

DIE BOARD RULING 2018-09

Hearing Details:

Style of Cause: *First Alberta Campus Radio Fund “Yes” Side v. Chief Returning Officer*

Hearing Date: February 27, 2019

DIE Board Panel Members: Christian Zukowski, Tribune (Chair)

Landon Haynes, Associate Chief Tribune

Nina Fourie, Tribune

Appearing for the Applicant: Kesia Dias, FACRA DFU “Yes” Side Manager

Witness: Meagan Miller, CJSR News Coordinator

Appearing for the Respondent: Ilyas Gora, Chief Returning Officer

Intervener(s): None

The reasons of Associate Chief Tribune L. Haynes and Tribunes C. Zukowski and N. Fourie are delivered by

ASSOCIATE CHIEF TRIBUNE L. HAYNES AND TRIBUNE C. ZUKOWSKI —

FACTS

[1] In an email sent by Deputy Returning Officer (DRO) Navneet Chand on February 15th, 2019 at 4:57pm, candidates were provided with "follow-ups and reminders" from the All-Candidates' Meeting that occurred the previous night.

[2] In point #8 of the email sent by the DRO, Dedicated Fee Unit (DFU) plebiscite sides were reminded that they “are not permitted to use official student group/DFU logos” on any campaign materials.

[3] Section 32(1) of *Bylaw 2200* empowers the elections staff to approve the cost of all campaign materials. Subsections (a) and (b) further provide that the elections staff shall be provided with the “written estimate of cost” and “complete contents” of proposed campaign materials.

[4] In an email to CRO Ilyas Gora on February 15th, 2019 sent at 2:12pm, Side Manager Kesia Dias sought to confirm multiple campaign rules added at the February 14th Candidates' Meeting. The clarifications sought that are relevant to this hearing are: that plebiscite “Yes” sides

cannot use their logos for their campaigns and that "the CRO can interpret any gaps in the nomination package as they see fit."

[5] Mr. Gora responded on February 19th, 2019 and confirmed these assertions.

[6] A restriction on the use of official student group logos does not appear in the original candidates' nomination package.

ISSUES

[7] The issues before this Board are as follows:

1. *What is the appropriate standard of review for this panel to apply in this issue?*
2. *Does the application of this standard of review suggest that the CRO was either correct or reasonable in their regulation?*

ANALYSIS

1. What is the appropriate standard of review for this panel to apply in this issue?

[8] It occurs to this Panel that a standard of review analysis must be conducted before a decision can be reached. Through a review of all DIE Board decisions dating back to 2000, it does not appear that this Board has ever engaged in a comprehensive standard of review analysis, nor set out any sort of framework to establish how a standard of review is to be determined.

[9] Our research indicates that the closest a panel came to a standard of review framework was in DIE Board Ruling 2008-02, *Reference re: Fiduciary Duties of Council*. In that case, the Panel was asked to interpret the term "fiduciary responsibility" in section 13(4) of *Bylaw 2000*, which at the time of the hearing read:

Students' Council shall, at the meeting following the drafting of the petition question by the Bylaw Committee as set out in Section 13(3), approve a question which meets the criteria set out in Section 13(3) unless the question would cause Students' Council to breach its fiduciary responsibility to the Students' Union.

[10] In that case, the majority decision relied on the earlier case of DIE Board Ruling 2005-09, *Langstone v. Students' Council (Re Pint Petition)*. Specifically, the Panel in *Re Pint Petition* found that "[t]he standard for acceptable grounds for dismissal are ones of reasonableness: could a reasonable student have come to the same conclusion that the petition question violated federal or provincial statutes or regulations?" However, no analysis was conducted to suggest *why* reasonableness was the correct standard of review. The Panel in *Reference re: Fiduciary Duties of Council* likewise ruled that a standard of reasonableness would apply to section 13(4) of *Bylaw 2000*:

[47] The Board can still review Council's use of its power to reject a proposed question. In *Re Pint Petition*, the Board suggested that determining whether or not a proposed referendum question would violate a provincial law may be beyond the capabilities of the Board, since the Board is not a court of law. We have reached a similar conclusion regarding our ability to define Council's fiduciary responsibility. But that panel went on to suggest that Council's decision to approve or reject a question on the basis it violated a law could be reviewed to determine whether its decision was reasonable, and overturned if it was not reasonable. We agree that this is the appropriate approach for the review of Council's decisions under section 13(4), should the Board be called upon to do so.

