

SUPERIOR COURT

CANADA

PROVINCE OF QUEBEC

DISTRICT OF MONTREAL

No: 500-17-082616-148

DATE: JUNE 3, 20014

BEFORE THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.

TARIQ KHAN

Plaintiff-Applicant

v.

STUDENTS' SOCIETY OF MCGILL UNIVERSITY et al.

Defendants-Respondents

JUDGMENT ON APPLICATION FOR PROVISIONAL INJUNCTION

Introduction

[1] Mr. Khan, a final year chemical engineering university student won the election to become President of the Students' Society of McGill University (the "Students' Society")¹. His election was short-lived: ten days after his election on April 1, 2014, the Chief Electoral Officer, Mr. Benjamin Fung issued a decision

¹ According to its Constitution [exhibit P-15], the Students' Society "shall serve as an umbrella organization to coordinate and support the student groups that make up civic life in the McGill community while providing services to strengthen the educational, cultural, environmental, political and social conditions of our membership". The Students' Society is the official voice of the undergraduate and professional students of McGill and acts "as a liaison between them and University".

disqualifying Mr. Khan (the "First Decision"). On April 29, 2014 after Mr. Khan took an appeal of the First Decision to the Judicial Board [as provided by the bylaws of the Students' Society], the Judicial Board decided to uphold the First Decision to invalidate the election of Mr. Khan (the "Second Decision")

[2] Mr. Khan seeks to have both of these Decisions suspended and amongst other things, to have this Court reinstate him in his usual functions as President pending the final judgment on the hearing of the permanent injunction.²

Procedural Context

[3] Mr. Khan's injunction proceedings are dated May 29, 2014. They were served on the Respondents on that date and the provisional injunction was heard by the undersigned on the following day.

[4] The Court sought to have the Parties fix a schedule of proceedings which would allow for the earliest hearing of the permanent injunction. For the reasons given under the heading "Urgency", this is one of those cases where the earliest hearing on the permanent injunction is in all Parties' interest, including that of the 23,000+ McGill student members of the Students' Society.

Analysis

Urgency

[5] Mr. Khan's one-year term of President - had he not been disqualified - would have started on June 1, 2014.

[6] The Court understands that Mr. Khan is in his final year of studies in a bachelors program for chemical engineering.

[7] In view of the immediacy of his Presidential term and the limited one-year duration for that term, the Court is satisfied that the objective criterion of urgency has been met.

Irreparable harm

[8] Mr. Khan asserts that if the Court does not accept his claim to enter into the President's office on a provisional basis that this will irreparably harm his

² For similar safeguard proceedings contesting elections to university student associations, see also *Canadian Federation of Students, Quebec Component v. Amrov*, 2007 QCCS 4561. The applicable legal criterion for safeguard orders is found at par. 25 of that judgment.

opportunity to sit as President for the Students' Society since he will complete his undergraduate studies within the President's term of office.

[9] The Court agrees. The loss of this opportunity cannot be compensated monetarily. As with the protection of a person's business reputation, the opportunity to hold elective office is "priceless" and accordingly the prejudice he suffers is considered irreparable at law.³

[10] The Court will now consider what qualification should be given to the rights asserted by Mr. Khan, i.e. clear, doubtful or nonexistent and, to the extent required, will also look at the balance of convenience.

Qualification of Mr. Khan's Rights as Clear, Doubtful, or Nonexistent⁴

[11] The Court is required to look at each one of the conclusions requested by Mr. Khan and, in accordance with what the Court of Appeal has instructed in earlier jurisprudence, determine whether the rights upon which those conclusions are asserted are: clear, doubtful, or non-existent or somewhere on the spectrum between the former and the latter.

Conclusion requested: "Suspend the execution of the statement of disqualification issued on April 1, 2014 by the Chief Electoral Officer and the Deputy Chief Electoral Officer Mr. Benjamin Fung and Mr. David Koots respectively."

