



Judgment of the USC Appeals Board in the matter of:

Team Litchfield v Elections Committee, 2015:1 Election

Date: March 13, 2015.

Panel: Philip Abraham, Janice Calzavara, Derrick Dodgson (Chair), Oren Kamen, and Jeffrey Wong

Reasons for Judgment: Dodgson (Abraham, Calzavara, Kamen, and Wong concurring)

Introduction

1. This is an appeal from a decision of the USC Elections Committee (hereafter the “Elections Committee”, or the “Respondent”) finding the 2015 USC election candidates (collectively “Team Litchfield” or the “Petitioner”) in violation of campaign rules under USC By-Law #2, and subsequently to award two (2) demerit points to Team Litchfield.
2. For the reasons which follow, the USC Appeals Board finds in favour of the Respondent and upholds the decision of the Elections Committee.

Facts

3. It is agreed by both parties that on January 28, 2015, USC Presidential candidate Jack Litchfield entered the USC Main Office (hereafter the “Office”) wearing a patterned blue and white scarf. It is also conceded by the Petitioner that this scarf and a number of others like it were purchased and featured prominently in association with the Team Litchfield campaign, such that it constitutes a “campaign material” under the definition in USC By-Law #2, s.1.03.
4. Through communications between USC Promotional Video Coordinator Derek Leung, the Elections Committee, Mr. Litchfield, and Team Litchfield campaign staff, it had been requested of Mr. Litchfield to participate in a USC Elections promotional video. Mr. Litchfield was to wear the scarf in his segment of the video. Mr. Litchfield attempted to meet with Mr. Leung at the location outside the Office where the video recording equipment was staged. Not finding Mr. Leung there, Mr. Litchfield entered the Office.

Violation as found by the Elections Committee

5. Following an investigation and hearing, the Elections Committee found Team Litchfield in violation of By-Law #2, s.11.04:

11.04 Candidates shall not campaign in the USC main offices (including the workspace or office of any Staff, Executive, or volunteer) or Council Chambers, or during any meeting of Council or the Standing Committees of Council regardless of location. **This prohibition shall include but not be limited to the display of campaign materials,** verbal campaigning, and discussion of campaign logistics. [emphasis added]

6. The Elections Committee classified this as a “Minor violation” under By-Law #2, s.11.12(5)(i). Under this classification, the Elections Committee may award up to four (4) demerit points. The Elections Committee chose to award two (2) demerit points to Team Litchfield for this violation.

Argument of the Petitioner

7. The Petitioner contends that Mr. Litchfield’s actions do not constitute a violation of s.11.04 as Mr. Litchfield had no intent to solicit votes in the Office. In the alternative, if a violation is found to have occurred, the Petitioner argues that the Elections Committee’s decision to award Team Litchfield two (2) demerit points should be overturned and zero points be awarded.

8. The Petitioner does not allege that the Elections Committee acted unfairly, with bias, or with a conflict of interest in reaching their decision.

Standards of Review

9. Before progressing to the Board’s analysis of the Elections Committee’s decision, the applicable standard of review must be determined. Current Canadian administrative law provides for two general standards upon which decisions of tribunals should be reviewed: reasonableness and correctness. These standards should be used by the USC Appeals Board when appropriate to resolve a particular issue.

10. Reasonableness requires that the Appeals Board review the lower decision in order to determine that it was a “reasonable” conclusion that could have been reached under the circumstances. In some situations, there may only be one reasonable conclusion that a decision-making body could have reached; however, in others there may be more than one and so long as one of them was reached the Appeals Board should not overturn the decision. Review on a reasonableness standard should be the default position of the Board.

11. Correctness requires that the lower decision made is the “correct” one. Where the Appeals Board finds that a lower decision was incorrect, it should substitute the correct one. In determining whether an issue should be reviewed on a correctness standard, the Appeals Board should consider the presence or absence of a privative clause, the administrative regime of which the decision-maker has special knowledge or expertise, and the nature of the question and purpose of the tribunal. If the Appeals Board were to find that a lower decision-maker lacks relevant special expertise or if the subject matter

of the dispute concerns a general question affecting the USC or its governance, this would suggest that the Board's own precise determination should be favoured over allowing deference to the lower decision-maker. In such a case, review on a correctness standard should be applied.

Was a violation of campaign rules committed?

12. First, the Appeals Board must determine whether the Elections Committee erred in finding Team Litchfield to have violated By-Law #2, s.11.04.

13. This is a case of interpretation of a By-Law created under the authority of USC Council and the Board of Directors. Collectively, By-Laws regulate the broader operations of the USC, while By-Law #2 specifically addresses USC Elections. Under By-Law #2, s.3.01, it is the duty of the Elections Committee to administer the By-Law. However, s.18.01 provides for any appeal of Elections Committee decisions to be heard by the Appeals Board.

14. It is of substantial importance that an organization's By-Laws be interpreted in a consistent manner. While the Elections Committee has special expertise concerning election issues, it does not have special expertise in the interpretation and application of USC By-Laws generally. Under the circumstances, the Board finds that review of the Elections Committee's finding of a By-Law violation should be conducted on a correctness standard.

15. By-Law #2 outlines the primary requirements which candidates for election must adhere to in conducting their campaigns. In interpreting the By-Law, the Appeals Board considers the Vision Statement and associated principles articulated in the By-Law's preface. In particular, the By-Law aims "to ensure fairness and democracy" and "to protect the reputation of the University and the USC in the city and elsewhere".

