laws); and
c. a declaration containing the written arguments of the petitioner conforming to the following format: (…)

4- The Issue

Should the Judicial Board hear the dispute on its merits?

This question is answered in the affirmative.

5- Analysis

a) Procedures undertaken by the petitioners

The facts demonstrate that the Petitioners submitted a notice of appeal within the time specified by section 32.1 of the Regulations. Since this article requires that such notice be submitted no later than five days after the written notice of referendum results, the November 11, 2011 filing to the Service satisfies this requirement. However, the more difficult question raised in this instance concerns the interpretation and application of Sections 32.2 and 32.3 of the Regulations, which we interpreted together for the purposes of this declaratory judgment.

On the one hand, Section 32.2 provides that the petition is prescribed 5 days after the publication of results. Furthermore, Section 32.3 acts to remove the Judicial Board's jurisdiction for actions submitted more than five days after the publication of referendum results. The components of a complete petition[2] are set out in both Procedures (1) and Procedures (2) in a similar manner. Indeed, there are three parts: (1) To fill out the P-1

[2] Articles 32.1-32.3, which address the prescription delays, mention "appeals", "petition" and "action". The term *action* is not defined by the relevant by-laws.

form and include all requested information, including names and signatures of witnesses to be heard, (2) to include all relevant documentation and (3) to provide notice of the written submissions to the other parties. The applicants met the first requirement on November 14 by submitting Form P-1.

b) The *Director's Advice*

It is clear from the facts that the Director of the Advocacy Service informed the Petitioners that the remaining components of the petition could be submitted no later than November 29.

In making these recommendations, he acted as a neutral Secretary to the Judicial Board, and the Board's sole agent for the control and dissemination of information. This role is conferred to him by section 5 of the Procedures (2), the only version available to the Program until November 17, 2011. However, the role of a neutral Secretary does not appear in Procedures (1).

i) *Authority of the Director to Act as Secretary for the Judicial Board*

The role of the Director and his authority as an agent of the Board is supported by Procedures (2). The role does not exist in Procedures (1). It is evident from the facts and exchanges with the Director that he was not aware of the procedural difference.

In fact, the Director had every reason to believe that he was correctly acting as a neutral Secretary of the Board. He was never informed of the abolition of its role and the Program only had the one version of the Procedures, which gave the Director the authority to act.

The Petitioners, for their part, did not have access to any information about the role of the Director except for what is contained in Procedures (2), wherein the authority of the Director is clearly established. Indeed, the other Procedures were not available or easily accessible online, so that the student in charge of the Program did not even know that his role may have been unfounded.

At this step, it seems unreasonable to expect that the Petitioners should have made further efforts to inquire into the existence of the role of a neutral Secretary to the Judicial Board.

The problem created by the absence of a satisfactory level of publicity surrounding the changes in procedures is considerable. In this case, it is not necessary to determine whether the role of neutral Secretary actually exists, but rather whether it existed factually given the circumstances. We posit that, given the foregoing reasons, the role and authority of the Secretary were, in addition to being apparent, legitimate and that the reliance of the Petitioners in this regard must be protected.

ii) The recommendations made by the Director

If the Director erred in allowing for the additional documents to be filed on November 29th, it is nevertheless important to ask whether it was reasonable for the Petitioners to rely on this advice. We believe it was.

First, the applicants were quick to obtain and submit the documents to which they had access. They immediately began the petition process, as evidenced from the facts mentioned above.

We find that it was difficult for the Petitioners to gain access to all of the relevant information. Indeed, not all documents are public, so it was through the Advocacy Program that the Petitioners were able to obtain the missing documents and information.

It is also understandable that the Petitioners relied, in good faith, on the Program as the first source of information and documentation.