Legal context under the Students' Society's Bylaw Book 1

[12] The Chief Electoral Officer is "responsible for administering the Students' Society's elections and referenda".⁵

[13] The Chief Electoral Officer has discretion to disqualify a candidate, in addition to declaring an election invalid, "for any infraction of the electoral bylaws, depending on the severity of the offense".⁶ (this Court's emphasis)

[14] Furthermore, if there is "any grave violation of the Constitution, Bylaws or Policies on the part of a candidate, the candidate's campaign team..., the CEO (Chief Electoral Officer) shall invalidate the election... if in his or her determination,

³ See *4077334 Canada inc. (Solutions Voysis IP) c. Sigmasanté*, SOQUIJ AZ-50865101; A.E./P.C. 2012-8058 (C.A.); J.E. 2012-1272 (C.A.); EYB 2012-207741 (C.A.) at par. 24

⁴ See *La Societe de Developpement de La Baie James v. Kanatewat*, [1975] C.A. 166,183 and *Brassard v. Societe zoologique de Quebec Inc.*, [1995] R.D.J 573 (C.A.)

⁵ Article 2.1 of Exhibit P-1

⁶ *Ibid.*, article 16.5 under the heading "Sanctions for Campaign Violations"

a violation... has adversely affected the outcome of the election... in making this decision, the CEO may consider the conduct of the parties and the seriousness of the violations".⁷ (this Court's emphasis)

[15] It is important to note that other than his very broad discretion, there is nothing restricting the investigation that the Chief Electoral Officer is to undertake where election violations have been alleged.

[16] Mr. Khan asserts that his right to due process and to provide full defence was breached and that the two electoral officers failed to act in good faith and protect his reputation since they published the First Decision only 4 minutes after it was sent to Mr. Khan.

[17] Counsel for Mr. Khan admits that the two electoral officers were acting in an administrative capacity. Hence, while they are bound to respect procedural fairness, they are not governed by the rules regarding natural justice which apply to a quasi-judicial proceeding.

[18] The Supreme Court of Canada has provided guidance on the limited role of the motions judge at the stage of the interlocutory injunction [which is even more applicable at the stage of a provisional injunction]. In *Manitoba v. Metropolitan Stores Limited* in 1987, the Supreme Court of Canada relied on the following statement from the classic English injunction case of *American Cyanamid*:

"It is not part of the courts function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial (Ed. note: i.e. trial of the permanent injunction)".⁸

[19] On March 31, 2014, Mr. Fung advised Mr. Khan of six alleged violations and the alleged facts that gave rise to them

[20] An investigation was carried out by Mr. Fung which included three meetings with Mr. Khan to pose questions and get Mr. Khan's responses. Prior to the second meeting, Mr. Fung provided Mr. Khan with a written summary of the questions and answers from the first meeting.

[21] On April 1, 2014, Messrs. Fung and Koots issued their 27 page "Statement regarding the campaign and election of Mr. Tariq Khan": the First Decision.

[22] At paragraph 6 of the First Decision, the electoral officers note "three major campaign violations were committed by Mr. Khan and his campaign team":

⁷ Ibid, art. 27.1

⁸ [1987] 1 S.C.R. 110,130

- 22.1. campaigning before the campaign officially started;
- 22.2. interference with the other candidates' campaigns; and
- 22.3. sending unsolicited text messages by a non-campaign committee member.

[23] The facts upon which these violations were based were outlined clearly in the First Decision.

[24] Furthermore, as a result of complaints the electoral officers received subsequent to the election campaign, they determined, in the First Decision, that there were the following "moderate" violations committed by the Khan campaign:

- 24.1. individuals external to the Students' Society were involved in the campaign activities of Mr. Khan;
- 24.2. Mr. Khan sent out unsolicited electronic mail to members of the Students' Society who are not involved in his campaign committee; and
- 24.3. members of Mr. Khan's campaign committee and Mr. Khan were involved in the process of individuals casting their votes.

[25] Finally, the First Decision makes reference to what is qualified as a "grave violation":

- 25.1. members of Mr. Khan's campaign committee and Mr. Khan were involved in the process of individuals casting their votes.

[26] For each of these violations, the First Decision provides a reasoned analysis which begins with a synopsis of the evidence, is followed by Mr. Khan's response from the interviews and written statements he filed and is concluded by an "Analysis and Ruling". On its face, the First Decision appears both objective and thorough. In its final section headed "Analysis and Ruling", the two electoral officers state: "Due to the repeated nature and severity of these violations, a disqualification of the campaign must be considered as an option."

