



Judgment of the USC Appeals Board in the matter of:

## ***Team ForYe v Elections Governance Committee, 2019:1 Election***

**Hearing Date:** January 29, 2019

**Judgment Date:** January 31, 2019

**Panel:** Joseph Wright (Chair), Andrew Beney, Ellen Wiltsie-Brown

**Reasons for Judgment:** Wright (Beney and Wiltsie-Brown concurring)

### **PART I: OVERVIEW**

1. This is an appeal by PVP Slate ForYe (“Team ForYe”) in response to the decision of the USC Elections Governance Committee (“EGC”) to sanction Team ForYe with a minor violation. For the reasons set out below, the appeal is dismissed.

### **PART II: FACTS**

2. On January 15, 2019, Team ForYe sent a message on Slack advising its campaign volunteers that a Facebook post featuring a Western Gazette article announcing Team ForYe’s candidacy in the USC PVP elections and that volunteers should not interact with the Facebook post as it was prior to the official start of the captaining period.
3. On January 16, 2019, at 2:45 pm, a link to the Gazette article was posted on Facebook. Prior to the official start of the campaigning period, two Team ForYe campaign volunteers “liked” the Facebook post featuring the Gazette article. On January 16, 2019, at 4:48 pm, Team ForYe’s campaign manager posted the message from Slack in the Team ForYe 2019 Campaign Volunteer’s Facebook group. Subsequently, one of the campaign volunteers

removed her “like.” The other campaign volunteer’s “like” remained for the remainder of the pre-campaigning period.

4. On January 20, 2019, the EGC notified Team ForYe of a hearing to review the facts of an allegation that the EGC had received concerning pre-campaigning by Team ForYe volunteers. The notice of hearing included a written summary of the alleged violation, but did not include the evidence upon which the allegation was based, including the specific names of the volunteers who had interacted with the Gazette article.
5. On January 21, 2019, Team ForYe attended the EGC hearing. At the hearing, the EGC provided Team ForYe with the names of the volunteers who were responsible for the violation. Following the hearing, Team ForYe removed both volunteers from the official Team ForYe campaign volunteer list.
6. On January 22, 2019, the EGC released its decision, finding Team ForYe was in violation of section 11.7 of By-Law #2, and sanctioning Team ForYe with a minor violation under the USC 2018-19 Elections Sanction Framework.

### **PART III: ISSUES**

7. There are 4 issues in this appeal:
  1. What is the appropriate standard of review?
  2. Was the EGC’s finding, that Team ForYe violated section 11.7 of By-Law #2, reasonable?
  3. Does the EGC’s failure to abide by the procedural requirements in the EGC Violations Procedure render this decision unreasonable?
  4. Was the EGC’s classification of this violation as a minor violation unreasonable?

## **PART IV: ANALYSIS**

### ***What is the appropriate standard of review?***

8. Currently under Canadian administrative law, there are two standards of review upon which administrative decisions are reviewed: reasonableness and correctness. To determine whether the EGC's decision should be upheld, the appropriate standard of review must first be determined. This Board has elaborated on these two standards in past decisions, including in relation to decisions of the EGC: see *Team DiBrina v Elections Governance Committee*, 2017:2 at paras 17-20.
9. In the present case, the EGC is interpreting its home statute. The EGC is considered an expert body on the interpretation of By-Law #2, as it is the EGC's statutory duty under s. 3.1 of the By-Law to administer it and uphold its visions and principles. The EGC also has the sole authority to enforce the provisions of the By-Law. As the expert on By-Law #2, a considerable level of deference should be granted to the EGC's interpretation and enforcement of By-Law #2. The standard of reasonableness achieves the necessary level of deference and the decisions of the EGC will therefore be evaluated under this standard.
10. The standard of reasonableness requires the Appeals Board to determine whether the EGC reached a decision that falls within a range of acceptable and defensible outcomes (*Dunsmuir v New Brunswick*, [2008] SCR 190). The standard of reasonableness requires deference to the decision-maker.

