



Judgment of the USC Appeals Board in the matter of:

## ***Ski and Snowboard Club v Clubs Governance Board, 2021:1***

**Hearing Date:** By oral argument (heard May 7, 2021)

**Judgment Date:** August 11, 2021

**Panel:** Zohaib Ahmed (Chair), Misha Apel, Sean Molnar, Alysia Sainas, Priyanka Singh

**Reasons for Judgment:** Ahmed (Apel, Molnar, Sainas and Singh concurring)

### **PART I: INTRODUCTION**

This judgment serves two functions:

[1] First, this judgment changes the Appeals Board’s role in the University Student’ Council (“**USC**”) adjudicative processes. This change mirrors a shift in the role that courts play when adjudicating administrative decisions in the Canadian legal system. More importantly, this change brings the powers of the Appeals Board in-line with its powers as originally envisioned by the USC’s policies, procedures, and bylaws (“**USC documents**”).

[2] Second, this judgment decides an appeal brought by the Ski and Snowboard Club (“**SSB Club**” or “**Club**”). The SSB Club appeals a decision by the Clubs Governance Board (“**CGB**”) wherein the CGB imposed sanctions on the SSB Club for violating the *Clubs COVID Policy* (“**COVID Policy**”), the *Clubs Event Planning and Risk Management Procedure* (“**CEPRMP**”), and the *UWO Student Code of Conduct* (“**Student Code**”).

[3] The CGB's sanctions consisted of the following: First, a fine of \$1200 payable to the University Students' Council ("USC"). Second, an order that the Club remove all posts on its social media accounts that show unsanctioned, in-person events held during the 2020-2021 academic year. Third, an order that the Club be placed on probation for one year; probation requires that the Club check-in with the USC's Student Organization Support Staff once a month; any violation of USC clubs policy during the probationary period will be adjudicated with heightened scrutiny. Fourth, an order that the Club's election nominations for the 2021-2021 academic year be invalidated and that the election and campaign period for said academic year be administered by the USC. Fifth, an order that the Club's executive team write an apology letter to all club members, apologizing for holding unsanctioned, in-person events. Sixth, an audit of the Club's finances. Seventh, that student and current President of the Club, Omer Abdalla, be barred from running for any executive roles for the Club.

[4] For the reasons below, the appeal is allowed in part. The Appeals Board orders as follows: The fine, which comprises the first sanction, is reduced to \$910. The second, third, fourth, fifth, and sixth sanctions are endorsed and upheld. The barring of Omer Abdalla, which comprises the seventh sanction, is rejected and quashed.

## **PART II: CHANGING THE APPEAL BOARD'S POWERS TO REFLECT CURRENT CANADIAN**

### **ADMINISTRATIVE LAW JURISPRUDENCE**

[5] In 2015, the USC created the Appeals Board, the final adjudicator for disputes on all matters referred to it by the USC and/or the USC documents.<sup>1</sup> In practice, the only disputes to

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<sup>1</sup> 11.01, *Appeals Board Policy*.

come before the Board have been appeals from decisions of the CGB or the Elections Governance Committee (“EGC”) (and their predecessors).

[6] Since its inception, the Appeals Board has bound itself to the prevailing administrative law framework(s) as set out by the Supreme Court of Canada (“SCC”). Until recently, this meant the Appeals Board followed the review framework found in *Dunsmuir v New Brunswick*.<sup>2</sup> *Dunsmuir* required the Appeals Board to review CGB and EGC decisions on the reasonableness standard. If the decision was reasonable, it was upheld. If the decision was unreasonable, it was remitted to the lower body for reconsideration, or, in extreme cases, a fresh judgement was provided. The Appeals Board could only review decisions on the correctness standard if the case fell within an exception outlined in *Dunsmuir*.<sup>3</sup> Only where there were sufficient reasons to do so would the Appeals Board depart from this practice.<sup>4</sup> Notwithstanding the USC’s corporate roots, the Board has reiterated the importance of following this precedent.<sup>5</sup>

[7] However, in 2019, the SCC released *Canada (Minister of Citizenship and Immigration) v Vavilov*.<sup>6</sup> This decision fundamentally altered how courts must see and address parties’ appeals of administrative decisions. In *Vavilov*, the SCC held that where an appeal (to a court) of an administrative decision was borne from a statutory right of appeal, that appeal was to be reviewed on the appellate standards of review rather than the reasonableness standard of review.

