Date : 05-02-2012

SSMU Judicial Board

McGill University

Newburgh and Steven (petitioners)

v.

Tacoma, Chief Electoral Officer Elections McGill (respondent)

CORAM: Chief Justice David Parry and Justices Ryan Gallant, Jean-Philippe Herbert, and James Nowlan.

REASONS FOR JUDGEMENT: Justice Ryan Gallant (David Parry, James Nowlan, and Jean-Philippe Herbert concurring)

JUDGEMENT ON RESPONDENT'S MOTION FOR RECUSAL OF JUSTICE SZAJNFARBER

The judgement of Parry CJ, Gallant, Nowlan Herbert, JJ was delivered by

JUSTICE GALLANT --

I. Introduction

1. On January 24, 2012, the Judicial Board was seized of a motion for the recusal of Justice Raphael Szajnfarber submitted by the respondent. The following decision is

written in consideration of submissions from both the respondent and petitioners in *Newburgh and Steven v. Tacoma*, as well as from Justice Szajnfarber himself. It is in response to an alleged apprehension of bias on the part of Justice Szajnfarber, which endeavours to have him recused from the bench in the matter of *Newburgh and Steven v. Tacoma*. Its purpose is to clarify the facts and to apply relevant policy and/or jurisprudence to these facts.

II. The Facts

2. Justice Szajnfarber is serving as one of five justices on the Students' Society of McGill University (SSMU) Judicial Board. He has held this position since November 2011.

3. During the 2008-09 academic year, while a student at Carleton University in Ottawa, Justice Szajnfarber served as President of Hillel Ottawa, a Jewish students' organization.

4. On November 3rd, 2008 Hillel Ottawa requested funding support from Ontario Public Interest Research Group (OPIRG) Ottawa for an event on the Jewish community of Uganda to be held later that month. Hillel was notified by email on November 25th, 2008 that the funding request had been rejected after the event had taken place. In rejecting the request for support, OPIRG Ottawa noted that funding had not been granted because of the relationship between Hillel and "apartheid Israel".

5. As a result of those comments, the funding request and subsequent rejection became a news story. In his capacity as President of Hillel Ottawa, Justice Szajnfarber made

public statements noting Hillel's displeasure with how OPIRG Ottawa had handled the request. He also noted that the decision was an example of discrimination and that, as OPIRG Ottawa was funded by all students, their funding structure should be reviewed.

6. OPIRG Ottawa and the Quebec Public Interest Group (QPIRG) are separate and distinct entities that, nonetheless, perform similar functions. Their mandate is to support social movements, often within and through student groups. Justice Szajnfarber has never made comments publically about QPIRG and is not affiliated in any way with that organization.

7. Szajnfarber disclosed his involvement with Hillel Ottawa to the SSMU and to the other members of the Judicial Board before and upon assuming duties as a justice.

8. *Newburgh and Steven v. Tacoma*, a case currently before the SSMU Judicial Board, deals with a referendum question pertaining to the funding mechanism of QPIRG. The Respondent in *Newburgh and Steven v. Tacoma* has requested that Justice Szajnfarber recuse himself of his duties relating to this case, suggesting that his involvement in the discourse between OPIRG Ottawa and Hillel poses a reasonable apprehension of bias.

III. The Issues

9. The main question at issue in this decision is the following: Should Justice Szajnfarber recuse himself from the case? The answer is dependent on the further question: Could Justice Szajnfarber be found, by a well-informed and reasonable

person, to be partial to the position of one party in *Newburgh and Steven v. Tacoma*?

10. We think both questions should be answered in the negative.

IV. Analysis

11. Judicial impartiality is central to the legal system in Canada. It is an important tenet of judicial integrity and is essential for the public to have confidence in the decisions rendered by judicial bodies. For this reason, it is not merely a bias that is considered an affecting factor for impartiality, but also the apprehension of bias on the part of the reasonable person.