16. Section 11.04 (as quoted above at paragraph 5) states that Candidates shall not campaign in the USC main offices. This prohibition is extended to encompass several listed categories of what constitutes campaigning. Of particular relevance is the inclusion of "the display of campaign materials". The Elections Committee interpreted this section to be violated through Mr. Litchfield wearing his scarf inside the Office.

17. The Appeals Board considered an alternative interpretation: the provision contemplates "campaigning" as defined at s.1.05 and therefore requires an attempt to encourage a student to cast a ballot. As Mr. Litchfield did not enter the Office with intention to solicit votes, his wearing of the blue scarf should not constitute a violation of s.11.04. With respect, this interpretation cannot be correct.

18. Section 11.04 specifically states that the prohibition includes "the display of campaign materials". It is acknowledged by the Petitioner that Mr. Litchfield entered the Office while wearing his scarf. It is also acknowledged by the Petitioner that the scarf did constitute a "campaign material" under s.1.03. The Board finds that wearing the scarf is sufficient to constitute "display" under s.11.04.

19. The intention for which Mr. Litchfield entered the Office is therefore not relevant to the determination that a violation occurred.

20. The Board finds the determination of the Elections Committee to be correct, in that a violation of s.11.04 did occur.

Did the Elections Committee properly award demerit points?

21. Upon determining that the alleged violation did occur, the Board must consider both the Elections Committee's classification of the violation as "Minor", and the decision to award Team Litchfield two (2) demerit points.

22. The Petitioner did not object to the classification of the violation as "Minor", as there is no class of violation of lesser severity than Minor. Consequently, the Board finds no basis to consider whether another class of violation would have been more appropriate.

23. By-Law #2, s.11.12(4)(i) provides for the awarding of demerit points:

11.12(4) The Committee, where it finds there has been a violation,:

- i. May assign a demerit point penalty and resulting fine against a candidate or a group representing a side, consistent with the guidelines in subsection 12.11 (5)(iv) below;

24. The reference to subsection 12.11(5)(iv) is a drafting error, which should refer to subsection 11.12(5)(iv). That section provides for a monetary fine against a candidate's eligible reimbursement equal to \$10 per point for President and Vice-President (PVP) slates.

25. By-Law #2, s.11.12(5)(i) outlines the quantity of demerit points which may be awarded in the event of a Minor violation:

11.12(5) The Committee shall award demerit points to candidates as follows:

- i. Where a candidate has been found guilty of a Minor violation the Committee may award up to four (4) demerit points.

26. The language of s.11.12(5)(i) is permissive: it allows the Elections Committee to award up to four (4) demerit points. The provision does not require the Elections Committee to award a minimum number of points for a Minor violation. The Elections Committee may in fact choose to award zero (0) points for a Minor violation.

27. In making such a determination of the number of demerit points which should be awarded, the Elections Committee considers a number of factors outlined in their internal policies. These policies created by the Elections Committee may be interpreted to be the "set of criteria and considerations" to be used in making decisions relating to elections, which is contemplated by By-Law #2, s.3.03(3).

28. The specialized expertise of the Elections Committee in interpreting and applying these criteria is noted by the Board. These criteria apply only within the context of elections and do not relate to the

governance of the USC outside that context. The Elections Committee is best positioned to apply these criteria in a consistent and organized fashion as they relate to all candidates and incidents in an election.

29. Under the circumstances, the Board finds that review of the Elections Committee's determination of the number of demerit points to award for a particular Minor violation should be conducted on a reasonableness standard.

30. The Elections Committee should have considered the nature of the violation, the benefit of the act to the candidate, the harm caused to any other candidate(s), restorative action, and the cooperation of the candidate in the investigative process.

31. In its oral submissions, the Respondent argues it considered the requisite criteria. Additionally, the written record of the Elections Committee's deliberation on the issue demonstrates that Mr. Litchfield's lack of intent to solicit votes weighed into the determination.

32. The Respondent also argues that a lack of intent or knowledge of the violation being committed should not excuse a candidate from any demerit point penalty. In order to effectively enforce campaign regulations, the Elections Committee should not be required to find evidence of intent to contravene them. Were that the case, candidates could claim a lack of intent, and barring clear evidence to the contrary, they could avoid penalty for any number of violations of the campaign regulations.

33. The Appeals Board accepts the position of the Respondent. Demerit points are a necessary aspect of the election process and the Elections Committee should be able to distribute points within the guidelines of s.11.12(5) so long as such distribution is fair and reasonable. The Elections Committee could have awarded anywhere from zero (0) to four (4) demerit points for this Minor violation.

34. The Board also finds that the Elections Committee did consider and weigh the criteria it ought to have in reaching its decision on the number of demerit points to award.

35. In light of the factors the Elections Committee weighed in reaching its decision, the Board finds the awarding of two (2) demerit points to be a reasonable conclusion. As such, the Board will not reweigh each criterion itself in an effort to reach its own demerit point decision. Doing so would jeopardize the consistency of the demerit points assigned in this case with others assigned by the Elections Committee in other decisions. Such a reweighing should only be done by the Board in a case in which the Board finds that the decision of the Elections Committee was unreasonable.

36. Accordingly, the Board finds in favour of the Respondent.

Appeal Dismissed