



Judgment of the USC Appeals Board in the matter of:

## ***Team Sophie v Elections Committee, 2015:2 Election***

**Hearing Date:** March 29, 2015

**Judgment Date:** April 7, 2015.

**Intervenors:** Team Litchfield, Isaac Jacobi

**Panel:** Philip Abraham, Janice Calzavara, Brandt Chu, Derrick Dodgson (Chair), Oren Kamen, Rufina Ning, and Jeffrey Wong

**Reasons for Judgment:**

Parts I-III – Dodgson (Abraham, Calzavara, Chu, Kamen, Ning, and Wong concurring)

Part IV – Wong (Abraham, Calzavara, Chu, Dodgson, Kamen, and Ning concurring)

## **PART I: INTRODUCTION**

### Summary

1. This is an appeal from several decisions of the USC Elections Committee (hereafter the “Elections Committee”, or the “Respondent”) finding the 2015 USC election candidates Jack Litchfield, Richard Sookraj, and Dilani Logan (collectively “Team Litchfield”) in violation of campaign rules under USC By-Law #2. This appeal was launched by 2015 USC election candidates Sophie Helpard, Lindsee Perkins, and Alex Benac (collectively “Team Sophie”).
2. This appeal occurs in the context of an election for the 2015-2016 University Students’ Council executive. The Appeals Board is aware of this context and the affect the Appeals Board’s judgment could have. However, public opinion and speculation did not weigh into the Appeals Board’s assessment of the issues on this appeal. The matters before the Appeals Board were judged in accordance with the principles of natural justice (as required by By-Law #6, section 2.02) and solely on the basis of whether the Elections Committee erred impermissibly in its judgment.
3. The Appeals Board was also cognizant of the USC executive transition timeline and determined that a prompt resolution of this matter (with minimal conflict to the USC Calendar) was in the best interests of all parties. Accordingly, the Appeals Board proposed a timeline for the various steps in adjudication of this appeal and at no time was the timeline objected to by any of the parties.

### Jurisdiction and Standing to Appeal

4. This appeal was initiated by an application from Team Sophie, received by the Appeals Board on March 17, 2015. In accordance with By-Law #6, the Appeals Board was required to determine within 48 hours whether it had jurisdiction to hear the appeal.
5. In general, appeals of Elections Committee decisions should be considered by the Appeals Board: By-Law #2, section 18.01 states that:

18.01 Any appeals of [Elections] Committee decisions or elections results shall be heard by the USC Appeals Committee [*sic*] and governed by the procedures contained in By-Law #6.
6. However, neither USC By-Law #2 nor By-Law #6 specifically addresses whom appeals (and particularly appeals of rules violations decisions of the Elections Committee) may be received from. The Appeals Board was required to make a determination based on the USC electoral system and the stated principles of the Appeals Board in By-Law #6.
7. At a minimum, a candidate found to be in violation of election rules and sanctioned accordingly must have standing to appeal. This was not questioned in the consideration of jurisdiction when evaluating the application to appeal by Team Litchfield in the Appeals Board’s earlier case *Team Litchfield v Elections Committee, 2015:1 Election*.

8. However, can other people appeal rules violation decisions made by the Elections Committee? If so, must they be other candidates, or even be students? In answering these questions, application of the Appeals Board's principles is required. According to By-Law #6, section 2.02: the Appeals Board "follows the principles of natural justice, including fairness and good conscience."

9. Fairness is most applicable in this case. The duty of fairness is generally required where a decision directly affects "the rights, privileges or interests of an individual" (*Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14). The contents of the duty of fairness are "flexible and variable" and depend "on an application of the context of the particular statute and the rights affected" (*Baker v Canada*, [1999] 2 SCR 817 at para 22). Under the circumstances, would it be fair if only a sanctioned candidate could appeal a decision of the Elections Committee finding that candidate in violation of election rules? The Appeals Board has determined that this would not be fair.

10. Election rules exist as a means to achieve fairness between all candidates seeking election to the same office. Indeed, much of the Elections Committee's violation procedure requires consideration of the effect that violating acts have on the election result and other candidates.

11. By-Law #2, section 3.02 provides the Elections Committee the sole authority to enforce provisions of this By-Law. This is an important reservation of power as without it, an election could become a circus of candidates attempting to enforce various By-Law provisions upon each other. However, fairness to all candidates requires that a mechanism exist to remedy a situation in which the Elections Committee fails – whether intentionally or otherwise – to enforce the election rules as it ought to.

12. This mechanism to enforce the provisions in By-Law #2 is the ability to appeal Elections Committee decisions to the Appeals Board. In order to ensure fairness to all candidates, decisions of the Elections Committee must be appealable by all those candidates who are affected by the decision; this will include any candidate(s) seeking election to the same office as the candidate(s) whom the original decision concerned.

13. Accordingly, it was within the jurisdiction of the Appeals Board to accept the appeal application from Team Sophie.

#### Parties to the Appeal

14. Team Sophie, as the party who applied to initiate this appeal, is the Petitioner. The Elections Committee, as the authority whose decision is being appealed, is the Respondent.

15. By-Law #6, section 12.03 allows the Appeals Board to "at [its] discretion, recognize intervening parties where those parties may be necessary for a fair and complete resolution of the Case." Also in the definition of "Intervening Third-Party" at section 1.09, By-Law #6 requires such an Intervenor to "demonstrate that they or their office would be materially affected by the outcome of the Case and therefore ought to be heard as part of the hearing".

16. As appeal of these rules violation decisions could affect the reputation of Team Litchfield, vary the demerit points assigned to them, and potentially result in their disqualification as candidates, they are

clearly materially affected by the outcome of the Case. Their participation is also required for a fair and complete resolution of the Case. In fact, they had the right to appeal these same decisions themselves. It would be inappropriate to allow multiple Cases concerning the same issues on appeal; the duplication of proceedings must be avoided, but both parties who had standing to appeal must be allowed to participate. Accordingly, Team Litchfield was recognized as an Intervening Third-Party with full participation rights in the appeal process.