### ***Was the EGC's finding, that Team ForYe violated section 11.7 of By-Law #2, reasonable?***

11. Section 11.7 of By-Law #2 prohibits candidates from influencing, or attempting to influence, voters prior to the campaign period. In the By-Law, s.11.2, Responsibility of Candidates, states:

Candidates shall be responsible for the actions, and the violations stemming from such actions, of any campaign volunteer(s) unless the Candidate satisfies the Committee that he or she did not direct the action, and could not have reasonably foreseen that the action would occur.

12. The EGC found that the actions of the two campaign volunteers, “liking” the Facebook post of the Gazette article, constituted pre-campaigning. While the effect of two “likes” on a Facebook post may be relatively minor, it is certainly reasonable that these actions be considered an “attempt to influence voters,” as it could, to some extent, increase the visibility of the candidates and promote Team ForYe’s campaign to anyone who saw the “liked” post on Facebook. Therefore, the finding of a violation of s.11.7 of By-Law #2 is *prima facie* reasonable.
13. Under s.11.2 of By-Law #2, the actions of campaign volunteers must be reasonably foreseeable in order for a candidate to be held responsible for those actions. It was reasonably foreseeable that campaign volunteers might “like” or “share” a post of the Gazette article on Facebook. Team ForYe clearly did foresee that there was a risk of these violations taking place based on the fact that it warned its volunteers not to interact with the article on social media. Team ForYe notified its volunteers via Slack and Facebook that they should not interact with the Gazette article on social media.
14. At the Appeal Hearing, Team ForYe submitted that it was not reasonably foreseeable that its volunteers would “like” the Facebook post in spite of the messages communicated through social media. However, it was reasonable for the EGC to determine that these violations were still reasonably foreseeable. The first communication from Team ForYe to its volunteers took place only one day before the Gazette article was posted on Facebook. It is foreseeable that volunteers might interact with the article before they saw the warning from Team ForYe. Team ForYe provided evidence at the hearing that volunteers had not seen the warning before interacting with the post. The second communication took place after the article was posted, and by this time both volunteers had already “liked” the post.
15. While it would not be reasonable to expect Team ForYe to monitor the entire internet to prevent violations caused by its volunteers, it would be reasonable to monitor this singular Gazette article on a regular basis. Team ForYe was aware that the article was being released and was aware that the article was a potential source of election violations. During the pre-

campaign period, the maximum number of campaign volunteers was 50 individuals. Given the relatively small size of this group, it is reasonable to expect Team ForYe to monitor the activities of its volunteers with respect to the Gazette article.

16. At the EGC hearing, and at the Appeal hearing, Team ForYe submitted that it should be considered dissociated from, and not held responsible for, the actions of the campaign volunteers who had “liked” the Facebook post. Section 11.2 of By-Law #2 states:

**11.2.1** Candidates may dissociate themselves from any person or organization who would otherwise be considered a campaign volunteer, provided that they give immediate notice to the CRO, in writing, and provided that the Committee is satisfied that the dissociation is genuine.

**11.2.2** A candidate shall not be held responsible for the actions of any person or organization if the candidate has previously and adequately dissociated herself from that person or organization.

17. In its decision, the EGC stated that it was not satisfied that Team ForYe’s dissociation from the two volunteers was genuine. Team ForYe submitted that it should be considered dissociated from the volunteers, due to the fact that they were removed as volunteers following the EGC hearing, and because of the warnings from Team ForYe concerning the Gazette article.

18. However, to allow dissociation for these reasons would be contrary to the language and the spirit of By-Law #2. Section 11.2.2 states that candidates will not be held responsible for the actions of a volunteer, if the candidate has “previously and adequately dissociated” from that volunteer. This suggests that the dissociation must occur prior to the violation. Furthermore, to permit retroactive dissociation would effectively remove any responsibility for candidates to proactively monitor and control the conduct of their volunteers with respect to elections violations.