[27] Following an analysis of the assertions by Mr. Khan before this Court, the Court determines that there is no proof of any procedural irregularities sufficient to support the suspension of this First Decision. The fact that the First Decision was published at large only minutes after it was sent to Mr. Khan in no way indicates any bad faith nor affront to Mr. Khan's reputation, as he alleges.

[28] Accordingly, the Court determines that this right asserted by Mr. Khan is non-existent.

Conclusion requested: "Suspend the execution of the decision rendered by the Judicial Board"

[29] Mr. Khan makes the following assertions in support of his request that the Judicial Board 's Second Decision, be suspended:

- 29.1. the Board rendered its decision precipitously on the same night as the hearing, April 29, 2014; and
- 29.2. Mr. Khan was denied the right to review all of the relevant evidence upon which the First Decision was made.

[30] The first submission is not compelling. The answer is provided in paragraph 1 of the Second Decision, where the Judicial Board says: "Since articles 28.4 and 28.5 of Bylaw Book I-1 provide 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." Accordingly, the Judicial Board was simply respecting the time constraints placed upon it by the Bylaws and was not deciding "precipitously".

[31] The second submission raises a weightier issue.

[32] At paragraph 8 of the Second Decision, the Judicial Board formulated the question before it as whether ***"the CEO's decision to disqualify Mr. Khan as a successful President elect was one that no reasonable decision-maker acting with due diligence would have made."***⁹

[33] Prior to the hearing before the Judicial Board, there was a preliminary conference, and from that conference, Mr. Khan sent an e-mail on April 28, 2014 in which he requested "any additional evidence and additional witnesses that the Chief Electoral Officer, acting as respondent in the hearing before the Judicial Board, was to provide."¹⁰

[34] Ultimately, this was done on April 29, 2014 and this Court was provided with a document entitled "Appendix [Redacted Version]".¹¹ In addition to that, the Court understands that Mr. Khan received a document entitled "Respondents Declaration" in which the following are the headings of redacted pages that he has never received:

- 34.1. Testimony A, B, C, D, E and F: one page each. [Appendix C-2]
- 34.2. Testimony 1,2,3 [Appendix D-1]

⁹ Exhibit P-12

¹⁰ Exhibit P-10

¹¹ Exhibit P-11

- 34.3. Correspondence Planning February 3 meeting.
- 34.4. Appendix D-6 testimony.
- 34.5. Unsolicited Text Sent [Appendix G-1]
- 34.6. Campaigning in Residences [Appendix H-3]
- 34.7. Intimidation of Other Candidates [Appendix H-5]
- 34.8. Door to Door Campaigning.¹²

[35] The Court is perplexed that Mr. Khan, neither prior to the hearing before the Judicial Board nor most importantly, in his proceedings before this Court, asked to receive a copy of these redacted documents. Moreover, he did not either ask for postponement of the hearing, or take any injunction or judicial review proceedings to prevent the hearing from going forward until he was provided with these complete documents without redaction (or, in the minimum, with only nominative information redacted).

[36] Hence, without this Court having any access itself to knowing the contents of those redacted documents, it is impossible for the Court to determine whether those documents would hurt or assist Mr. Khan's case that the First or Second Decisions were unreasonable.

[37] In an affidavit filed by the Students' Society on the date of the hearing before the Court, Mr. Fung provides the only evidence as to the reason for the redaction:

"6. Where in the redacted reports and documentation delivered to Mr. Khan the names of witnesses or other information was redacted, this was done at the request of the witnesses in order to protect their identity;

7. Regardless of any redacted information, I fully summarized the reports and documentation delivered to Mr. Khan, the allegations made by the relevant witnesses, so as to enable Mr. Khan to understand and respond to same;"¹³

[38] The difficult question that is raised is the balance between the application of the principles of natural justice [including the principles of procedural fairness] to which the Judicial Board is bound¹⁴ and the rights of the witnesses providing information to Mr. Fung in the course of his investigation as Chief Electoral Officer, to their confidentiality – which was the basis under which they gave their information to Mr. Fung in the first place.

¹² Exhibit P-9

¹³ Detailed Affidavit of Benjamin Fung, dated May 30th, 2014

¹⁴ See Exhibit P-14 - SSMU Judicial Board Procedures, and particularly article 2, which says that the Judicial Board follows "the principles of natural justice, including equity and good conscience" and article 30, which says that the Judicial Board "is loosely modeled on a Human Rights tribunal".