12. The counterweight of a strong and reasonable apprehension of judicial impartiality imposes a high threshold on finding a justice to be in a position of conflict of interest or bias. These principles are most clearly and relevantly laid out in *Wewaykum Indian Band v. Canada* ([2002] 4 S.C.R. 245, 2002 SCC 79) [*Wewaykum*]. It is noted (at para. 76) that any grounds for apprehension of bias must be substantial and (at para. 77) must be taken in context of the entire case, considering all aspects of potential benefit, interest or connection to the parties.

13. In defining an apprehension of bias, the court in *Wewaykum* cites the definition articulated in *Justice for Liberty et al. v. National Energy Board et al.* ([1978] 1 S.C.R. 369) as the test for impartiality:

> “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

14. Therefore, any alleged apprehension of bias must be substantial in light of all the facts, and must be realistically and practically conceived by an informed person.

15. Nothing in Justice Szajnfarber's past meets the threshold set out in *Wewaykum.* The comments made by Justice Szajnfarber in 2008 concerned OPIRG Ottawa, and were in response to a specific event. They were made in his capacity as President and as a representative of Hillel Ottawa. They were restricted to the situation and to OPIRG Ottawa. As previously stated, OPIRG is autonomous and is not connected to QPIRG as an institution. Neither OPIRG nor Hillel are involved in the current case.

16. Objectively, we find that it would be difficult to argue that comments made years ago, in a different city about a different organization, in a different capacity, and in response to specific event, could in any way be construed to translate into a bias towards an unrelated entity in a completely different role and set of circumstances. Nor would this, without compelling evidence to the contrary, indicate substantial grounds on which to base an apprehension of bias claim. There is no reasonable connection between the 2008 events and the present petition that would essentially make Justice Szajnfarber an interested party in this case.

17. Further, not only does Justice Szajnfarber not have any connection, affiliation, or relationship with QPIRG, but QPIRG itself is not one of the named parties in the present case. *Newburgh and Steven v. Tacoma* relates to the functions and procedures of the SSMU and its elections/referenda.

18. Nothing produced in any of the submissions of the parties claims that Justice Szajnfarber is found to have any potential financial or personal benefits to the issue

at hand. Absent any evidence or allegations to the contrary, it cannot be said that Szajnfarber stands to gain monetarily or personally in any way from the decision of the Judicial Board in this case. On disclosing from the beginning his past involvement with Hillel and comments on OPIRG to the SSMU and the Judicial Board, Justice Szajnfarber has demonstrated good faith and nothing in the submissions claims or alleges that any past involvement in any student groups has coloured the ability of Justice Szajnfarber to conceive or detect any potential bias or conflict of interest.

19. The Judicial Board requires the work of individual students who are dedicated to interpreting the By-Laws and Constitution of SSMU. Many who hold these positions have much experience with student and community groups, and represent a variety of levels of involvement within educational institutions. Limiting service on the Judicial Board to individuals who have made no prior contributions or comments about various groups and institutions, especially ones that are unaffiliated with groups at McGill, would drastically limit the number of available and experienced individuals to serve on the Judicial Board.

20. The decisions of the Judicial Board must have the confidence of the student body, and as such, must represent a balanced, educated, and experienced view of student affairs, policies, and politics. Justices must be held to a standard of impartiality, but the threshold for rebutting the presumption of judicial impartiality must be rational and reasonable. The standard for impartiality is not boundless; that is impossibly high. Instead, an apprehension of bias is limited to a bias that is both well-founded and reasonably conceived from a student having thought the matter through fully.

21. There is no convincing evidence that a reasonable and well-informed individual would conclude that Justice Szajnfarber is partial to a party in *Newburgh and Steven v. Tacoma*. This claim has no grounds and fails to connect any benefit or anything Justice Szajnfarber has done or said in the past to QPIRG, the parties in this case, or the result of its eventual outcome.

V. Disposition

22. For these reasons, the respondent's motion is rejected.