Second, the amount of time provided to complete the additional documentation was not unreasonable. The preparation of a complete file requires considerable work. As was the case here, an applicant may seek to be represented by a law student, working as an advocate with the Program. This law student volunteer can contribute to the preparation of the petition. On November 15, 2011, two days before the prescription of the petition, such a student advocate was assigned to the Petitioner's case. This chronology is meant to demonstrate the reasonableness of the November 29 deadline which, in particular, without which the Petitioners would not have been able to receive any meaningful assistance from their assigned advocate.

The five-day prescription period required by Section 32.2 of the Regulations is very short. The one suggested by the Director, while statutorily unfounded, seems to have had the effect of advancing justice by allowing the Petitioners adequate time to prepare, when considering the time needed to collect, organize and analyze information and to produce a high quality product.

The analysis of the reasonableness of the delay is not foreign to the principles of natural justice and procedural fairness. Section 30.2 of the Constitution, requires the Judicial Board to follow these principles, which are at the core of all judicial systems. While the

subject of this declaratory judgement is not the invalidation of sections 32.2 and 32.3 of the Regulations because of a potential violation of Section 30.2 of the Constitution, natural justice and equity must nonetheless inform our analysis of relevant facts. In our opinion, considering that the Petitioners relied in good faith on the reasonable recommendations of an official representative of the Board, a refusal to hear this petition, even when the Petitioners depended in good faith on the reasonable recommendations of a Board representative, would amount to a substantial violation of the principles of natural justice and fairness.

Finally, the delay does not shock the conscience or provide an unfair advantage to the Petitioners. Indeed, this respect, we also granted an extension to the Respondent.

In sum, the foregoing reasons indicate that the Petitioners should not suffer the consequences of having relied on the advice of the Director. Based on this premise, the prescription was interrupted by the last procedural action taken independently by the Petitioners. This action was the filing of P-1 Form on 14 November 2011, which interrupted the prescription in a timely manner and in conformity with the Regulations.

6- Conclusion

For all these reasons, the petition is admissible and we will hear it on its merits.

The reasons of Gallant and Nowlan JJ was delivered by

JUSTICE GALLANT --

According to article 33.3 [sic] of SSMU By-Laws (hereafter “the By-Laws”), the Judicial Board has no jurisdiction to “examine, try or hear any action that is submitted more than

5 (five) days after written results are transmitted to the General Manager". It is my opinion that this is an absolute limit on judicial review of election and referendum results; it clearly marks the bounds of the Judicial Board's actions. I would also speculate that this rule is in place to ensure the fluidity, finality and fairness of the electoral and referendum process within the SSMU allowing for results to be accepted and ratified, thus enabling corresponding projects and work to continue within a timeframe proportionate to the short terms of the SSMU Executive and Council. This, however, is an aside, and whatever the reasons are for the rule, it remains absolute.

Articles 32.1 and 32.2 of the By-Laws prescribe petitions taken five days after the transmission of electoral or referenda results, further clarifying that the five-day limit is the intent and will of the SSMU Council, and is not meant to be overridden by the Judicial Board.

Under Section 12 of the Judicial Board Procedure, it is articulated that petitions must be made to the Judicial Board before ten days have elapsed from the cause of the petition, unless expressly indicated otherwise. This document is subordinate to By-Laws of the SSMU, and therefore the aforementioned limit of five days enumerated in sections 32.1-33.3 [sic] of the By-Laws hold precedence.

Even if the ten-day limit was found to be the appropriate prescription on petitions for electoral and referenda, the time between the transmission of results and the submitted petition exceeded ten days.

Ultimately, this case is clearly articulated in the existing and available by-laws of the SSMU and the procedural guidelines of the Judicial Board. While the alleged

miscommunication between the Director of McGill Student Advocacy and the petitioners is unfortunate, it does not change the duties and scope of the Judicial Board's jurisdiction and does not expand the ability to appeal.

It is incontestable that the Judicial Board has no jurisdiction in this matter as articulated in those guiding documents, and I therefore see no recourse but to reject the petition at hand.