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: The Judicial Board

Date of hearing: 6 February 2012

Date of judgement: 14 February 2012

FINAL JUDGEMENT

The 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

through Minerva allowing students to "opt-out" of QPIRG-M's fee online. A similar system is also in place for other student groups.

[10] In the 2011 fall semester, members of the SSMU were called upon to answer two referendum questions including QPIRG-M's.

[11] A "Yes Committee" was officially constituted to campaign in favour of the referendum question. A "No Committee" was never formed.

[12] During the campaigning period, there were a series of communications between Mr. Newburgh and the respondent over alleged campaign irregularities. These were reviewed by the respondent in her capacity as CEO, and sanctions were issued when she deemed it appropriate in accordance with SSMU by-laws.

[13] The referendum period ran from November 4, 2011 until November 10, 2011.

[14] 5245 students, or roughly one quarter of all students, participated. The results were released in the evening of November 10: 65% of participating students voted in favour of QPIRG-M's question.

[15] On November 11, 2011, Zachary Newburgh and Brendan Steven (hereafter "petitioners") lodged a notice of appeal to the Director of McGill's Student Advocacy Program (hereafter "Director"), advising him that they would be challenging the constitutional validity of QPIRG-M's referendum question.

[16] After receiving an extension from the director, on November 29th, 2011, the petitioners submitted their factum.

[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] On January 18, 2012, a formal preliminary conference took place between the parties, their advocates and the J-Board. At that meeting, QPIRG-M requested to be named as a party to the petition.

[20] On January 20th, the Respondent submitted her factum after an extension was granted by the J-Board.

[21] On January 22nd, we rejected QPIRG-M's request to be named as a party and immediately granted it intervener status.

[22] Between January 23rd and 29th, CKUT and Carol Fraser, in her capacity as VP Clubs and Services of the SSMU, were accepted as interveners to this petition.

[23] On January 25th, a final preparatory conference was held between the parties and their advocates in order to agree on non-contentious facts and to determine the admissibility of evidence.

[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 neutral and fair way possible.

[29] We have been told many times – by all parties – that this case is about democracy. From the factums we have read, the oral arguments we have heard, and the tremendous

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 necessary, as a participant compelled to act when disputes cannot be resolved by other means. In any functioning democratic polity, there must be a clear divide between the political and judicial branches of government. With that said, to the extent that is realistic, we must remove ourselves from campus politics.

[32] In light of the powers granted to us by virtue of s. 30.3 of the Constitution, the J-Board has an effective power to invalidate acts of the SSMU and its constituents if they are found to violate the Constitution and By-laws of the SSMU. This is a check on the SSMU's democratic system. Nevertheless, the J-Board should not assume an interpretation and invalidation role unless specifically asked to by a party to a dispute. The process of legislative reform falls, rather, within the SSMU Legislative Council's duties, where the student community's values and compliance with the Constitution will be duly debated.

E. The Alleged Petitioners' Motives

[33] With this context in mind, we would like to address from the outset arguments put forward by the respondent and interveners that our decision ought to bear in mind the petitioners' alleged "bad faith". They argue that the petitioners' personal and premeditated intents, having both openly worked on "opt-out" campaigns against QPIRG-M, goes against us finding in their favour.

[34] We cannot agree for two reasons. First, this case is in large part a public law (constitutional) challenge of a referendum question. That means the referendum question must be objectively constitutional, regardless of who poses it and who opposes it. Second, it matters not in law whether complainants act with a specific personal underlying belief. In that sense, the law must be blind to politics.

[35] The advocate for the intervener QPIRG-M brought forward the issue of frivolousness. As a general rule, the threshold for a judicial body to reject a claim based on its frivolous and vexatious character is high, since it denies the party any *prima facie* right to be heard. While it is true that CKUT's referendum question could have been challenged by the petitioners, they were under no duty to do so.

F. The Referendum Question and Relevant Legislation

[36] QPIRG referendum question read as follows:

> *Whereas the Quebec Public Interest Research Group at McGill (QPIRG) is one of 200 PIRGs in the United States and Canada, and has been incorporated as a not-for-profit organization since 1989;*

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-out";

Whereas McGill University took over QPIRG's opt-out process in 2007 without consulting QPIRG or McGill students and created their own online opt-out system via the Minerva website;

Whereas McGill undergraduate students voted in the Fall 2007 General Assembly to "put an end to the online opt-out system [...] such that campus groups shall be in charge of their own opt-out processes";

Whereas the placement of QPIRG's fee on the Minerva opt-out system has put QPIRG's finances in a position of increasingly unmanageable financial instability, thereby interfering with QPIRG's capacity to serve the McGill and Montreal communities;

Whereas a "yes" vote on the following question shall mean that QPIRG continue receiving the undergraduate fee-levy, with refunds administered by QPIRG instead of the externally imposed Minerva opt-out system, and that students retain their right to receive a full refund;

Do you support QPIRG continuing as a recognized student activity supported by a fee of $3.75 per semester for undergraduate students, which is not opt-outable on the Minerva online opt-out system but is instead fully refundable directly through QPIRG, with the understanding that a majority "no" vote will result in the termination of all undergraduate feel-levy funding to QPIRG?

[37] Relevant SSMU Constitution sections read as follows:

25.1 Referenda may be initiated by Council or by students.

25.2 Each referendum question shall deal with one, and only one, issue.

25.3 The CEO shall ensure that referendum questions are clear, concise and do not violate this Constitution and Bylaws (unless they are proposed amendments to this Constitution or Bylaws).

25.4 Referenda are regularly held during the periods from the fifteenth (15th) of February to the fifteenth (15th) of March and from the fifteenth (15th) of October to the fifteenth (15th) of November. Council may define exceptional referendum periods by a two-thirds (2/3) majority vote.

