DIE BOARD RULING 2018-08

Hearing Details:

Style of Cause:	*Sunday v Students' Council (Speaker)*
Hearing Date:	February 7, 2019
DIE Board Panel Members:	Landon Haynes, Associate Chief Tribune (Chair)
	Christian Zukowski, Tribune
	Nina Fourie, Tribune
Appearing for the Applicant:	Nathan Sunday, Councilor
Witness:	Mpoe Mogale, Councilor
Witness:	Katherine Belcourt, Councilor
Appearing for the Respondent:	Jonathan Barraclough, Students' Council Speaker
	Emma Ripka, Vice President Operations and Finance
Intervener(s):	None

The DIE Board is unanimous in the following decision

FACTS

[1] At the January 29, 2019 meeting of Students' Council, Vice President Ripka and Councilor Bilak moved to approve a "Students Spaces Referendum Question" that asked whether students would support a students spaces levy.

[2] Significant discussion followed, including opposition from Councilor Sunday over concerns that the Native Studies Faculty, as the smallest faculty, would receive less funding than larger faculties. He also expressed concern that voting on the Levy before receiving the final report related to it would breach the oath of office which states that Councilors should know the facts before voting.

[3] Further concerns were brought up by other Councilors, while others still defended the Referendum Question.

[4] After much debate, Vice President Ripka move to table the motion until the next meeting and call a special meeting that would occur before February 4, 2019.

[5] As per Councilor Sunday's application, "[o]n January 31, 2019 at 2:42 PM, Students' Council was notified by the Vice President Operations & Finance (Emma Ripka) that a special meeting of Students' Council would be called for February 2, 2019 at 4:00 PM." This fact is not in dispute.

[6] The special meeting was held on February 2, 2019, and the inclusion of a "Students Spaces Referendum Question" during elections was voted down by 9 "Yeses" to 17 "Nos."

[7] According to Students' Council Standing Order 3(3) ("SO 3(3)"): "Members of Students' Council must be notified of special meetings of Students' Council no later than 96 hours prior to the meeting time."

ISSUES

[8] Councilor Sunday has asked two questions of the DIE Board which we have identified as involving two sub-questions:

1. *Is the February 2, 2019 special meeting of Students' Council null and void due to breach of SO 3(3)?*

    a. *Can the Speaker of Students' Council unilaterally suspend either bylaw or Students' Council Standing Orders to allow for this meeting to take place?*

    b. *Is there a circumstance in which the contravention of Students' Union legislation is justified?*

2. *Is the motion to approve the Students Spaces referendum question out of order?*

ANALYSIS

1. Is the February 2, 2019 special meeting of Students' Council null and void due to breach of SO 3(3)?

Introduction

[9] There are two ways to approach interpreting SO 3(3) in the context of the current situation. First, we could start counting the 96 hours requirement from the time that Vice President Operations & Finance Ripka emailed Students' Council, being January 31, 2019 at 2:41PM. If this is the correct time at which to begin the 96 hour clock, then not enough notice had been given for the February 2, 2019 meeting.

[10] Instead, we could start the 96 hour clock from the time that Ripka and Raitz "moved to table item 2018-18/8b [i.e. the motion to approve the Referendum Question] until the next meeting and call a meeting, yet to be determined, that will occur before Monday, February 4."

This occurred sometime after 6:00PM on January 29, 2019 (being the start of the Students' Council meeting). Even if the motion was brought exactly at the start of the Council Meeting, because notice was given for the special meeting to begin at 4:00PM on February 2, 2019, this would have only given Students' Council 94 hours notice.

[11] Under either interpretation, not enough notice was given and SO 3(3) was violated. We leave it to a future DIE Board panel to determine which notice regime is the correct interpretation.

[12] Councilor Sunday has alerted this panel to DIE Board ruling *Nicol vs. Eruvbetine* (Ruling #1, 2007/2008) where the DIE Board found that similar notice legislation was not complied with and found that the subsequently held meeting was null and void due to the violation and imposed that all references to and records of the meeting be purged from the official record.

