April 17, 2013 - Ruling of Appeals Board

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Note: Secretary-General Jonathan Mooney has recused himself from this committee.

Background

On April 16, 2013, the Appeals Board received a written appeal to two distinct decisions of the CRO. The appeals were made by candidate in the upcoming elections, Jonathan Mooney. The appeal concerns actions of the CRO, and the concomitant interpretation of the governing documents with respect to elections. Of note, the CRO and the candidate, given a reasonable lead time on the question of interpretation, had previously submitted related questions to this appeal to the Governance Committee (GC). The Appeals Board is very pleased with this course of action, as it recognizes the appropriate channels and suggests it as best practice with regards future questions of interpretation.

Briefly, we outline the difference between the scope of authority of the Appeals Board and the Governance Committee.

The Governance Committee is a committee of council, created under Society Activity Manual (SAM) Chapter 5 Section 2, and, in particular, it “may exercise jurisdiction regarding [...] the overseeing of all PGSS elections and referenda to ensure that they are being run in accordance with all PGSS rules and regulations set out in governing documents.” (SAM 5.2)

The Appeals Board is created in the Bylaws 6 (Governing Bodies), and it “[m]akes decisions about appeals made by members regarding decisions of the PGSS or its Officers following procedures specified in the Society Activities Manual. (Bylaws Section 6).”

As per Bylaw 5, the Bylaws take precedence over the Society Activities Manual, and as per Bylaw 6, decisions of the Governance Committee may be appealed to the Appeals Board. That is not what is occurring here, however, the Appeals Board felt it useful to spell out the jurisdictional relationship between the various bodies.

1 As per Bylaw 5, governing documents is comprised of: Letters patent, bylaws, Corporate Activities Manual, Society Activities Manual, Business Activities Manual, Policy and Position Manual, Contracts. As per Bylaw 9.12 Contracts may be either of an exclusive business nature, or approved by Special resolution of the Executive Committee ratified by the Board of Directors.
Discussion

As part of the pre-election preparation process, the CRO has prepared a “Candidate Guide” along with a contract which he has asked candidates to sign prior to participating in meaningful ways in the conduct of the election (hustings, campaigning, etc.)

The complainant suggests that by requiring the signing of this form, the scope of regulation to which the candidates are bound, is enlarged to include dispositions (notably with respect to third party endorsements) that are not part of the bylaws or the Society Activities Manual (SAM).

The complainant refuses to “bind himself contractually” to these terms, and suggests that any sanction based upon violation of these extra terms would be contrary to the governing documents.

The Appeals Board sees three substantive questions before it, and shall entertain each in turn.

1) Does the CRO have the authority to require signature to such a form?

2) If so, to what degree may dispositions not explicitly included in the governing documents comprise part of such a form?

3) What, if any, sanctions are available to the CRO if a candidate refuses to sign such a form, absent explicit violations of the governing documents.

1) Does the CRO have the authority to require signature to such a form?

In its “Elections Reference” of April 7th, the Governance Committee (GC) tackled the broader question of the scope of the meaning of discretion in SAM 9.1.1 (emphasis added):

_The CRO will have discretion over enforcing rules and regulations pertaining to elections, referenda and petitions contained within this Manual. The CRO shall be responsible for all aspects of the administration of PGSS elections and referenda._

The decision of the GC reads as follows:
_The CRO is given the freedom to decide what should be done in a given situation. [...] [The CRO is] given broad suggestions as to the management of the election based on the subsequent sections of Chapter 9, but these points are secondary to the discretion of the CRO in the application of such rules and regulations._

_The authority is not without its limitations, however. The Governance Committee exists to offer oversight and guidance to the CRO in managing the balance between strict adherence to the_
SAM and other pragmatic options. Furthermore, the Appeals Board retains the ability to overrule rulings of the CRO in a period of short delay.

In short: It is the opinion of the Governance Committee that the CRO does have the authority to create such rules and regulations for the election has they see fit, based on the guidance of the Society’s.

The GC correctly interpreted the meaning of discretion in this article to give the CRO broad freedom to decide what should be done in a given situation to fill out the broad suggestions as to the management of the election. We shall not repeat the GC’s argument in these regards.

However, the Appeals Board is of the opinion that the GC erred in asserting the authority of the CRO to “create such rules and regulations” as he sees fit. Rules and regulations are properly the province of the governing bodies of the PGSS. Their very generality requires democratic debate and oversight.

In his submission to the GC, the CRO suggest that should his powers be limited “to what is only specifically outlined in the SAM, it will mean that I, and any future CRO will have to consult council for even the most pedantic, cumbersome things – be it procedural, or otherwise.”

The Appeals Board feels that the CRO is limited in his ability to create “rules and regulations” ex nihilo, yet he is in no way limited in exercising his substantial discretion in setting out the manner in which the election will run. Procedures, processes, guidelines, and behaviour all fall easily within his mandate.

The Appeals Board finds that the requirement for a candidate to sign a statement affirming the candidate’s adherence to the election rules set out in the governing documents, and the manner in which the election will proceed, is a reasonable process within scope of the CRO’s authority.

In fact, we consider such a document to be highly recommended, as it can serve to ensure full knowledge of the rules by candidates. The didactic effect on candidate knowledge as well as the dissuasive effect on candidate behaviour are both positive outcomes of such an approach.