***Does the EGC’s failure to abide by the procedural requirements in the EGC Violations Procedure render this decision unreasonable?***

19. Section 5.2 of the Elections Governance Committee Violations Procedure, which pertains to hearings, states:

The Committee shall inform the Candidate in writing of the hearing no fewer than six (6) hours in advance and at this time shall provide the Candidate with a written summary of the allegation prepared by the Manager of Investigations, and a copy of the findings of the investigation.

20. The EGC failed to provide Team ForYe with a copy of the findings of its investigation. It did not provide the evidence upon which the allegation of the violation was based. The EGC acknowledged this mistake at the Appeal Hearing.

21. At paragraph 28 of *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, the Supreme Court commented on the requirement of procedural fairness in administrative proceedings:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

22. In the context of this case, the procedural error did not deprive Team ForYe of its right to a fair hearing. In the notice email, Team ForYe was provided with the allegation that some campaign volunteers had “liked” the Gazette article before the campaign period began. Team ForYe was not provided with the required evidence, screenshots of the volunteers who had interacted with the post, in advance of the hearing. Team ForYe was, however, provided with the evidence at the time of the hearing. It was also granted the opportunity to present its case at the initial EGC hearing, and once again on appeal to this Board.

23. Team ForYe was given the opportunity to present its case fully and fairly. Neither the violation itself nor the decision of the EGC was impacted by the failure to include screenshots of the names of the two specific volunteers involved. The notice was sent to Team ForYe shortly before the beginning of the campaign period, but Team ForYe did not see the notice until after the campaign period had begun. Therefore, the failure to include the evidence did not have any bearing on the violation itself, as the violation had already

occurred in whole by the time Team ForYe was in a position to take action based on the notice.

24. Team ForYe submitted that this procedural error was prejudicial, stating that the failure to include the relevant evidence resulted in a delay in Team ForYe's ability to identify the campaign volunteers involved, and to dissociate from these volunteers. Team ForYe submitted that if the EGC had provided evidence including the names of the two volunteers, Team ForYe would have been able to dissociate from these individuals prior to the EGC hearing. However, for the reasons outlined in paragraph 18, it would be too late at this stage to dissociate from the conduct of these volunteers. Therefore, this procedural misstep does not impact the reasonableness of the EGC's decision.

***Was the EGC's classification of this violation as a minor violation unreasonable?***

25. Section 6.3 of the EGC Violations Procedure provides 6 criteria which shall be considered by the EGC in determining an appropriate penalty: (1) degree of scope, (2) degree of influence, (3) degree of intent, (4) degree of repetition, (5) degree of legality of action, and (6) degree of obstruction. Team ForYe submitted that based on these factors, the minor violation sanction was unreasonable. However, section 6.3 states that the EGC should "not be limited to" these criteria in determining an appropriate penalty. Indeed, section 7.3 of the EGC Violations Procedure, pertaining to sanctions, states:

3. The Committee may establish a yearly schedule outlining how fines may be levied for specific violations. The yearly schedule must be officially released by the All Candidates Meeting.

26. The EGC has the discretion to create a yearly schedule, which it did by creating the 2018/19 USC Elections Sanction Framework. It is not the role of the Appeals Board to comment on the severity of rules concerning sanctions established by the EGC for elections violations, provided these rules are consistent with USC By-Laws and Policies, and are applied in a fair and consistent manner.

27. The 2018/19 USC Elections Sanction Framework clearly indicates that violations of s.11.7 of By-Law #2 are to be regarded as “Minor Violations.” The EGC explained that this framework was intended to decrease the subjectivity in determining the appropriate sanctions for violations in USC elections. The Framework does not provide for any greater or lesser sanction as a result of a violation of section of 11.7 of By-Law #2. Therefore, it was reasonable for the EGC to sanction Team ForYe with a minor violation in this case.

#### **PART V: DISPOSITION**

28. The appeal is dismissed and the minor violation sanction is upheld.