17. By-Law #6, section 12.03 also requires the Appeals Board to inform the President of the USC and the Chairman of the Board of Directors of the pending case such that they may apply to intervene. The Appeals Board accepted the application of Isaac Jacobi, Chair of the Board of Directors, to act as an Intervenor on a limited basis: the opportunity to make a written submission and an opening and/or closing statement at the oral hearing on the basis of how this appeal and the timeliness of its resolution may affect the USC Corporation.

#### Issues on Appeal

18. Based on the Petitioner's application, the Appeals Board accepted the appeal on two issues:

19. The first issue on appeal is the Elections Committee's classification of Team Litchfield's post-campaigning actions as one Extraordinary violation, and the decision to assign 15 demerit points.

20. The second issue on appeal is the Elections Committee's classification of Team Litchfield's physical campaign material distribution without consent as one major and one minor violation, and the decision to assign 8 and 3 demerit points respectively.

21. Other novel allegations raised by the Petitioner were found to be outside the Appeals Board's jurisdiction to hear. It was determined that barring a clear *prima facie* case and evidence that allegations were wilfully ignored by the Elections Committee, the Appeals Board would not usurp the authority of the Elections Committee to enforce By-Law #2 in first instance.

#### **PART II: POST-CAMPAIGNING VIOLATION**

##### Facts

22. It is agreed by all parties that on February 10 and 11, 2015 while election polls were open, USC Presidential candidate Jack Litchfield posted "get out the vote" messages online to a number of Western community-related Facebook groups. Included in the messages was a link to the Team Litchfield campaign website, as part of the sentence "Platform at teamlitchfield.com".

23. Twenty-one such posts (all virtually identical in content) were identified by the Elections Committee and formed the basis of their investigation. Additionally, several other Facebook interactions by Team Litchfield during the polling period were brought to the attention of the Elections Committee but were not included in their investigation.

##### Violation as found by the Elections Committee

24. Following an investigation and hearing, the Elections Committee found Team Litchfield in violation of By-Law #2, section 11.09:

11.09 Candidates are not permitted to influence or attempt to influence voters while the polls are open but shall not be forced to remove any previously existing materials or objects from display until after the voting period. **Candidates and their teams may attempt to remind students to vote in the election provided their efforts do not constitute an attempt to influence voters towards a certain candidate.** [Emphasis added]

25. The Elections Committee collectively classified all twenty-one posts as a single “Extraordinary violation” under By-Law #2, section 11.12(5)(iii). Under this classification, the Elections Committee may award up to fifteen (15) demerit points and reserves the right to disqualify a candidate based on the seriousness of the violation. The Elections Committee chose to award fifteen (15) demerit points to Team Litchfield for this violation.

Argument of the Petitioner

26. The Petitioner contends that the Elections Committee did not issue penalties to Team Litchfield that were consistent with its other rulings regarding post-campaigning. Team Sophie alleged in its written and oral submissions that grouping these infractions together did not allow each to be appropriately judged on its own merit.

27. Team Sophie compared the 15 demerit points issued to Team Litchfield for their twenty-one violations with the 3 demerit points issued to their own team for a single Facebook post-campaigning violation. Team Sophie argues that based on the relative weight of each instance (as measured by the party making the posts, the number of potentially influenced voters, notifications, and restorative action) each post made by Team Litchfield should have been assessed at least an equivalent number of demerit points as were assessed for their own single violation.

Argument of Team Litchfield

28. In response, Team Litchfield argues that the demerit points assigned for their collective post-campaigning violations were a sufficiently serious sanction considering the extent of the violation committed.

29. Team Litchfield argues that several of Team Sophie’s comparisons were misrepresented. Team Litchfield presented evidence that Team Sophie engaged in posting similar “get out the vote” posts to some of the same groups, which would have resulted in the same notifications and similarly influenced voters. Team Litchfield also argued that unlike in the case of Team Sophie’s single post-campaigning violation, they were not provided with notice of the complaint against them during the balloting period and therefore could not take any restorative action.

30. Team Litchfield argues that inclusion of the link to their platform was the only relevant factor differentiating their posts from those of Team Sophie. They argue that the inclusion of the link was not

an attempt to influence voters towards a certain candidate, but rather to simply promote voting and create an informed voter. Additionally, the posts linked to the voting page at [voteusc.ca](http://voteusc.ca), which itself also included links to the platforms of both candidate teams.

*Was a violation of campaign rules committed?*

31. For the reasons established in the Appeals Board's earlier case *Team Litchfield v Elections Committee*, 2015:1 Election, the Appeals Board should review of Elections Committee decisions in the following manner: (1) review the finding of a By-Law violation on a correctness standard, and then (2) review the classification of the violation and the determination of the number of demerit points to award on a reasonableness standard.

32. By-Law #2, section 11.09 (as quoted above at paragraph 24) states that candidates are not permitted to attempt to influence voters towards a certain candidate while the polls are open. The Elections Committee interpreted this to have been violated by the inclusion of "Platform at [teamlitchfield.com](http://teamlitchfield.com)" in the Facebook posts made by Jack Litchfield.

33. A political platform may vary considerably depending on the candidate seeking elected office and the nature of the office being sought. However, it is accepted by the Appeals Board that regardless of the form it takes, a candidate's platform is by definition an instrument which aims to influence voters towards that candidate.

34. The posts did not link to the platforms and/or website of any other candidates in the election. The Elections Committee found in their report concerning this violation that "Had [Team Litchfield] truly desired students to make an informed decision, they would have posted the link to [Team Sophie's] webpage as well."

35. The Appeals Board agrees that the Elections Committee's finding the posts to be a violation of By-Law #2, section 11.09 was correct.