[13] While the DIE Board does not operate on a precedential standard, instead considering each application on its merits on a case-by-case basis, we find *Nicol vs. Eruvbetine* to be a useful check on the analysis we have conducted. We do not find that the slight legislative differences between the legislation in question in *Nicol vs. Eruvbetine* and SO 3(3) to be so significant as to render this case distinguishable.

[14] Councilor Sunday requested that this Panel also nullify the February 2, 2019 meeting on two further grounds: (1) "As the special meeting was called on a weekend and without sufficient warning, it is unacceptable that Councillors are expected to attend such a meeting. It is unacceptable for Councillors to be penalized (i.e., via attendance) as a result of not being able to attend the meeting when less than two (2) days' notice being given"; and (2) "[t]he item up for debate is not an emergency item, as it will not have detrimental effects on the Students' Union. Rather, the Students' Union will have an opportunity to introduce it next year, should it follow its bylaws, without significant effect on the Students' Union."

a. Can the Speaker of Students' Council unilaterally suspend either bylaw or Students' Council Standing Orders to allow for this meeting to take place?

[15] All of this being said, *Roberts' Rules of Order* (*Roberts' Rules*) specifically contemplates the ability to suspend Standing Orders. As per SO 1(1): "Roberts' Rules of Order will be observed at all meetings of Students' Council except where they are inconsistent with the Bylaws or Standing Orders of Students' Council." There being nothing in the Standing Order that contemplates the suspension of particular sections of the Standing Order, we find that *Roberts' Rules* fills this gap. Specifically, if Council wishes to suspend the operation of part of the Standing Order, then the following rules must be followed (adopted from *Roberts' Rules*):

> *This motion is not debatable, and cannot be amended, nor can any subsidiary motion be applied to it, nor a vote on it be reconsidered nor a motion to suspend the rules for the same purpose be renewed at the same meeting, though it may be renewed after an adjournment, though the next meeting be held the same day ... The rules of the assembly shall not be suspended except for a definite purpose,*

and by a two-thirds vote. The Form of this motion is, to "suspend the rules which interfere with," etc., specifying the object of the suspension.

[16] We find that by bringing a motion to adjourn the vote on the referendum question, there was an implied attempt at suspending SO 3(3). However, no evidence was presented to us during the hearing that the motion passed "by two-thirds vote." Instead, Speaker Barraclough only indicated that the motion to adjourn the vote, and therefore implicitly suspend SO 3(3), was passed with a simple majority.

[17] Note that this provision of *Roberts' Rules* only applies to Standing Orders. Bylaws cannot be suspended.

b. Is there a circumstance in which the contravention of Students' Union legislation is justified?

[18] Speaker Barraclough brought up a concern during the hearing that by restricting the Speaker's discretion, Students' Council hearings would become rigid to the rules of Standing Orders (especially in consideration of specific timing rules that these Orders require). However, this ruling should not be interpreted as meaning that the efficient operation of Students' Council and the Students Union in general should be jeopardized for strict and unwavering adherence to SU legislation. In our following comments, we paraphrase the Supreme Court of Canada's "Oakes' Test" to inform whether or not a contravention of SU legislation is appropriate.

[19] When deciding to contravene SU legislation, Students' Council (and by extension, discretion conferred upon the Speaker) should make sure that the contravention is not arbitrary, unfair, or based on irrational considerations. In short, the contravention must be rationally connected to its objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the intended meaning of the contravened legislation. Third, there must be a proportionality between the effects of the contravention and the objective which has been identified as of sufficient importance.

[20] An additional factor that must be considered is legislative deference. Greater deference to legislative choice is appropriate in circumstances such as ensuring efficient operation of Students' Council meetings. Students' Council knows best how their meetings should be run.

[21] The DIE Board must respect what Students' Council chooses within a margin of appreciation. There is no perfect answer. There must nevertheless be a sound evidentiary basis for the Students' Council's decisions.

[22] Turning to the first prong of our test, seeing that the February 2, 2019 special meeting of Council had the Student Spaces referendum question as it's sole agenda item, we find that the contravention of the Standing Order in this hearing is rationally connected to the goal of approving the referendum question within the timeline outlined in *Bylaw 2200 5(1)*.