[48] When reviewing Council's decisions under section 13(4), the question for the Board to ask is: "Was Council acting reasonably when it exercised its discretion to approve (or reject) this referendum question?" The question is not: "Would the DIE Board panel have come to the same conclusion?" An unreasonable decision is a decision that no reasonable person could reach, or that is based on unreasonable assumptions or considerations, or that is decided in a procedurally unreasonable manner. Only an unreasonable decision should be overturned, and a decision is not automatically unreasonable just because the Board panel members would have come to a different decision or used a different procedure.

However, again, the Panel in *Reference re: Fiduciary Duties of Council* did not provide any comprehensive reasons *why* this standard was the correct one to use in their analysis.

[11] It also appears that different panels of this Board have come to different conclusions as to the appropriate standard of review in different contexts, but again, lacking any sort of justification for the standards determined. For example, in DIE Board Ruling 2016-01, *Scott v. Chief Returning Officer*, the Panel seems to have determined, without specifically saying so, that the CRO's interpretation of "heckling" should be assessed on a correctness standard since the Panel engaged in a comprehensive statutory analysis without referring to whether or not the CRO's interpretation was reasonable.

[12] So as to not follow in what this panel perceives to be the airy footsteps of past instantiations of this Board, we have decided to engage in a comprehensive analysis to determine the appropriate standard in which to review the decision of the CRO in this case. In doing so, we have adopted Canadian common-law jurisprudence to guide our analysis.

[13] Two standards of review are available to this panel in reviewing the Chief Returning Officer's decision, as laid out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. This panel may take a correctness standard, in which no deference is given to the administrative decision maker (the Chief Returning Officer) and the panel makes its own analysis of the question before it. Alternatively, a reasonableness standard may be chosen in which a degree of deference is given to the administrative decision maker and this panel makes a determination on whether a decision was justifiable, transparent, and intelligible.

[14] While there are many factors that contribute to whether a question is reviewed under the either correctness or reasonableness standard, the Supreme Court of Canada, in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 at para 5, has clarified that “[questions of jurisdiction] will always be subject to a standard of review of correctness.”.

[15] Before engaging in a *Dunsmuir*-type analysis, we should therefore first determine if this case contemplates a “true jurisdictional question.”

[16] In considering whether or not this Board has been presented with a “true jurisdictional question,” we will consider the approach taken by the Alberta Court of Appeal in *Macdonald v. Mineral Springs Hospital*, 2008 ABCA 273. In this ruling, the Court found that drew upon *Dunsmuir*, *United Taxi*, and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, to create a framework for deciding what constitutes a “true jurisdiction question.” In *Dunsmuir*, the Supreme Court said that “[t]rue jurisdictional questions are those which ask whether the office’s statutory grant of power gives it the authority to make the inquiry.” In *United Taxi* the Supreme Court found an instance of a true jurisdiction question by examining the whole of the *Municipal Government Act* to determine whether the municipality had the authority to impose a freeze on the issue of taxi plate licences. As stated by the Supreme Court in *Dunsmuir*, courts should be slow to brand as jurisdictional issues that are doubtfully so. The Supreme Court in *VIA Rail* also cautioned that an overly broad approach to characterizing an issue as jurisdictional would effectively reduce the tribunal’s authority to that of fact-finding.

[17] The Court in *Mineral Springs Hospital* also emphasized the importance of looking at both the expertise of the administrative decision maker and the enabling legislation in determining a standard of review.

In Via Rail, the majority looked to the enabling legislation, concluding that it gave the tribunal an open-ended grant of power which widened its jurisdiction and narrowed the ambit of jurisdictional review of the legality of its actions. This showed that Parliament intended it to use its expert assessment to decide whether it had authority to proceed with a particular application. [Emphasis added]

[18] Further, the Court identified that:

In Dunsmuir, the issue was whether certain statutory provisions gave an adjudicator the power to inquire into an employer’s reason for dismissing an employee with notice or pay in lieu of notice. The Supreme Court characterized this as a question of law and applied a standard of review analysis to conclude that the reasonableness standard applied. Manifestly, it did not treat the issue as jurisdictional. [Emphasis added]

[19] Professor Alice Woolley (as she was then), elaborated on the issue of “true” questions of jurisdiction, in the context of *Mineral Springs Hospital*, in a blog post from 2009:

Thus in [*Mineral Springs Hospital*], the issue under appeal was a decision by the Hospital Privileges Appeal Board that it had no jurisdiction to hear an appeal from an Operating Room Committee decision that it would not increase a physician's operating room time. This looks at first glance like a jurisdictional question – after all, they are deciding whether they have jurisdiction to do something. However, as the Court rightly points out, that isn't sufficient to make something a jurisdictional question in the relevant sense. A jurisdictional question would be one that says, can the Hospital Privileges Appeal Board even ask this question? Are they even entitled to decide whether they have the power to hear the appeal of the Operating Room Committee on this issue? That type of question isn't raised here. They do have that power, and the only question is as to the answer – can they hear the appeal or not? That question is a straightforward matter of statutory interpretation, and is reviewed on a reasonableness standard.¹

[20] Borrowing Professor Woolley's wording, we can analogize to this case: "A [true] jurisdictional question would be one that says, can the CRO even ask whether or not it has the jurisdiction to approve or disprove campaign materials based on content? Are they even entitled to decide whether they have the power to make this approval?"