*Did the Elections Committee properly classify the post-campaigning actions as one "Extraordinary" violation?*

36. The Elections Committee decided to treat all investigated instances of post-campaigning by Team Litchfield as a single violation of By-Law #2, section 11.09. In its report, the Committee decided that:

...the aggregate penalty, in its totality, should not be disproportionate to the seriousness of the offending behaviour. For the purposes of imposing a sanction, the separate postings by [Jack] Litchfield can be regarded as one course of action, with the result that the combined penalty should not be unduly excessive.

37. In cases such as this, the decision of where to draw the line between similar but related acts or violations is a difficult and somewhat arbitrary one. Such a determination must necessarily be influenced by the practicalities of investigation. It would be inappropriate to require the Elections Committee to

separately investigate, hold hearings, deliberate, and write reports on potentially dozens of separate individual violations which occurred in the commission by a candidate of a single plan of action.

38. The Elections Committee must have some degree of flexibility in how it addresses such a situation. It must therefore be within the scope of the Elections Committee's authority to consider such a group of closely related offenses as a single violation for the purposes of investigation, deliberation, and sanction. When doing so the Elections Committee must collectively assess the impact of the entire violation.

39. This was not the only instance in which this course of action was taken by the Elections Committee this year. In investigation of a violation relating to a Team Sophie thread on Reddit, the Elections Committee grouped together all offending posts in the Reddit thread, as well as a Team Sophie Tweet relating to it, and assigned demerit points based on the entirety of the incident.

40. The Appeals Board finds the Elections Committee's decision to classify all of Team Litchfield's post-campaigning as a single violation to be reasonable. The underlying justification behind the Elections Committee decision to group the violations as a result of administrative practicalities is on its own, very persuasive.

41. There may be some dissent regarding consistency since the Elections Committee explicitly stated that had these infractions occurred physically in different residence buildings with posters, the violations would all be considered separately. However, consistency has not and has never been a relevant consideration in reasonableness review.

42. Precedent does not bind administrative decision-makers. Administrative decision-makers are "not only at liberty not to treat their earlier decisions as precedent, they are positively obligated not to do so" (*Bell Canada v Canada*, 2011 FC 1120 at para 88). Administrative decision-makers are prohibited from exclusively relying on past decisions. This prohibition ensures that decision-makers have "the flexibility to respond to new circumstances on a case-by-case basis," particularly in the realm of "policy and factual determinations" (*Bell Canada v Canada* at para 90).

43. In this case, binding the Elections Committee to this statement would not only go against the spirit of *Dunsmuir* reasonableness review, which by its very nature accepts that there can be more than one possible acceptable outcome "defensible in respect of the facts and law," (*Dunsmuir v New Brunswick*, [2008] SCR 190 at para 47) but would be legally incorrect. Therefore, there is no reason to hold these infractions as individual infractions merely because of past acts of the Elections Committee.

44. No party argued at any point that if collective classification was accepted, the classification of the violation as Extraordinary ought to be changed. According to section 4.03 of the Elections Committee Violations Procedure, classifications of severity should be made based on five principal criteria: Impact on Potential Result, Effect on Other Candidates, Financial Benefit to Candidate, Legality of Action, and Abuse of Position or Powers.

45. In the absence of any compelling argument to contradict the findings of the Elections Committee based on these criteria, the Appeals Board finds the classification of the violation as Extraordinary to be reasonable.

*Did the Elections Committee properly award demerit points?*

46. Under an Extraordinary classification, the Elections Committee had the ability to assign to Team Litchfield up to 15 demerit points. The Elections Committee also had the ability to disqualify Team Litchfield from the election. The Elections Committee chose to assign the maximum 15 demerit points, but not to disqualify Team Litchfield from the election.

47. According to section 7.05 of the Elections Committee Violations Procedure, the Elections Committee ought to have considered three mitigating factors in its determination of the penalty assigned to the candidate: intent to commit a violation, restorative action taken without request from the Elections Committee, and cooperation with the investigation.

48. In reaching its decision, the Elections Committee accepted that there was no deliberate effort on the part of Team Litchfield to subvert the electoral process. Team Litchfield did make some effort to seek clarification from the Elections Committee about what could and could not be posted during the polling period. However, Team Litchfield did not specifically ask if it was allowed to include a link to its website and platform in get out the vote posts.

49. Team Litchfield did not take any restorative action of its own accord – nor was it requested by the Elections Committee to take any restorative action.

50. In the absence of accusations to the contrary by the Elections Committee, it is accepted that Team Litchfield cooperated with the investigation.

51. In consideration of these factors, the Appeals Board disagrees with Team Sophie that Team Litchfield should have been disqualified as a result of its post-campaigning violation. Under the circumstances, the Appeals Board finds the Elections Committee's decision to assign 15 demerit points to Team Litchfield for their post-campaigning actions to be reasonable.

*Additional alleged instances of post-campaigning which went uninvestigated*

52. Team Sophie presented evidence of five additional instances of Facebook interactions by Team Litchfield which took place during the polling period. They allege that these interactions also constitute post-campaigning and were not investigated by the Elections Committee, despite being submitted as complaints within the allowable period.

53. The Elections Committee admits that these complaints were not addressed as part of its analysis of Team Litchfield's post-campaigning activities. However, it argues that these additional interactions would not have affected the decision made by the Elections Committee. The Appeals Board agrees.

54. Two of the interactions were invitations to a “Vote Team Litchfield” event. Complaints were submitted to the Elections Committee for similar interactions by other candidates and were dismissed.

55. One of the interactions was a Facebook private message sent by Jack Litchfield featuring similar content as the group posts. Similar complaints regarding private messages sent by other candidates were also dismissed by the Elections Committee.

56. One of the interactions was Jack Litchfield’s sharing of a Facebook post by an individual indicating who they voted for. Such posts were specifically allowed by the Elections Committee to occur during the polling period.

57. The final interaction was Richard Sookraj changing his Facebook cover photo during the polling period. The Elections Committee prohibited the uploading of any new photos to social media during the polling period. The photo in question was uploaded during the campaign period.