[23] While there were significant concerns from Councilors regarding time constraints on

approving the referendum question, we find that Vice President Ripka did, in fact, act in "good faith" with the motion (under item 2018-18/8b) to table and return to the question in a meeting scheduled before February 04, 2019. While it could be argued that the contravention could have been even more minimally impaired by holding the special meeting on Sunday, February 3, 2019, there was significant concern that many members would not be able to attend a Sunday meeting, and that Sunday is a religious holiday. There were also attempts to ensure maximum attendance at the special meeting by distributing a Doodle Poll to determine the optimum time when the meeting could have been held. We do, however, note that not all Councilors could access the Poll, but we were told in the hearing that the vast majority were otherwise notified and that quorum was achieved on the ultimate date chosen (being Saturday, February 2, 2019). In sum, we find that the efforts to minimize the contravention are sufficient to find that the contravention of the 96 hour notice provision was indeed "minimally impaired."

[24] In considering the final prong of our test, we must attempt to balance the effects of the contravention and the "sufficiently important" objective. In short, the effect of the contravention was to put intense time pressure on Councilors to appreciate a complicated financial issue, consult with constituents, and ultimately decide how to vote on the motion. This being said, one could certainly argue that, in light of this intense pressure and lack of notice, Councilors could have easily been able to vote against the motion on the basis of their Oath of Office to not vote until knowing the facts as well as not having enough time to survey their constituents. Further, while there was no evidence that the vote to adjourn the referendum question motion passed the 2/3rds majority demanded by *Roberts' Rules* to successfully suspend the 96 hour notice order, the adjournment vote did receive at least a simple majority. Under this argument, the effect of the contravention was minimal. Indeed, and while the outcome of the vote does not impact our decision, the referendum question was ultimately voted down due to this lack of awareness of the facts, as explained by Councilors during the hearing. On these facts, we find the effect of the contravention to be minor.

[25] On the other side of the scale, we must assess the importance of forcing the referendum question motion to a vote before the February 4th deadline to the point where a special meeting was held without proper notice. Speaker Barraclough argued that the reasons why this vote was so important is because delaying the vote by a year would put Students' Council in a situation where the Students' Union may face opposition from a newly elected provincial government, as well as the fact that the prime mover of the referendum question, Vice President Ripka, would not be involved with Students' Council in the next legislative year. However, these reasons are not very convincing in the context of rushing the vote. It is purely circumstantial whether a new provincial government will be elected, nevermind whether the new government will be antagonistic towards what the referendum question is seeking to address. Further, the fact that Vice President Ripka may no longer be involved with the Students' Union does not prevent her and any other related individuals from developing a succession plan. Taken together, we do not consider the goal of rushing this motion to a vote to the current Students' Council to be particularly important.

[26] We are left with a situation where the effect of the contravention was minor and the importance of rushing the referendum question to a vote was not very important. This makes it

very difficult to determine which way the scale tips.

[27] Ultimately, because the margin between the effect of the contravention and the importance of the ultimate goal is so small, but also because the magnitude of each element is also small, we find that the most just and appropriate outcome is to defer to the wisdom of the Students' Council. Because a simple majority agreed to postponing the vote on the referendum question motion, we defer to this decision. As mentioned earlier, Students' Council knows best how their meetings should be run.

[28] In conclusion, while there was a contravention of SO 3(3), and while the suspension provision of *Roberts' Rules* was not complied with, under the test we have developed, the contravention was justified.

[29] While the Board has found the contravention of legislation in this case to be justified, Council is to be cautious in its contravention of legislation. The test laid out above is intended to create a process in which legislation may be contravened so that Council is not restricted in effecting practices that promote sound governance in the context of unique situations. This test is not to be taken to mean that Council is not required to respect and follow the legislation that it passes.

2. Is the motion to approve the Students Spaces referendum question out of order?

[30] We do not find it appropriate for DIE Board to wade into legislative waters and question what is and is not out of order during a Council meeting. What is and is not out of order is to be determined under usual legislative procedure as set out in the Standing Orders of Students' Council, including *Roberts' Rules* as per SO 1(1): "Roberts' Rules of Order will be observed at all meetings of Students' Council except where they are inconsistent with the Bylaws or Standing Orders of Students' Council."