[21] To answer this question, it is necessary to look at the entire statutory scheme to determine whether or not the issue before the CRO was jurisdictional and consequently directly reviewable on the correctness standard. *Bylaw 2100* gives the Elections Office a broad mandate for controlling many aspects of Students' Union elections. CRO decisions are final and absolute unless appealable to the DIE Board under section 48 of *Bylaw 2200*. This broad mandate can mostly be found in section 8 of *Bylaw 2100*. Specifically, the CRO is "the highest responsible manager ... particularly when interpreting, enforcing, and delegating authority afforded by the [relevant] Bylaws." More specifically, the duties of elections staff (including the CRO) are set out in section 8(3) of *Bylaw 2100*, but the list is inclusive rather than exclusive. Students' Council clearly intended to give the Elections Office (and by association, the CRO) very comprehensive decision-making powers and the CRO the power to decide questions that arise in the course of the CRO's operation of the Students' Union elections. Unlike *United Taxi*, the enabling Bylaws are clear that the CRO is to interpret bylaws pertaining to Students' Union elections. This is not the same sort of jurisdiction (or *vires*) questions *Dunsmuir* refers to as "true" questions of jurisdiction. Consequently, we answer the stated question in the immediately preceding paragraph in the positive, and hence, a standard of review analysis is necessary.

[22] The Supreme Court in *Dunsmuir* is clear that while it is no longer necessary in all cases to examine each of what have been called the *Pushpanathan* factors (the existence or absence of a privative clause, the purpose of the tribunal as determined by interpretation of enabling legislation, the nature of the question, and the expertise of the tribunal), no existing DIE Board

¹ Alice Woolley, "After *Dunsmuir*: The Alberta Court of Appeal's Identification and Application of Standard of Review May 2008-May 2009," (11 June 2009) *ABlawg* (blog), online: <<https://ablawg.ca/2009/06/11/after-dunsmuir-the-alberta-court-of-appeal%E2%80%99s-identification-and-application-of-standard-of-review-may-2008-may-2009/>>

jurisprudence has comprehensively done so as regards the CRO. Therefore, this Board must embark on a contextual standard of review analysis.

[23] As already noted, there is a statutory right of appeal to the DIE Board on questions of law: section 48 of *Bylaw 2200*. This suggests a low level of deference since such questions are intended to be reviewable by the DIE Board.

[24] The purpose of the CRO and Elections Office is to determine the issues assigned to it under section 8 of *Bylaw 2100*, balance a number of competing interests and considerations, and find solutions that balance benefits and costs among various candidates. This suggests greater deference to its decisions.

[25] The question is one of statutory interpretation (whether section 32 of *Bylaw 2200* contemplates the substance of campaign material as being subject to approval by the CRO) and therefore a question of law. But it is a question of statutory interpretation that requires the CRO to interpret its constituting statute, with which it has particular familiarity. This suggests a greater degree of deference.

[26] Given its composition, the Elections Office and the CRO undoubtedly have more expertise than the DIE Board about how Students' Union elections are to function and what the scope of campaign materials is within complex advertisement requirements.

[27] Therefore, an application of *Dunsmuir* suggests that deference is warranted and that the reasonable standard governs a review of the CRO decision. Therefore, this Board must assess whether the CRO decision was justified, transparent, and intelligible.

2. Does the application of this standard of review suggest that the CRO was either correct or reasonable in their regulation?

[28] During the hearing held for this case, there was no dispute surrounding the transparency and intelligibility in the Chief Returning Officer's actions. Both parties made submissions that the regulation made by the Chief Returning Officer was made in a clear and open manner, a fact that this Board accepts.

[29] This leaves this Board to consider whether or not the Chief Returning Officer was *justified* in creating the impugned regulation. An issue that is grounded in a question of law relating to the interpretation of section 32(1) of *Bylaw 2200* and Bylaws 2100 and 2200 as a whole.