[39] Protection of confidentiality raises complex legal issues. For example, in a different proceeding concerning protection of confidentiality, the issue of the right of journalists to protect their confidential sources arose where they were confronted with a search warrant arising out of a criminal investigation. The issue was considered by the Supreme Court of Canada in the 2010 case of *R. v. National Post*.¹⁵ The following excerpt from the head note to that case demonstrates the complexity of the legal analysis required in a case where the confidentiality of a journalist's sources (which are encompassed within freedom of expression) are confronted by the right to a full police investigation:

"The scope of the privilege (Ed. note: the privilege of a journalist to protect their confidential sources) will depend, as does its very existence, on a case-by-case analysis, and may be total or partial. It is capable, in a proper case, of being asserted against the issuance or execution of a search warrant. A promise of confidentiality will be respected if: the communication originates in a confidence that the identity of the informant will not be disclosed; the confidence is essential to the relationship in which the communication arises; the relationship is one which should be sedulously fostered in the public good; and the public interest in protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. This approach properly reflects Charter values and balances the competing public interests in a context-specific manner.

The media party asking the Court to uphold a promise of confidentiality must prove all four criteria and no burden of proof shifts to the Crown. This includes, under the fourth criterion, proving that the public interest in protecting a secret source outweighs the public interest in a criminal investigation. The weighing up under this criterion will also include the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained measured against the public interest in respecting the journalist's promise of confidentiality. The underlying purpose of the investigation is relevant as well. Until the media have met all four criteria, no privilege arises and the evidence is presumptively compellable and admissible. Therefore, no journalist can give a secret source an absolute assurance of confidentiality. (this Court's underlining).

[40] Except for the above-mentioned supplementary affidavit of Mr. Fung, the evidential underpinning to determine whether Mr. Khan has this right to disclosure of the unredacted documents as a right of natural justice is incomplete on the present record. The Court refers back to paragraph 18 of this judgment where reference is made to the difficulty, at the provisional injunction stage, of deciding very complex issues of law based on an incomplete factual record.

¹⁵ [2010] 1 SCR 177

[41] The difficulty also facing Mr. Khan is that he has never asked for and does not now ask for the specific documents that he alleges were not properly disclosed to him.

[42] On the basis of the record as constituted, the Court determines that Mr. Khan has not proven that he has any right to have the Second Decision suspended and that at best, if he were to take a judicial review application (or the equivalent under CCP article 33), he could argue that the matter should be remitted to the Judicial Board for re-hearing after he was provided with the full evidence that formed the record for the First Decision but to reach this point, he would have first to prove that he has a right to this evidence, a right that he would have to prove superseded the right to keep the deponents' identity confidential by means of redaction, as Mr. Fung solemnly affirms he was required to do. (this Court's emphasis)

[43] At best, the right of Mr. Khan to obtain the full evidential record –without any redaction- is doubtful.

Conclusion requested: order the Students' Society to recognize the Plaintiff Tariq Khan as President for the 2014 2015 term of office beginning on June 1, 2014

[44] As Mr. Khan's Introductory Motion indicates, he won the election for President of the SSMU by 77 votes over the second-place candidate, a margin of victory equivalent to 1.3% of the votes cast.

[45] Mr. Khan was disqualified after this election as a result of the First Decision, which was subsequently upheld by the Second Decision. The role of the Court is not to sit in appeal and determine whether it would have made a different decision than those made by the electoral officers or the Judicial Board. Rather, the Court's role is to determine if those Decisions were legally made or not. To do this, the Court must make a provisional qualification of whether the rights asserted by Mr. Khan are clear, doubtful or non-existent.

[46] To be entitled to provisional reinstatement as President, Mr. Khan must prove that he has either a clear right to suspend the First and Second Decisions, or if his right(s) are doubtful, that the balance of convenience weighs in his favour since, as the Court has indicated, he has already proven the other two criteria of urgency and irreparable harm.

Balance of convenience

[47] This criteria requires the Court to weigh the respective inconveniences to be suffered by Mr. Khan– if he is not reinstated as President on a provisional basis – or alternatively, to be suffered by the Students' Society – if he were to be reinstated as President on a provisional basis.