#### Post-Campaigning Violation Conclusion

58. In consideration of all circumstances and arguments made concerning Team Litchfield’s post-campaigning violation, the Appeals Board upholds the decision of the Elections Committee.

### **PART III: PHYSICAL CAMPAIGN MATERIAL DISTRIBUTION WITHOUT CONSENT VIOLATIONS**

#### Facts

59. It is agreed by all parties that on the evening of February 9, 2015, representatives of Team Lichfield distributed a number of “door hangers” in two apartment buildings on Richmond Street near the Western campus. These apartment buildings were 1209 Richmond Street (Somerset Place) and 1235 Richmond Street (Luxe).

60. The door hangers in question included the Team Litchfield campaign logo and the words “Vote Team Litchfield – USC Executive Feb 10 & 11”. They included a hole at their top, so as to allow them to be hung around a door handle or doorknob. It is not disputed that they constitute “campaign material” under the definition in USC By-Law #2, section 1.03.

61. A complaint concerning the door hangers placed at Somerset Place was made by the building management and received by the Elections Committee on February 10. Along with their complaint, the Somerset Place management provided conclusive evidence that: Team Litchfield representatives entered the building without authorization by following a resident into the building; visible at the entrance of the building was a sign which said “No Soliciting”; and the individuals put door hangers on all 170 suite doors in the building.

62. A complaint concerning door hangers placed at Luxe was made by a Western Student resident. The complaint email alleged that door hangers were placed on the individual’s apartment door and those of all other doors on their floor of Luxe. The complaint did not include any additional evidence. The Elections Committee did not respond to the complainant.

Violations as found by the Elections Committee

63. Following hearings for both complaints, the Elections Committee found Team Litchfield in two violations of By-Law #2, section 11.10(4):

11.10(4) Physical campaign materials may not be distributed to individuals without their consent.

64. The Elections Committee collectively classified the Somerset Place complaint to be a “Major violation” under By-Law #2, section 11.12(5)(ii). Under this classification, the Elections Committee may award up to eight (8) demerit points. The Elections Committee chose to award eight (8) demerit points to Team Litchfield for this violation.

65. The Elections Committee collectively classified the Luxe complaint to be a “Minor violation” under By-Law #2, section 11.12(5)(i). Under this classification, the Elections Committee may award up to four (4) demerit points. The Elections Committee chose to award three (3) demerit points to Team Litchfield for this violation.

Argument of the Petitioner

66. The Petitioner contends that the Elections Committee did not appropriately investigate what transpired at Luxe. Team Sophie alleged in its written and oral submissions that had a proper investigation of the Luxe incident been conducted, the Elections Committee would have found conduct akin to what transpired at Somerset Place. Additionally, at the oral hearing, Team Sophie alleged that the investigation into the Somerset Place violation was also deficient in that the Elections Committee did not properly find representatives of Team Litchfield to have been in violation of provincial law. As a result, Team Sophie argues that the severity classifications and the points assigned for both these violations should be increased.

67. In their initial appeal application, Team Sophie also presented two additional related allegations that: (1) door hangers were also distributed by Team Litchfield at other off-campus residences, constituting additional violations of section 11.10(4); and (2) the door hangers were not printed and purchased at Creative Services, constituting a violation of section 11.10(2). The Appeals Board was unable to consider these allegations as part of this appeal. The Appeals Board had previously determined and communicated to the parties that:

Under By-Law #2, section 3.02, the Elections Committee has the sole authority to enforce the provisions of By-Law #2. Barring a clear *prima facie* case and evidence that such allegations were wilfully ignored by the Elections Committee, the Appeals Board will not usurp the authority of the Elections Committee to enforce By-Law #2 in first instance.

68. The Elections Committee did not find violations to have occurred based on these allegations. At the time the appeal was initiated it was not clearly demonstrated by the Petitioner to the Appeals Board that a *prima facie* case existed and that these allegations were inappropriately ignored by the Elections

Committee. As a result, they were not considered as part of this appeal. If this test were to be met in the future for these separate allegations, such an appeal of them could then be considered by the Appeals Board.

Argument of Team Litchfield

69. In response, Team Litchfield argues that it is not deserving of any additional demerit points based on these violations. The primary basis for Team Litchfield's contention is that based on conversations with the USC Governance Officer, they believed their actions were not in contravention of By-Law #2.

70. The Governance Officer confirmed that two related conversations with Team Litchfield did occur, however the parties disagree as to some elements of what was discussed, as will be addressed below.

71. In the case of Somerset Place, Team Litchfield argues that in the course of their representatives' distribution, consent was obtained from some residents. They allege that consent to place door hangers was received from approximately 70% of the residents they interacted with. Consent in the remaining 30% of cases was unknown because some distribution was conducted by a building resident whom they met in the course of their distribution. This individual became a non-arms-length party as a result of their participation in campaigning, but Team Litchfield was unable to confirm any details resulting from this individual's distribution of door hangers on their behalf.

72. In the case of Luxe, Team Litchfield argues that they gained access to the building from the security officer on duty who acted on behalf of the building manager to give consent for their entrance and the distribution of door hangers.

73. Team Litchfield does not argue that they interacted with all residents whom door hangers were distributed to. Team Litchfield did not provide an estimate of how many residents that door hangers were distributed to whom they did interact with and received consent from at Luxe.

Were violations of campaign rules committed?

74. By-Law #2, section 11.10(4) states that "physical campaign materials may not be distributed to individuals without their consent." It is not disputed that the door hangers constitute physical campaign material.

75. The Elections Committee found that the consent required by section 11.10(4) is that of the individual to whom the campaign material is distributed. In this case, that would be the individual residents on whose doors the door hangers were placed – not the building management.

76. In the judgment of the Appeals Board, it is clear that the provision refers to the consent of the individual resident. It is also clear that this provision was meant to prohibit exactly this kind of non-consensual distribution of campaign material to an individual's place of work or residence (whether done in person or through mail).