25.5 Referenda to raise ancillary fees or create new ancillary fees shall be held in the Fall referendum period except in the case of council-initiated exceptional referendum periods as per article 25.4.

25.6 Any dispute or uncertainty arising from the CEO's interpretation of a referendum question shall be referred to Judicial Board for resolution.

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" as per s. 25.2 of the Constitution. Referenda are opportunities for students to make a choice regarding how they chose to govern themselves, student fees included. The pre-condition is that that choice must be in response to a question dealing with only one issue.

[41] The third and final issue is whether the referendum question is clear pursuant to s. 25.3 of the Constitution. A choice made on an unclear question is no choice at all.

[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] We agree with the petitioners and find the proper standard on the constitutional validity of referendum questions to be correctness. A correctness analysis asks us to decide whether we agree, in law, with the determination of the decision maker. Adopting a reasonableness review, with a deferential standard, would undermine the J-Board's ability to promote a just and consistent application of the SSMU Constitution. In the case at bar, if the standard of review were anything other than correctness, it would allow for an uncertain interpretation of the rights and duties of all students under the SSMU Constitution.

[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 to constitutional questions, the reasonableness standard cannot apply.

b) Validity of the referendum question

i. Guiding perspective under ss. 25.2 and 25.3

[47] The guiding perspective underpinning any constitutional validity analysis of a referendum question should always be the reasonably informed average voter. This is an objective test based upon the reasonable person in similarly-situated circumstances. The test, or a variation of it, is commonplace in many legal analyses.

[48] This standard imposes a burden on the petitioner to show that the reasonably informed average voter would think that the referendum question deals with two issues as opposed to one, and/or that the question is not clear.

[49] The "reasonable" component of this guiding perspective cannot be stressed highly enough. What is reasonable must be viewed in light of the average voter of the SSMU,

who is relatively well informed about student and campus politics. Our intent with using the word reasonable is to prevent arguments from parties that split hairs, delve too deep into finer points of English or French grammar, and that are so far removed from the average student that he/she could not have possibly contemplated them when voting in the referendum.

ii. Single issue

1. The test

[50] As mentioned above, before delving into whether QPIRG-M's question violates s. 25.2 of the SSMU Constitution by dealing with two issues, we must first determine what test is to be applied in what may be called the "single-subject rule". Two main tests were pleaded and described to us by the parties and interveners.

[51] Firstly, the petitioners put forward the test of philosophical connectedness between issues. The test was articulated in the J-Board's decision *Tanguay-Renaud v SSMU* (6 April 1999), likewise described as "philosophical overlap" or "philosophical intention". That decision suggested that "referendum questions are abusive if a majority of students voting 'yes' to only one of [the] proposals but will vote 'yes' to ensure the execution of that one proposal."

[52] Secondly, QPIRG-M argued that the correct test for deciding if a question conforms to the single-subject rule is whether such sub-issues are reasonably germane.

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 recognize that the sitting J-Board may not be bound by past decisions in accordance with *stare decisis*, previous decisions involve considerable legal work that may be considered to maintain central concepts running through the jurisprudence.

[54] The philosophical connectedness test as developed in *Tanguay-Renaud* also adequately sets out the danger against which s. 25.2 of the SSMU Constitution aims to protect: a voter feeling compelled to vote in favour of one of the issues to ensure the passing of the proposal connected to that issue, even if he/she may wish to vote against another issue raised by the referendum question.

[55] This compulsion is the key issue that must be kept in mind under s. 25.2, and it sheds light on why the J-Board in *Tanguay-Renaud* used such strong language by calling referendum questions that do not meet the philosophical connectedness test "abusive". We do not believe that the reasonably germane test adequately protects students from potential abuses of the system.

[56] However, we would stress again that the philosophical connectedness test must be employed from the perspective of the reasonably informed average voter. Therefore, the correct question to ask is whether an average student, who votes in SSMU referenda and is reasonably informed of the issues, would see a sufficient philosophical connection between two or more issues raised in the same referendum question. The issues are not

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-out question calls upon the McGill administration to abolish the online opt-out system and allow QPIRG-M to reinstitute the in-person refund.

[61] The respondent and interveners, especially QPIRG-M, submit that the online opt-out question and existence question are so intimately linked that a reasonably informed average voter could not possibly support the online opt-out while supporting QPIRG-M's continued existence. They go so far as to argue in great detail, and with an array of evidence, that QPIRG-M cannot continue to exist if the online opt-out mechanism is allowed to continue. Several witnesses explained the financial instability that QPIRG-M faces as a result of the online opt-out system. They also explained, through financial analysis, that QPIRG-M's existence is intricately connected to its ability to administer its own refund.

[62] While we emphasize with QPIRG-M's concerns, and found the testimony very credible, we do not believe that a reasonably informed average voter would make that link. It is not whether QPIRG-M believes that the existence question and online opt-out question are so linked as to make them one issue. It is, rather, whether the reasonably informed average voter would agree that, taken together, they constitute only one issue.

[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 constitutional and this cannot be used as a justification to allow an unconstitutional referendum question to pass.

iii. Clarity

[65] Having found that QPIRG-M's referendum question is unconstitutional under s. 25.2 of the SSMU Constitution, it is not necessary to consider arguments over its clarity pursuant to s. 25.3 of the SSMU. However, some brief remarks are warranted.

[66] Referenda questions must be clear to the reasonably informed average voter. His/her perspective can be quite different from whether the drafter of the question believes the question to be clear. Drafters have the benefit of significant time in preparing their referendum question, often have first-hand knowledge of the issues at stake that may not be readily available to the public, and typically have conducted

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