[48] Neither party was able to provide the Court with any jurisprudence "on all fours" with their respective positions.

[49] Mr. Khan argues that he will suffer the greatest prejudice since not only will he not have the opportunity to exercise the function of President, but the Students' Society suffers no prejudice "since they are or should be independent and impartial, and since they do not have or should not have any actual interest regarding which candidate will enter into office as President on June 1, 2014."¹⁶

[50] With respect, the Court believes this argument misses the crucial point. The Court finds it important to also consider the interests of the 23,000+ members of the Students' Society who have no choice but are obligated to pay the full society fee and in consideration, are entitled to have the Students' Society meet its obligations to the membership, as the Constitution requires, for Service, Representation and Leadership.¹⁷

[51] The Students' Society has filed the detailed affidavit of Ms. Pauline Gervais, who is the general manager and person responsible for the day-to-day management of the Students' Society's operations. She indicates she is required to assist the Students' Society's Executive Committee, Legislative Council and Board of Directors in the performance of their duties.

[52] She asserts that to reinstate Mr. Khan on a provisional basis as President would cause "serious inconvenience and additional costs." In this regard, the Court is compelled by the following paragraphs from her uncontradicted affidavit:

- 52.1. an incoming President must be trained, which involves training sessions, programs, meetings and tests (Ed. note: the nature of the "tests" is not specified) with Students' Society and University administrative staff concerning: accounting, budget, IT, public relations, human resources, building, security, governance, ethics, mental health and bylaws (par. 6);
- 52.2. since May 1, 2014, the runner-up to Mr. Khan, President-elect Courtney Ayukawa has been undergoing this training (par. 5);
- 52.3. to redo this training would take more than one month, which would create serious logistical issues regarding the coordination of staff vacations (par. 10);
- 52.4. the outgoing President has spent four hours a day during the month of May, 2014 to supervise this training and ensure a smooth transition and it is not clear she would be available to do this now in the month of June (par. 5 and 8); and

¹⁶ Mr. Khan's Introductory Motion at paragraph 102

¹⁷ see Exhibit P-15, the Constitution of the Student Students' Society of McGill University and particularly page 2 thereof, under the headings Service, Representation and Leadership.

52.5. ongoing projects and other executive members' activities would have to be suspended or slowed down to accommodate the new training of Mr. Khan (par. 11).

[53] These assertions were not contradicted by Mr. Khan at the provisional hearing.

[54] The Court determines that these considerations are critical. The membership must be able to rely on the Students' Society to function normally and provide those services for which not only is the Students' Society mandated by its Constitution but for which – with certain limited exceptions – all students are obligated to pay the full Students' Society membership fee. The fact that the students have no choice in paying the fee is a further reason to emphasize the need for the Students' Society to meet its ongoing obligations of the members. The affidavit of Ms. Gervais makes clear that it is essential for the President to be knowledgeable and trained in these various areas to ensure the smooth delivery of the Society's services to its members.

[55] The Court is satisfied that the balance of convenience favours the Students' Society for the reasons above mentioned

[56] In addition to the balance of convenience, the issuance of a provisional injunction – at its origins an equitable remedy – requires the Court to consider all the circumstances together.¹⁸ The Court takes into consideration that both parties have agreed that within a week following the provisional hearing, they will agree on a schedule which will permit an early hearing of the permanent injunction¹⁹. Since the parties are working to have an early final hearing, and since Mr. Khan himself both waited approximately one month before instituting these injunction proceedings following the April 29, 2014 Second Decision and has not requested the redacted documents in any of the present proceedings, the Court determines that it is in the interest of justice that the relief requested by Mr. Khan at the provisional stage not be granted.

CONCLUSIONS

FOR THESE REASONS, THE COURT:

[57] **DISMISSES** the Application for a Provisional Injunction;

[58] **WITH COSTS TO FOLLOW** the Outcome of the Permanent Injunction Hearing.

¹⁸ *Favre v. Hôpital Notre-Dame*, (1984) C.A. 548

¹⁹ The Parties have agreed to go directly to the hearing of the Permanent Injunction.

A handwritten signature in black ink, appearing to read 'Mark G. Peacock, J.S.C.', written over a horizontal line.

MARK G. PEACOCK, J.S.C.

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Date of hearing: May 30, 2014