77. There were a number of residents in both buildings that had door hangers placed without consent on their suite doors by representatives of Team Litchfield.

78. Accordingly, the Appeals Board finds the Elections Committee's interpretation of section 11.10(4) to have been correct, and that violations did occur in both the Somerset Place and Luxe buildings.

*Did the Elections Committee reasonably classify the Somerset Place violation as a "Major" violation?*

79. According to section 4.03 of the Elections Committee Violations Procedure, classifications of severity should be made based on five principal criteria: Impact on Potential Result, Effect on Other Candidates, Financial Benefit to Candidate, Legality of Action, and Abuse of Position or Powers.

80. Under the "Legality of Action" criteria, it is stated that:

The [Elections] Committee should determine whether the alleged violation breaks any municipal, provincial, or federal laws or any regulations set by the University. Actions that break municipal, provincial, or federal law shall be automatically classified as Extraordinary violations.

81. In an interview with the USC Governance Officer, the Elections Committee heard and accepted the following as fact, including it in their final violation report:

Kriszenfeld notes that the Trespassing Act is exonerated by the Municipal Elections Act which is what By-Law 2 is intended to mirror.

82. The Ontario *Trespass to Property Act*, RSO 1990, c T21 governs the provincial offence of trespass. Specifically, section 2(1) states that:

2.(1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

...

is guilty of an offence and on conviction is liable to a fine of not more than \$2,000.

83. The *Trespass to Property Act* also states at section 3(1) that:

3.(1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

...

(b) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises.

84. The *Trespass to Property Act* also states at section 4(2) that:

4.(2) Where entry on premises is not prohibited under section 3 or by notice that one or more particular activities are permitted under subsection (1), and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited.

85. The *Trespass to Property Act* also states at section 5(1) that:

5.(1) A notice under this Act may be given,

...

(b) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies;

...

86. Team Litchfield representatives entered Somerset Place without express permission of the occupier or anyone who could have been reasonably seen to have been acting with the authority of the occupier. Entry was prohibited by the enclosed nature of the premises. They entered the premises in order to engage in solicitation. Notice of the prohibition of solicitation on the premises was properly given by the "No Soliciting" sign visible in daylight under normal conditions at the entrance to the premises. All of this was determined by the Elections Committee in the course of their investigation of the violation.

87. The *Ontario Municipal Elections Act, SO 1996, c 32* does not apply to USC elections. Specifically, section 3 states that:

3. This Act applies to:

1. An election to an office on:

i. the council of a local municipality,

ii. the council of an upper-tier municipality, if the holder of the office is required to be elected by the electors of one or more local municipalities,

iii. a local board, if the holder of the office is required to be elected in the same manner as members of the council of a local municipality.

2. An election to obtain the assent of electors to a by-law as required or authorized by law

3. An election to obtain the opinion of the electors on any question as required or authorized by law.

88. Additionally, no provision of the *Municipal Elections Act* addresses the offence of trespass or exceptions to law on the basis of soliciting for an election.

89. At the oral hearing, it was asked of the Governance Officer by the Appeals Board if he had meant to refer to an “exoneration” in the Ontario *Residential Tenancies Act*, SO 2006, c 17. Specifically, section 28 states that:

28. No landlord shall restrict reasonable access to a residential complex by candidates for election to any office at the federal, provincial or municipal level, or their authorized representatives, if they are seeking access for the purpose of canvassing or distributing election material.

90. The Governance Officer did not specifically answer if this was the clause to which he was referring; however he did later attempt to clarify his position by saying that when drafting amendments to By-Law #2, “it was our intention that the spirit of this clause would be reflected in our bylaw”.

91. With respect to the Governance Officer, like the *Municipal Elections Act*, this provision of the *Residential Tenancies Act* does not apply to the USC Elections as it is not an election at the federal, provincial, or municipal level. Additionally, “reasonable access” would likely be interpreted to require some form of advance notice, and could not be extended so far as to permit unannounced distribution of campaign materials to the entire apartment building at 11:00 PM.

92. The Elections Committee is required by its Violations Procedure to determine whether a violation breaks municipal, provincial, or federal law. It is evidenced by their final report on the door hangers violations that they were specifically alerted to the possibility of a breach of the *Trespass to Property Act*.

93. Considering that the Elections Committee was aware of all constituent elements of the offence, the Elections Committee should have found the representatives of Team Litchfield to have committed the offence of trespass, and consequently in violation of provincial law.

94. Under the circumstances and considering their awareness of the facts and law, the only conclusion the Elections Committee could have reasonably come to is that Team Litchfield was in violation of provincial law.

95. The Appeals Board emphasizes that this is not a legally binding adjudication as to whether Team Litchfield did indeed breach a provincial law as the jurisdiction to do so can only reside with a court of law. Rather, it is only the Appeals Board's interpretation of the law as it relates to section 4.03 of the

Elections Committee Violations Procedure that requires such a determination to be made for the purpose of classifying a violation.

96. Accordingly, the Elections Committee would have been required to automatically find Team Litchfield's distribution of campaign materials without consent in Somerset Place as an Extraordinary violation. As a result of finding unreasonable the Elections Committee's classifications of the Somerset Place violation as Major, the Appeals Board must perform its own analysis. Part IV of this decision outlines the analysis and judgment of the majority of the panel, which according to By-Law #6, section 11.04, is binding, conclusive, and not open to question or appeal in a court on any grounds.

*Did the Elections Committee properly classify the Luxe violation as a "Minor" violation?*

97. According to section 5.02 of the Elections Committee Violations Procedure, the Elections Committee "shall take as much time to ascertain the facts of a case as necessary."

98. Additionally, section 3.03 of the Violations Procedure states that:

3.03 The Violations Secretary shall notify the individual who submitted the allegation of the allegation's receipt and shall follow up with the individual to ascertain any information that has been left out of the allegation including but not limited to the following:

- (1) The approximate date and time that the alleged violation occurred;
- (2) The approximate location in which the alleged violation occurred, and;
- (3) The names of any other individuals who may have knowledge of the alleged violation that the Committee may contact during the course of its investigation.