[31] Further, we keep in mind the jurisdiction of this Board which is limited in scope to "actions and appeals brought before it that: (a) initiate a complaint about a contravention of Students' Union legislation; (b) request an interpretation of Students' Union legislation or; (c) appeal rulings made by the Chief Returning Officer during the Students' Union's general elections" (Section 3(1) of *Bylaw 1500*). The only way the DIE Board might be able to question whether or not a motion or question is out of order is if it contravenes SU legislation.

[32] This being said, we do not mean to imply that Standing Orders are not justiciable. Indeed, Standing Orders are undeniably caught under the gambit of "Students' Union legislation" as *Bylaw 100* clearly establishes what may be considered legislation:

> **1 Definitions**
>
> 1. In this bylaw
>
> e. "Legislation" means
>
> i. Students' Union bylaws,

ii. Students' Union political policies,
iii. Students' Council standing orders, and
iv. general orders of Students' Council;

Our comments are instead only directed at the term "out of order."

[33] Our conclusion is also informed by the fact that *Roberts' Rules* includes a section on appeals of a Chair's decision. There being nothing in the Standing Order that deals with appeals of a Speaker's decision, we find that *Roberts' Rules* fills the gap, as discussed earlier. Since there is a procedural legislative appeal process, we find that DIE Board does not have *general* jurisdiction to deal with decisions of the Speaker that involve whether or not something is out of order. The only kind of appeal that DIE Board could hear is if the Speaker's decision directly contradicts SU legislation. Our conclusion is also based on the fact that "out of order" appears in the Standing Order and *Roberts' Rules* exclusively in the context of the discretion of the Speaker (except for 7(1) of the SO). We interpret this to mean that the Speaker has sole discretion and is not justiciable if the decision does not breach other legislation. There is also a check on the Speaker in 24(1) of the SO, which mandates that a motion that the Speaker vacate the chair is always in order. One example where DIE Board would have jurisdiction to assess a Speaker's decision is if the Speaker rules that a motion that the Speaker vacate the chair is out of order. Similarly, if the Speaker fails to order a presentation out of order that substantially deviates from the abstract in the Order Paper, this decision would be justiciable since 7(1) of the SO would be contravened.

[34] There is also a policy reason why we conclude the way we do. If the DIE Board were to allow appeals of this type there is a likelihood that the DIE Board's Registrar would be inundated with trivial applications questioning every little discretionary decision that the Speaker has made.

[35] Even in cases where there has been a contravention of technical or procedural legislation, this Board should only take remedial action if the technical or procedural error is not trivial or insubstantial. Substantiality, in this case, should be taken to mean that a contravention may be either detrimental to the function of the legislative body or puts in jeopardy the public opinion of its function and all legislative means of appeal should have been exhausted. Further, this Board must ensure that it is reviewing decisions in which the dispute concerns legislation and are thus justiciable.

[36] While the DIE Board is not bound by precedents in the Canadian common law, Sopinka J provides guidance regarding justiciability at p. 545 in *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525:

> *In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.*

[37] A review of a legislative or procedural dispute by this Board should then only occur if the following criteria are met: there must be a sufficient legal component (a contravention of legislation) for this Board to review; the dispute must not be trivial in that it would either threaten the legislative process or place it's reputation in jeopardy; and all routes of procedural appeal have been exhausted.

[38] This creates a high standard for review as well as recognizes the authority of this Board to review contraventions of legislation. The stringent nature of this standard also insulates the legislative process from unwarranted judicial review and protects the Board from applications that are frivolous or vexatious in nature. In effect, this approach creates a threshold test that must be passed before analysis can turn to whether any contravention is justified under the Oakes-esque test we outline and applied above.

[39] Councilor Sunday argues that the question is out of order due to the fact that:

> *Students' Council was not given sufficient time to debate the merits of the referendum question. Instead, the question was presented to Council at the latest possible date allowed under Bylaw 2200. Due to this, Students' Council is currently being pressured to accept this referendum question because of 'time constraints.' As this is not the first time Students' Council is forced to make a decision due to such tactics (i.e., putting forward a motion close to bylaw deadlines and using 'time constraints' to force Council to vote), I would rule this question out of order.*

We do not find a bylaw contravention in this ground that Councilor Sunday argues. That is, even if there are "time constraints," and even if this is "not the first time" this has occurred, we find no contravention of legislation.