[30] Read in the context of *Bylaw 2200*, it is somewhat unclear what the purpose of section 32(1) is. While section 32(1), as shown below, directs the Chief Returning Officer to approve the *costs* of campaign material, section 32(1)(b) also directs candidates to submit the complete contents of the proposed material.

32 Campaign Materials

1. The cost of all campaign materials shall be approved by the elections staff before being used in campaign activities. Candidates shall provide the elections staff with:
 - a. a written estimate of the cost of the proposed campaign material, including the source of that cost;
 - b. and the complete contents of the proposed campaign material.

[31] Further, section 33 directs the election staff to disallow any proposed campaign materials that cannot be removed at the end of the campaign or are likely to damage or alter property. What is unclear, is whether these are the only instances that campaign materials may be disallowed by the election staff apart from concerns arising from costs.

[32] *Bylaw 2200* also lends a reasonable amount of discretion to the election staff in other provisions. Sections 34 and 37, concerning the use of media and posters respectively, provide the Chief Returning Officer discretion in regulating their use during the campaign.

[33] In considering whether the Chief Returning Officer was justified in creating the regulation in question, on the basis of conflicting wording in the bylaw and deference given to the election staff in other provisions in *Bylaws 2100* and *2200*, this panel holds that the Chief Returning Officer acted in a reasonable manner in the disallowing the use of official student group logos on campaign material.

CONCLUSION

[34] The Board would like to use this hearing and dispute regarding the wording of *Bylaw 2200* as an opportunity to discuss the dangers of the improper drafting of bylaw that creates confusion in its interpretation. Had this Board chosen to apply a standard of correctness in reviewing the Chief Returning Officer's decision, our decision would likely be quite different.

[35] It is clear from considering the Council debate surrounding Bill 6, which amended *Bylaw 2200*'s provisions to their current state, that Council intended for the election staff to only review campaign materials on the basis of cost. See Item 7a at the 2016-11 meeting of Student's Council contains the second reading of Bill #6. The first principles of the bill clearly state that:

The C.R.O.'s responsibilities regarding the review of campaign materials content shall be amended to focus on ensuring campaigns do not go over budget.

[36] This first principle is further supported by the comments of Vice President Robyn Paches at the 2016-11 Council meeting, which lend support to the idea that *Bylaw 2200* be treated as restrictive vis à vis the power delegated to election staff:

The way that I view Bylaw, and I agree with President Rahman, is that it forms a box in which the organization and its employees operate within and this [Bill #6] sets a very defined box in which the [Chief Returning Officer] can operate in.

[37] Despite striking clarity in Council's intention in the amendments to *Bylaw 2200* introduced in Bill 6, *Bylaw 2200* was left with a provision that, on the one hand, directed the election staff to consider the approval of bylaws on the basis of cost, but on the other hand, directed candidates to make available the complete content of their proposed campaign materials to the election staff. It is the view of this Board that such a provision could only be a remnant of the previous scheme that allowed the election staff to approve campaign materials on the basis of content, but for an unfathomable reason was not removed by Bill 6.

[38] In drafting legislation, Council must display extraordinary caution in what is legislated. Each provision of a bylaw should have a direct and intended purpose relating to the overall scheme of the bylaw. If amended to remove a duty of the election staff, for example, related provisions should be removed or changed accordingly to avoid confusion in interpretation.

[39] We would like to remind Students' Council that past DIE Board panels have not undertaken the expansive standard of review analysis we have done here. Indeed, the analysis we have conducted was not necessary. This Board has a broad discretion in the way it goes about formulating its judgments. This broad case-by-case mandate is specifically required through SU legislation. For example, recall DIE Board Ruling 2016-01, *Scott v. Chief Returning Officer* where the Panel in that instance immediately jumped into a statutory interpretation analysis and seemingly reviewed the CRO's decision on a standard of correctness. Had this Panel followed in the footsteps of this previous Panel, our decision would have been markedly different to significant consequence in future elections without immediate bylaw amendment. Further, our decision would not be (and is not) appealable due to section 34(7) of *Bylaw 1500*.

DISPOSITION

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

1. *What is the appropriate standard of review for this panel to apply in this issue?*

As this panel has determined that this issue is not one of jurisdiction, and that there exists multiple reasons for the Chief Returning Officer to be shown a degree of deference in the consideration of their decision, a standard of reasonableness will be applied in this panel's review of the Chief Returning Officer's regulation.

2. *Does the application of this standard of review suggest that the CRO was either correct or reasonable in their regulation?*

Yes. The regulation disallowing the use of official student group logos on campaign material is a reasonable action under Bylaws 2100 and 2200?

Appeal denied.