99. It was demonstrated to the Appeals Board that in most of the Elections Committees' investigations of rules violations this year it did follow up with complainants and other potentially knowledgeable individuals they identified in order to determine the extent of the violation committed. This was exhibited in the Somerset Place violation investigation, as well as in the investigation of an allegation that Jack Litchfield was campaigning in the USC Offices.

100. In the case of the Luxe complaint, the Elections Committee did not respond to the initial email that was sent and made no effort to follow up with the complainant or any representatives of the Luxe building. This oversight was despite the Elections Committee already being aware of the extent of the notably similar violation committed at the same time in the nearby Somerset Place, affecting over 170 apartments. The only means by which the Elections Committee followed up on the Luxe complaint was by interviewing Team Litchfield, and consequently accepting their statements about the incident as fact.

101. Based on this, the Elections Committee classified the violation as Minor. It was clarified at the oral hearing that the classification as Minor was for the unsolicited hanging of a single door hanger on the door of the complainant.

102. The Elections Committee argued at the oral hearing that it was not allowed to investigate the extent of violations committed off campus. When questioned about the reason for this, the Elections Committee was unable to provide specific justification.

103. The Elections Committee did indicate that their ability to investigate complaints was affected by the make-up of the Committee (15 volunteer student members), the volume of complaints they received, and the timeline during which they were required to reach their decisions on potential violations. The Elections Committee stated that they were required by By-Law #2 to reach their decisions on rules violations within 15 “school days” of the end of balloting. The Appeals Board is not aware of any such requirement in By-Law #2 or in the Elections Committee Violations Procedure.

104. The actions of the Elections Committee in investigation of the Luxe complaint were wholly insufficient in order to ascertain the facts of the case. The Appeals Board is sympathetic to the significant workload the Elections Committee was under. However, fairness to all candidates requires that the Elections Committee thoroughly investigate all submitted complaints, and (in accordance with section 5.02 of the Violations Procedure) “take as much time to ascertain the facts of a case as necessary”. This was not reasonably done in the case of the Luxe complaint.

105. The Elections Committee classified the Luxe complaint as a Minor violation on the basis of an unreasonably limited investigation.

#### Appeals Board Analysis of Luxe Violation Classification

106. As a result of finding unreasonable the Elections Committee’s classification of the Luxe violation as Minor, the Appeals Board must perform its own analysis.

107. In considering the five criteria under section 4.03 of the Elections Committee Violations Procedure for use in classifying a violation, only the first criteria (Impact on Potential Result) is relevant to this case.

108. At the oral hearing, Team Litchfield representatives were evasive in answering questions about the number of door hangers distributed without consent in Luxe. Eventually, they admitted that door hangers were distributed on multiple floors of the building, but were not willing to confirm or deny whether they were distributed to the entire building.

109. The Luxe building has 19 residential floors with two, three, and four-bedroom suites. Its footprint is considerably larger than the nearby Somerset Place, which housed a total of 170 units in 13 residential floors. The Appeals Board finds it reasonable to say that Luxe is a larger building with more residents than Somerset Place.

110. It is admitted by Team Litchfield that 500 door hangers were printed and approximately 170 were distributed in Somerset Place. This leaves approximately 330 door hangers unaccounted for. Therefore, the number of door hangers distributed in the building is somewhere between 1 and 330.

111. Even at the upper end of this range, 330 represents approximately 1% of the undergraduate population based on Western’s stated 2014-2015 undergraduate full-time enrollment of 31,766. There

is also insufficient evidence to suggest that all 330 remaining door hangers were distributed, or that all residents in Luxe who received door hangers were undergraduate students. The Appeals Board therefore finds it more likely than not that less than 1% of individuals eligible to vote in the election saw the offending door hanger.

112. As only one of the criteria for classification of severity has been satisfied and relative weight of that satisfaction is unclear to minimal, the Appeals Board finds that a classification of the Luxe offense as Minor is appropriate.

*Did the Elections Committee properly award demerit points?*

113. The Elections Committee's reasoning for assigning 3 demerit points for the Luxe violation was unclear from the final report on the violation. In the oral hearing, the Elections Committee argued simply that in comparison to the extent and severity of the Somerset Place violation, 3 points was appropriate.

114. The Elections Committee ought to have considered the "mitigating factors" under By-Law #2, section 7.05 when determining the number of points to award. Team Litchfield's intentions and the cooperation of Team Litchfield with the Elections Committee's investigate are relevant.

115. Team Litchfield argues that the Governance Officer gave Team Litchfield the erroneous impression that it was not contrary to By-Law #2 to distribute the door hangers off-campus. The information provided by this official, a person who presented themselves as an authority on these matters, could have led a reasonable person to believe that their actions were in compliance with By-Law #2. The Appeals Board partially accepts the argument of Team Litchfield in this regard, specifically in that they never would have knowingly approved of their team members violating campaign rules. However, the Appeals Board does not accept that Team Litchfield specifically told the Governance Officer what they planned to do, or that the Governance Officer sanctioned the off-campus distribution of physical campaign materials without consent.

116. Another mitigating factor in favour of Team Litchfield was their cooperation with the Elections Committee's investigation. The Appeals Board concludes that Team Litchfield, on the balance of probabilities, was cooperative. The video evidence of the hearing before the Elections Committee at first instance suggests that the members of Team Litchfield present answered questions promptly, candidly, and with honesty. The oral testimony heard before the Board on this subject generally suggests the same, though some members were evasive when answering questions regarding where the 330 unaccounted-for door hangers currently are located.