It is worthwhile noting, however, that the election regulations contained within the governing documents have the force of contract, regardless whether a candidate has signed to that effect or not. The Bylaws of the PGSS, along with the activity manuals (insofar as they are created and defined by Bylaw) are the contract of association, within the meaning of the Civil Code. Members of the PGSS, as parties to the contract of association, bind themselves to the bylaws.

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2 2186. A contract of association is a contract by which the parties agree to pursue a common goal other than the making of pecuniary profits to be shared between the members of the association. (CCQ http://canlii.ca/t/z35)
2) If so, to what degree may dispositions not explicitly included in the governing documents comprise part of such a form?

As per the preceding discussion, the form may not include entirely novel regulatory additions to the electoral landscape, while it may include guidelines and directives within the broad scope of authority of the CRO.

In particular, we consider the single part of the form that the CRO had asked the candidate to sign that the complainant has signalled as problematic. The passage he flagged is as follows: “Candidates must not, on any circumstances, accept support from any organization or grouping; this includes PGSAs, on campus groups, political organisations, etc.”

The only reference to campaigning by non-candidates contained within the governing documents is as follows: “Candidates cannot be held responsible for campaigning or the distribution of campaign materials not done or produced by the candidate or due to the suasion of the candidate” (SAM 9.10.10).

The SAM provision does not forbid campaigning or distribution of materials by others (including groups) under the suasion of the candidate, but notes that candidate could be held responsible for such activities. That is to say, candidates must otherwise comply with the campaign rules (no defamation, poster size limits, spending limits, etc.) This SAM stipulation does not open up field of regulation sufficient to allow the CRO to forbid the “accept[ing] of support” from “organization[s] or grouping[s].” This passage goes beyond the scope of the CRO’s discretionary power to fix the rules of the elections, and properly into the scope of the Society’s governing bodies.

The Appeals Board sees some merit in the provision forbidding the acceptance of support from organizations etc., and suggests that the Policy and Structure Advisory Committee or the Elections Committee (should it be filled), might profitably consider such changes to the governing documents.

3) What, if any, sanctions are available to the CRO if a candidate refuses to sign such a form, absent other explicit violations of the electoral rules contained within the governing documents?

In the CRO’s submission to this Appeals Board, the CRO suggests that a refusal to sign such a form is required, as his “participation as a candidate is contingent upon his compliance with these rules in the form of a contract.” This is correct, but as we have stated above, the
candidate, merely by participating in the election process, in fact, by allowing himself to remain a member of the PGSS (and not resigning from the Society), is party to the contract of association, and has thus agreed to comply with the governing documents. Refusal to sign such a form, would not unduly hamper the candidate’s participation in the election, as he or she would continue to be bound by the rules and by the rulings and decisions of the CRO.

In the same submission from the CRO, he suggests that a candidate who had not signed, could “participat[e] as a ‘shadow candidate,’ that is a candidate who simply appears on the ballot, without any campaigning. [...] he would not be able to attend the hustings, which as required as per the SAM, which would in turn lead to his withdrawal from the elections.”

Although the precondition for this situation, a candidate who had not signed, is as we mentioned above, not explicitly a problem, the Appeals Board nonetheless considers it vital to engage with this line of argument. It suggests that the CRO has the authority to exclude a candidate in good-standing from the hustings, and thereby make use of the expectation that a candidate participate in the hustings as grounds for withdrawal of a candidacy.

The disqualification of a candidate requires an intentionally high threshold. The only part of the governing documents that explicitly call for disqualification is SAM 9.11, to wit:

*It is prohibited to use defamatory or prejudicially misleading statements in any form in the course of an election or referendum campaign. So doing may result in the disqualification of the election candidate at the discretion of the CRO if the candidate is found responsible, or expulsion from the referendum campaign in the case of ROC members (chair included). Such expulsion or disqualification must be served in writing by the CRO clearly stating the reason for the disqualification or expulsion.*

Although other violations of the electoral rules contained within the governing documents, may be sufficiently grave for the CRO to make use of his discretion in disqualifying candidates, this single reference to the practice sets the bar high. Defamation and prejudicial misdirection of extremely specific and may even consist of violations of Quebec or Canadian law. This suggests that the simple failure to attend hustings (which, one recalls, have “expected” not “required,” attendance), particularly if such failure were due to having been barred by the CRO, to be nowhere near the level of gravity required for disqualification. Participation is fundamental to the democratic process; this Appeals Board has made decisions in the past that make use of the guiding principle of democratic involvement.³ The use of the CRO’s power to disqualify over relatively minor infractions discourages democratic participation, and is not to be countenanced.

³ Of note, the ruling of February 19th, 2013 on the extension of the nomination period and confusing language in the governing documents.
Summary

1) Does the CRO have the authority to require signature to such a form?

The Appeals Board finds that the requirement for a candidate to sign a statement affirming the candidate’s adherence to the election rules set out in the governing documents, and the manner in which the election will proceed, is a reasonable process within scope of the CRO’s authority.

2) If so, to what degree may dispositions not explicitly included in the governing documents comprise part of such a form?

They may be so included, insofar as they fit within the CRO’s discretion to organize the election. This discretion arises from the application of and interpretation of the governing documents, and may not be used to create new regulation from scratch.

3) What, if any, sanctions are available to the CRO if a candidate refuses to sign such a form, absent explicit violations of the governing documents.

No sanctions are required, as a candidate has already entered into the contract of association, and is subject to the directives of the CRO. The form signing remains an excellent informative instrument for the CRO to help the candidates in understanding the governing documents as they pertain to the election process.