[40] Councilor Sunday also argues that the question should be out of order since:

> *Students' Council has not been provided with the necessary background information to make an informed decision on the referendum question. As stated in the Oath of Office, "I will vote after knowing the facts, not before." A report detailing consultation done with student groups and Faculty Associations, as well as information on how the Student Spaces Levy would operate, has not yet been provided to Council. Estimates given to Students' Council state that the report will be made public at 4:00 PM on February 1, 2019. As Students' Council is*

> *scheduled to vote on the referendum question on February 2, this means that Council will have less than 24 hours to review the contents of the report and reach out to constituents.*

[41] The only way this ground can survive is if the Oath of Office is to be considered SU legislation. However, we find that it is not. An oath itself is nothing but a promise to constituents and breach of such oath has no consequence unless the legislation which mandates the oath includes such consequence. There being no perjury provision in SU legislation that we have been made aware of that would operate in this situation, we cannot find that a breach of the Oath of Office is punishable by the DIE Board's plenary remedial powers. Further, we do not consider it appropriate to determine what "knowing the facts" means in this context.

[42] Even if it were the case that this Panel found the Council Oath of Office to hold the force of legislation, the issues of undue time constraints or a violation of the Council Oath does not possess a "sufficient legal component" to be considered by this Board. It is the duty of individual Councilors and the electorate to determine whether or not they possess the knowledge required to act in good faith in accordance with their Oath of Office.

[43] Even in the event that the special meeting of Council had been called in accordance with Standing Orders and the Council Oath was determined to have legislative force, the question of whether the motion to approve the Student Spaces referendum question was in order, on the grounds presented by the Applicant, would have to "be determined in another forum" as it does not possess a "sufficient legal component to warrant the intervention of the judicial branch" as stated in *Reference Re Canada Assistance Plan (B.C.)*. This "forum" would naturally be the appeal process described in Roberts' Rules.

CONCLUSION

[44] We would now like to turn our attention to some particular discussion that occured at the January 29, 2019 meeting of Students Council. Specifically, this panel took great exception to the following recorded exchange:

> ***SPEAKER:*** Confirmed that Monday, February 4th is the cutoff for passing the Levy without contravneting bylaw.
>
> ***BHATNAGAR:*** Suggested that Council may contravene bylaw with good reason.
>
> ***SUNDAY:*** Considered that only the DIE Board can authoritatively confirm whether the Levy question is or is not within the 30 days notice period as per Bylaw 2200 Section 5.
>
> ***SPEAKER:*** Suggested there are no repercussions for contravening bylaw as determined by a DIE Board ruling.

On its face, this exchange should be obviously concerning to any reader. The audio recording of this exchange is even more disturbing:

BHATNAGAR: At the end of the day, we are the Board of this organization, and so at the end of the day we get to choose whether we break our own bylaws or not, and we will also, like, face those consequences, whatever those are.

SPEAKER: Councilors, SUNDAY brings up a good point in that if we are unsure about bylaw, there is only one group we can go to to determine that, and that is DIE Board.

UNIDENTIFIABLE: We can break it anyway, [indiscernible, among laughter].

SPEAKER*:* We also, as was determine by a DIE Board ruling at the beginning of this school year, there are no repercussions for Students' Council for breaking bylaw.

UNIDENTIFIABLE: Oh.

[45] Offhandedly commenting that "[Students' Council] can break [bylaw] anyway," received by laughter from members of Students' Council, should obviously be concerning to the voting populace.

[46] Speaker Barraclough was referring to, as confirmed during the hearing, DIE Board Ruling 2018-02 (*Sunday v Students' Council (Speaker)*) when he claimed that "there are no repercussions for Students' Council for breaking bylaw."

[47] Since the Chair of Ruling 2018-02 is also the Chair of the current application, we would like to clarify some decisions made in that Ruling (that was unanimously upheld on appeal) in the context of Speaker Barraclough's comment.