117. However, these mitigating factors are counterbalanced to some degree by Team Litchfield's actions to circumvent Luxe building management. Although the available evidence suggests that Team Litchfield received the approval of the on-duty security official (an agent of Luxe having apparent authority) to enter the residence, Team Litchfield failed to contact the building manager or superintendent in order to seek any advance permission for their plan to enter the building and distribute door hangers. These individuals of authority would have been in a better position to grant permission to Team Litchfield to

distribute door hangers, but were overlooked in favour of a more convenient figure: the on-duty security official. It is also unclear whether Team Litchfield received the permission of this agent to distribute campaign materials, or whether Luxe has its own internal rules prohibiting the distribution of unsolicited materials.

118. Overall, the Appeals Board concludes that the factors in favour of mitigation outweigh those against. Team Litchfield received unclear advice from an Elections Committee official. There is no evidence to suggest that Team Litchfield was in contravention of municipal, provincial, or federal law at Luxe. Evidence suggests that some permission to enter the building was obtained.

119. In total, while the violation committed by Team Litchfield had the potential to impact the election, the conceivable gains of this violation were small. The door hangers based on a reasonable estimate could only have reached a relatively low number of students. The factors in favour of mitigation, when balanced against those that do not, point towards mitigation. Based on all the available evidence, it is just and appropriate in the circumstances to award 3 demerit points.

120. The Appeals Board therefore finds that while the investigation of the Elections Committee was unreasonable, the Appeals Board agrees with the classification of the Luxe violation as Minor and the awarding of 3 demerit points.

#### **PART IV: PHYSICAL CAMPAIGN MATERIAL DISTRIBUTION WITHOUT CONSENT VIOLATIONS** **(CONTINUED)**

##### *Appeals Board Analysis of Somerset Place Violation*

121. The Appeals Board has automatically classified the Somerset Place violation as Extraordinary due to Team Litchfield's violation of provincial law under the "Legality of Action" criteria of section 4.03 of the Elections Committee Violations Procedure.

122. In properly determining the number of demerit points to assess Team Litchfield, the Appeals Board has considered the three mitigating factors in section 7.05 of the Elections Committee Violations Procedure, namely: intent, restorative action, and cooperation.

123. In the Elections Committees' written response to Team Sophie's initial written appeal, the Committee noted that Team Litchfield took no restorative action, which made their violation more serious. Nonetheless, it was established at the oral hearing that Team Litchfield was not made aware of the possibility of a violation until a complaint was made and an Elections Committee apology was provided to the Somerset Place building manager. By that time, no restorative action by Team Litchfield could have reasonably been taken. The Appeals Board finds that Team Litchfield was not provided the opportunity to rectify the situation, and thus restorative action cannot be a factor to consider.

124. Moreover, considering that "mitigating" is ordinarily defined as "to make less severe," this suggests to the Appeals Board that the original five criteria in section 4.03 of the Violations Procedure should also be used to determine the number of demerit points to assess. Besides "Legality of Action", the only other criterion that is relevant to this case is "Impact on Potential Result."

125. Although not stated in its final report, it was stated in the Elections Committee's response to Team Sophie's appeals that the formal complaint from Somerset Place's building manager to be a factor in its decision making. Because the complaint came from the building manager rather than any single resident, the Elections Committee noted that it damaged Western's reputation more severely. This appears to be in line with the principle to "protect the reputation of the University and the USC in the city and elsewhere," as outlined in the Vision Statement of By-Law #2. This principle is not explicitly stated as a relevant factor in the Elections Committee Violations Procedure. However, the Appeals Board accepts this as a reasonable interpretation of By-Law #2 and a relevant factor to contemplate considering the Vision Statement principles are meant to underpin the entire USC election process. With that said, the Appeals Board concurs with the Elections Committee that Team Litchfield's actions did damage the reputation of the University and the USC. A complaint made by an authority figure unassociated with the University alleging multiple violations clearly points to damage to the University's reputation.

126. Regarding the impact on potential result, it was established at the oral hearing that Team Litchfield's representatives distributed 170 door hangers in Somerset Place to all 170 units in the building. Team Litchfield argued that they received consent from approximately 70% of the residents of Somerset Place whom they interacted with. However, in the response to Team Sophie's appeal, the Elections Committee refuted this claim by stating that the majority of door hangers were confirmed to have been distributed without consent. At the oral hearing, the Elections Committee did note the building manager received multiple resident complaints, but the Elections Committee was unclear as to exactly how many when questioned by the Appeals Board.

127. The Appeals Board recognizes that not all residents of Somerset Place are eligible voters in the USC elections. Combined with the lack of clarity as to how many residents received consent, the impact on potential result can be considered to be small considering Western's stated 2014-2015 undergraduate full-time enrollment of 31,766. Moreover, no evidence was presented to support the effectiveness of this method of campaigning. As such, the impact on the potential result is unclear, but is likely minimal.

128. In its written decision, the Elections Committee found that there was a clear lack of cooperation from Team Litchfield at the initial Elections Committee. At the oral hearing, the Appeals Board confirmed that the Elections Committee's finding that Team Litchfield did not cooperate was solely based on what occurred during the hearing conducted regarding Team Litchfield's violations. The Appeals Board has thoroughly analyzed the video evidence of that hearing provided by the Elections Committee.

129. With respect, the Appeals Board finds the Elections Committee's finding on this issue to be unsubstantiated. The video evidence shows no indication of a lack of cooperation from Team Litchfield. Rather, it shows Team Litchfield answering questions promptly and with sincerity. Moreover, the Appeals Board does not find that Team Litchfield's retraction of their statement of an interaction with a female providing consent to place door hangers to indicate a lack of cooperation. A belief at the time the incident occurred, which proved to be uncorroborated, cannot be taken as a "clear lack of

cooperation" as described by the Elections Committee in its response to Team Sophie's written submissions. Rather, it merely shows a mistaken belief.

130. Another factor the Appeals Board has considered is the legality of action. Team Litchfield's decision to enter Somerset Place in contravention of a clearly visible "No Soliciting" violated the *Trespass to Property Act*. The Appeals Board must consider any breach of municipal, provincial or federal law with the utmost scrutiny considering such laws transcend USC elections and any university by-laws; they govern all private citizens and actions within their respective jurisdictions.

