

Michigan House of Representatives Elections Committee  
Testimony of Ellis Boal Re SB 776  
Committee to Ban Fracking in Michigan  
April 27, 2016

On March 16 I provided you written testimony concerning SB 776. The testimony is on your website for proceedings that day. I appear today to provide copies and discuss newly re-discovered public documents from the precedential 1986 supreme court case, *Consumers Power v Attorney General*, a case which underlies the positions of all the parties, pro and con.

To briefly recap my testimony of last month, SB 776 would remove a “rebuttability” provision now in MCL 168.472a, which allows initiative proponents to utilize signatures older than 180 days. The short-range problem with the bill of course is that it would unfairly change the rules in the middle of the game for signature collection in ongoing initiative campaigns which started last year.

The long-range problem is that it runs up against the wording of article 2 section 9 of the 1963 constitution. That wording is significantly different than that of article 12 section 2, which underlay the holding in the *Consumers Power* case.

Article 12 section 2 and the *Consumers Power* case only concern initiatives to amend the constitution, not initiatives to amend statutes.

Statutory initiatives are controlled by the 1971 decision in *Wolverine Golf Club v Secretary of State*, as I pointed out last month. *Wolverine Golf Club* struck down 30-year-old legislation which prescribed timing for filing that type of initiative.

(My March testimony contained one factual error, that collectors for the “bottle bill” of the 1970s used the 4-year period of the governor's term to collect signatures. We have since learned that the bottle campaign had institutional support, and was able to collect in a much shorter period.)

The briefs and transcripts I have for you today eliminate all doubt of the legality issue for statutory initiatives, because they contain a court admission by John Pirich, who represented the successful utilities in *Consumers Power*, that section 472a is unconstitutional under *Wolverine Golf Club*, insofar as it purported to regulate statutory initiatives.

Puzzlingly, last month Pirich testified to the Senate Elections Committee in

support of SB 776, even insofar as it touches statutory initiatives. He gave no reason for the flip-flop from what he said in court, which I will quote momentarily from the papers I am giving you.

The briefs and transcripts were filed in the Ingham County Circuit Court, in June-August 1986, before the supreme court's final opinion at the end of August. The circuit court docket number was # 86-56487-CZ. Hon. Robert Holmes Bell, now a federal judge in Grand Rapids, presided.

You will recall that the background of the case was a 1974 opinion of attorney general Frank Kelley holding section 472a unconstitutional for both constitutional and statutory initiatives.

On August 7, 1986, in a court brief joined by Michael Hodge, Pirich discussed the predecessor of article 12 section 2 in the 1908 constitution, the detailed procedures enacted by the delegates for initiatives that year, and a 1923 court decision holding that the 1908 predecessor was self-executing.

Later in oral argument on page 11, Pirich noted that commentators considered the 1908 constitution too "long, verbose, and complicated."

Accordingly the 1961-62 Con-Con streamlined procedures. Article 12 section 2 added provisions requiring the legislature to regulate the process. In other words, as Pirich and Hodge said at page 7 of the brief, article 12 section 2 "is not self-executing and supplemental legislation is necessary."

The foregoing from the brief was about constitutional initiatives. But to bring the point home, in a 6-page section of the brief Pirich and Hodge highlighted "the distinction" between article 12 section 2 and article 2 section 9. They explained that AG Kelley had improperly "extrapolated the holding" of *Wolverine Golf Club* – that article 2 section 9 forbids legislative meddling – to cover constitutional initiatives.

The brief noted that at the Con-Con in 1961-62, there was an initial proposal of a maximum of 300,000 signatures for constitutional initiatives (underlining is added to some of the quotes which follow):

"This proposal was defeated on the basis that article 12 petitions should be difficult to pass and by no means should be made easier than an article 2 petition to initiate legislation. ... These sentiments were aptly expressed at the Convention by Delegate Stevens:

We do not want to make it easy to amend the constitution. The recent vote shows that. What we want to do is to keep it rather difficult to do it, but we do not want it easier to amend the constitution than it is to pass an ordinary statute....

...

The process of amending the Constitution was logically intended to be more restrictive than the process of initiating legislation.”

Another way of saying the same thing: Initiating legislation was intended to be easier than initiating constitutional amendments. The brief continued:

“The Convention debate supports the view that [article 2 sections 8 and 9] were regarded as 'the right of the electorate to, first of all, initiate legislation without giving reasons, to review legislation without giving reasons, and to recall elective officers without giving reasons.' (Emphasis added.)

...

Restrictions, by the legislature, upon the right to initiate legislation are contrary to the purpose of [article 2 section 9]. Both [article 2 sections 8 and 9] are direct responses to suspicion of the legislature and manifestations of a desire to make it more receptive to the will of the people.

...