[48] Speaker Barraclough was referring to paragraph 15 of Ruling 2018-02 when he made his comment:

> *However, all of these possible remedies are up to the Council to ignore, though they could hardly be called "remedies" at such a point. This Board does not have a police service, does not have a prosecutorial team, and does not have a jail in which to send contemptible Executives or Councilors. This Board further has no actual or tangible control over the finances of the SU. Therefore, if Students' Council decides to ignore orders of this Board, that is up to their contemptible conscience.*

[49] It is at this point that we would like to remind Students' Council that, as the DIE Board wrote in Ruling 2018-02 at paragraph 10, "the DIE Board can order **any** remedy it considers appropriate and just in the circumstances when Students' Council itself has contravened the SU Bylaws, to ensure compliance" [emphasis in original]. While it is true that the DIE Board does not have a formal enforcement mechanism, it is almost certainly not true that "there are no repercussions for Students' Council for breaking bylaw." Indeed, one can only wonder how the voting populace would react to a Students' Council that ignores an order for "the immediate

disbandment of the entire Students' Council and [an] order [for] a new election to be held forthwith" (Ruling 2018-02 at para 14), especially considering how contemptible the actions of Council must be for such an extreme ruling to be just and appropriate.

[50] Regardless, it was very misleading for Speaker Barraclough to interpret Ruling 2018-02 in the way that he did, and publicly announce his interpretation to the lawmaking body of the Students' Union of the University of Alberta, as well as any other vested parties who may have been in attendance at the January 29th meeting.

[51] The comment: "We can break it anyway" is equally, if not even more disturbing. It is a dangerous road when the legislative branch openly suggests that there are no operational checks and balances on its powers.

[52] To clarify, this Board does not and would not condone contravening SU legislation in any of its decisions.

[53] All of this being said, President Larsen took some exception to Speaker Barraclough's comment when he spoke as follows:

> ***LARSEN:*** When the speaker says that if we contravene bylaw there are no consequences that is not true. We all take oaths of office to uphold the rules and regulations, as well [indiscernible]. Now, that is important to say because, sometimes, flexing or interpreting or sometimes breaking bylaw is of necessity for a question. Now, that is a question for all of you to debate, whether or not you would like to do that, but my suggestion is that we should try to stick to bylaw, the convention being that bylaw is important to us.

[54] President Larsen is right. Students' Council may at times have legitimate reasons to debate whether they might breach legislation, and may indeed decide to do so. However, that decision will inherently come with consequences. Those consequences would be determined by the DIE Board. These consequences could range from non-existent (in the case where the DIE Board finds the contravention to be justified under the test we developed above) to severe. Thus, if Students' Council is going to debate or take such an action, they should do so with the fullness of understanding that they will be accountable to the DIE Board's rulings and ultimately to the electorate.

DISPOSITION

[55] The questions posed to the DIE Board, and the answers to those questions are as follows:

1. ***Is the February 2, 2019 special meeting of Students' Council null and void due to breach of SO 3(3)?***

    a. *Can the Speaker of Students' Council unilaterally suspend either bylaw or Students' Council Standing Orders to allow for this meeting to take place?*

No. However, Students' Council may pass a 2/3rds majority motion to suspend the operation of a particular Standing Order as per the procedure laid out in *Roberts' Rules*. There is no evidence that a 2/3rds majority was obtained. Bylaws cannot be suspended in this way.

b. *Is there a circumstance in which the contravention of Students' Union legislation is justified?*

   Yes. Students' Council (and the Speaker) may at times have legitimate reasons to debate whether they might breach legislation, and may indeed decide to do so. When deciding to contravene SU legislation, Students' Council should make sure that the contravention is not arbitrary, unfair or based on irrational considerations. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the intended meaning of the contravened legislation. Third, there must be a proportionality between the effects of the contravention and the objective which has been identified as of sufficient importance.

Applying the above test, we find that the contravention of SO 3(3) was justified, and the meeting held on February 2, 2019 was indeed a special meeting of Students' Council.

2. Is the motion to approve the Students Spaces referendum question out of order?

There being no contravention of legislation alleged, DIE Board does not have the jurisdiction to answer this question.