131. With that said, the Appeals Board accepts that certain acts of illegality are more serious than others. For example, a violation of section 177 (Trespassing at Night) of the *Criminal Code*, RSC 1985, c C-46, should be considered as being more serious than a violation of the Ontario *Trespass to Property Act*. This position is reflected in the discrepancy in remedies afforded under the statutes' respective clauses. Under section 2.(1) of the *Trespass to Property Act*, it states that a person is liable on conviction "to a fine of not more than \$2,000." In contrast, a conviction under section 177 of the *Criminal Code* is punishable by summary conviction, which is described in section 787 of the same act as punishable with a fine not exceeding \$5000 or imprisonment not exceeding 6 months, or both.

132. The Appeals Board concludes that this breach of provincial law is of medium severity when considering the Act that was contravened; it would be more serious than a parking infraction under a municipal by-law, but less serious than one under the *Criminal Code*.

133. Last, the Appeals Board has considered Team Litchfield's intent to commit the violation and any factors that motivated the candidate to commit the violation. The Appeals Board accepts Team Litchfield's argument that the Governance Officer gave Team Litchfield an impression that it was not contrary to By-Law #2 to distribute door hangers off-campus, nor was it in contravention of any municipal, provincial or federal laws. The Governance Officer's reference to a potentially exonerating provision within the *Municipal Elections Act* (without such a provision existing) was an unacceptable misstatement of the law. The Appeals Board accepts that this statement could lead a reasonable person to believe their actions were in compliance with By-Law #2 and municipal, provincial and federal laws. This is in consideration of the fact that the Governance Officer presented himself as an authority on matters relating to elections campaigning.

134. As such, the Appeals Board finds that Team Litchfield did not have the intention to violate By-Law #2, nor did they have the intention to break any provincial laws. Moreover, the Appeals Board accepts Team Litchfield's argument that if they had known, they would have never approved a deliberate violation of By-Law #2 and provincial law. However, the Appeals Board does not accept that Team Litchfield specifically told the Governance Officer what they planned to do or that the Governance Officer sanctioned the off-campus distribution of physical campaign materials without consent.

135. The Appeals Board has also considered the many opportunities available to Team Litchfield to ensure they were following By-Law #2 and provincial law. Following their conversation with the Governance Officer, it would have been prudent for Team Litchfield to consult a second opinion. The Appeals Board recognizes the impracticality and potential costs of seeking a legal opinion, but a simple

Internet search of the laws the Governance Officer referred to would have revealed the errors made. In the oral hearing, Team Litchfield confirmed that no additional steps were taken prior to attending Somerset Place. As such, the Appeals Board concludes that Team Litchfield did not make a reasonable effort to ascertain the legality of their actions and to contact the building manager to obtain consent prior to attending the premises.

136. When Team Litchfield attended Somerset Place, team members contend that they did not see the "No Solicitation" sign. Moreover, it was stated that they attempted, but were ultimately unsuccessful, to communicate with the building manager through the building's buzzer system. Despite not receiving consent, Team Litchfield proceeded to enter the premises by following a resident into the building without asking for the individual's consent. Upon entry onto the premises, Team Litchfield proceeded to place door hangers (without consent of residents) on the doors of each Somerset unit.

137. The Appeals Board concludes that Team Litchfield ought to have known they had not received the necessary consent to enter the building, or the necessary consent to place door hangers on residential units. Team Litchfield's statements that team members did not see the "No Solicitation" sign and their attempt to communicate with the building manager is insufficient reasoning to negate their responsibilities under By-Law #2 and provincial law.

138. As such, the Appeals Board finds that Team Litchfield did not intentionally commit a violation considering the appearance of legitimacy in their actions presented to them by the Governance Officer. However, this mitigating factor is largely invalidated by the opportunities provided to them to ascertain the legality of their actions, as well as to ask for consent from both building management and residents prior to and upon entry into the building.

139. In sum, the Appeals Board has considered intent and cooperation, and legality of action and impact on potential result from section 7.05 and section 4.03 of the Violations Procedure, respectively. The Appeals Board has also considered and accepted the damage to the reputation of the University as a factor.

140. In summary, the Appeals Board cannot ignore the severity of Team Litchfield's actions in trespassing at Somerset Place. To do so would bring the USC electoral system into disrepute. Although the Appeals Board recognizes that the directions given to Team Litchfield by the Governance Officer were at times unclear or erroneous, this factor must be balanced against the numerous opportunities Team Litchfield had to seek additional clarification and consent for their actions. Additionally, considering the apparent damage to the reputation of the University, the Appeals Board finds that Team Litchfield's actions should be considered severe. Mitigating factors include Team Litchfield's cooperation during the investigation process as well as the relatively low impact on the potential result.

141. Accounting for the totality of the circumstances, the factors in favour of mitigation do not outweigh those factors that necessitate the assignment of a high number of demerit points. As such, the Appeals Board concludes that a high number of demerit points shall be awarded.

142. Therefore, the Appeals Board finds that Team Litchfield's illegal and un-consented distribution of physical campaign materials in Somerset Place is an Extraordinary violation, and the awarding of 10 demerit points is reasonable and appropriate in the circumstances.

**DISPOSITION SUMMARY:**

*The decision of the Elections Committee with respect to Team Litchfield's Post-Campaigning Violation (Extraordinary, fifteen (15) demerit points) is upheld.*

*The decision of the Elections Committee with respect to Team Litchfield's Physical Campaign Material Distribution Without Consent Violation in the Luxe apartment building (Minor, three (3) demerit points) is upheld.*

*The decision of the Elections Committee with respect to Team Litchfield's Physical Campaign Material Distribution Without Consent Violation in the Somerset Place apartment building (Major, eight (8) demerit points) is overturned. The Elections Committee should substitute their decision with the Appeals Board's finding of an Extraordinary Violation and the awarding of ten (10) demerit points.*