[Article 2 sections 8 and 9], on the other hand, are antagonistic to legislative authority....”

Commenting specifically about the AG's ruling for statutory initiatives at page 6 of the oral argument on July 18, 1986, Pirich agreed with it. This is the most important point I want to make to you today:

“The Attorney General was constrained to conclude that Article 2 section 9 was self-executing....”

Judge Bell then pinned him down at page 15 in colloquy about constitutional initiatives:

“The court: And it's your position that on all of these constitutional provisions, they rest on the 'as provided by law' contained in all these constitutional provisions [in article 12 section 2] that the Legislature is acting in accordance therewith?

Mr. Pirich: That's correct.”

The attorney general's brief in opposition, signed by Gary Gordon, Richard Gartner, and Todd Adams on July 15, 1986, noted “From the scant and hurried legislative history, it is impossible to know the legislative intent in passing MCL 168.472a....” Then on pages 33-36 they discussed and dismissed the reasons which the utilities were advancing in its support. The following passage did not convince the court as to constitutional initiatives, but it remains compelling today as to statutory ones:

“There is no history of significant fraud and abuse in Michigan. [Daniel McHargue, Michigan Constitutional Convention Studies # 17, Direct Government in Michigan, Initiative, Referendum, Recall, and Revision in the Michigan Constitution] p 29, 35.”

...

[T]he Secretary of State has adequate power to prevent fraud and abuse.

...

[The utilities] argue that the 180 day rebuttable presumption rule assures that the persons signing the petitions are still residents of and registered voters of the state. First, these are not important reasons. Once the people have voted on the constitutional amendment, the registered voters of the state will have expressed their opinion. Second [the 180-day statute] serves these purposes very poorly. ... If the petition is filed well before the next scheduled election, then the 180 day rebuttable presumption will serve little purpose because an initiative petition filed very early during the period before the upcoming election would still have this problem.

...

Fifth, the Constitutional Convention debates clearly demonstrate that the number of signatures and not the time within which they are gathered are the check place on the exercise of the initiative. ... In fact limiting the time period will

discourage the debate and discussions which inform the electorate.”

In effect though not in terms, Gordon was saying here that Michigan has no “freshness” requirement for signatures. In oral argument on July 18, at page 41 he added:

“[T]he convention comments, the delegates were concerned about limiting constitutional amendments or limiting the right of initiative to highly organized special interest groups rather than allowing access to this right by broad-based, loosely organized grass roots type organizations. If the circulation period is limited to six months, I would submit that it would effectively remove the right of the people as a broad-based group to go out and, I guess, casually, without a great deal of organization, without a great deal of money, to circulate petitions and come in with an adequate number.

As mentioned, these points ring true today when it comes to statutory initiatives. But as to constitutional initiatives the court slapped Gordon down. Why the difference? Because article 12 section 2 has important wording – to which I adverted above, and which was quoted by the supreme court as you will see momentarily – which article 2 section 9 does not.

The circuit court issued an oral opinion that day. Then it signed a declaratory judgment that

“section 472a ... does not violate Const 1963, art 12, §2, and is constitutional as applied to petitions to propose a constitutional amendment.”

Eight days later, on August 26, 1986, the supreme court upheld the judgment, for the reasons stated by that court. Resting solely on the point about which Judge Bell asked in oral argument, it said:

“Of extreme importance to resolution of the present controversy is focus on the absence of a call for legislative action in Const 1908, art 17, § 2 and the clear presence of one in Const 1963, art 12, § 2 as evidenced in the sentence:

‘Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.’”

The court did not cite, and it expressed no opinion, on the constitutionality of the 180-day statute as applied to statutory initiatives under article 2 section 9.

But from the Ingham Circuit papers we now know that in 1986 John Pirich argued

what today is the position of the Committee to Ban Fracking in Michigan, and won the case in great part on that basis: *Wolverine Golf* “constrains” the result that section 472a is unconstitutional as applied to statutory initiatives.

No counsel on either side disagreed with this. You cannot ignore such unanimous and thoughtful opinion of Michigan's top election attorneys.

If enacted, SB 776 too will suffer from the same vice, unconstitutionality as to statutory initiatives. To quote again from Pirich:

- “What we want to do is to keep it rather difficult to do it [amend the constitution under article 12 section 2].”
- “Restrictions, by the legislature, upon the right to initiate legislation are contrary to the purpose of [article 2 section 9]. Both [article 2 sections 8 and 9] are direct responses to suspicion of the legislature and manifestations of a desire to make it more receptive to the will of the people.”
- “[Article 2 sections 8 and 9], on the other hand, are antagonistic to legislative authority....”
- “Article 2 section 9 was self-executing....”

Section 472a – both in its current form and in the form proposed by SB 776 – is unconstitutional. The legislature's most honorable course would be simply to repeal it altogether, and not replace it.