[8] If the Appeals Board is to stay committed to applying the prevailing review framework, its jurisprudence must change. Appeals to courts that are borne from statutory rights of appeals

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<sup>2</sup> [2008 SCC 9 \(CanLII\)](#) [*Dunsmuir*].

<sup>3</sup> *Dunsmuir*, *supra* note 2.

<sup>4</sup> *Craft Lovers Club v Clubs Governance Board*, [2020:2](#) [*Craft Lovers*]; *Unload Western v Clubs Governance Board*, [2020:1](#) [*Unload Western*]; *Shadeed v Elections Governance Committee*, [2021:1](#) [*Shadeed*].

<sup>5</sup> *Ibid*, all.

<sup>6</sup> [2019 SCC 65 \(CanLII\)](#). [*Vavilov*].

must be reviewed on the appellate standards of review. The Appeals Board has always seen itself as the “court” of the USC and the EGC and the CGB as administrative decision-makers. Appeals from EGC and CGB decisions are borne from a statutory right of appeal; the right to appeal is written into the constating documents (or “statutes”) of those respective bodies. Accordingly, the Appeals Board must review CGB and EGC decisions on the appellate standards of review.

[9] At the outset, I make clear that this decision is *not* rejecting past jurisprudence. On the contrary, this decision pays homage to past practice by bringing into the Appeals Board’s jurisprudence the most recent review framework as set out by the SCC. This is what the Appeals Board has always done. To reject developments in Canadian law in the name of status quo would be an affront to justice.

#### **(A) The Appeals Board Hears Statutory Appeals**

[10] How do we know that the Appeals Board hears appeals of statutory right? The CGB and EGC’s constating documents make this clear. In some provisions, the word ‘appeal’ is expressly written. In other provisions, the provision’s wording implies the right to an appeal.

[11] Prior to *Vavilov*, even when the word ‘appeal’ was used, an appeal of administrative law decisions did not attract the appellate standards of review but rather the administrative standards of review. The most common administrative standard of review was the reasonableness standard. In *Vavilov*, the SCC expressly stated that, when an appeal of an administrative decision comes before a court because a party has triggered a provision containing the appeal language, the appellate standards of review will apply.<sup>7</sup>

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<sup>7</sup> *Vavilov*, *supra* note 6 at para 17.

### i) CGB Documents

[12] The *Club Ratification Procedure* (“**Ratification Procedure**”) sets out what the CGB must consider when it deliberates whether to approve a club’s request for ratification. Section 6 states that “all *appeals* will be directed to the USC Appeals Board”. The *Club Hearings and Sanctions Procedure* (“**Sanctions Procedure**”) sets out the process through which students may file complaints against clubs. The *Sanctions Procedure* also sets out the investigative, adjudicative, and sanctioning processes of the CGB with respect to club policy violations. Section 7 states that an “organization that has been sanctioned may *appeal* the decision of the Clubs Governance [Board]”. Because both documents provide that aggrieved parties may *appeal* to the Appeals Board, that review must be conducted on the appellate standards.

### ii) EGC Documents

[13] Similarly, the EGC’s governing policies and procedures also provide for a statutory right of appeal to the Appeals Board.

[14] *ByLaw #2* is an expansive, 21-page bylaw and one of the most important pieces of legislation passed by the USC. This document sets out definitions, implements voting and finance rules, prescribes election timelines, and provides procedures in case of a tie, etc. This document also gives effect to various other elections policies and procedures by way of reference.

[15] *ByLaw #2* also states that decisions by the EGC may be *appealed* to the Appeals Board. Section 16.1 states that “*appeals* of Committee decisions or election results shall be heard by the Appeals Board...” and s. 26.1 states that “*appeals* of the validity of any referendum or plebiscite results shall be heard by the Appeals Board”. There is no ambiguity here. The use of the term

*appeal* gives students the automatic right to appeal decisions made pursuant to *ByLaw #2* by way of the bylaw itself.

[16] The *Elections Governance Committee Violations Procedure* (“*Elections Procedure*”) gives students a right to appeal a finding of an election violation. This document sets out the procedure for the filing, investigation, adjudication, and sanctioning of election violations. The *Elections Procedure* does not contain a provision that expressly provides for an appeal. However, because *ByLaw #2* is the primary legislation with respect to elections, the *Elections Procedure* must be read in conjunction with *ByLaw #2*. When one reads these two documents together, it is clear that candidates may appeal findings of elections violations through s. 16.1 of *ByLaw #2*.

[17] Section 3 *Elections Procedure* also supports the finding that the document provides a right of appeal. Section 3 states that audio recordings of election violation hearings can be released to the public “in the event of an *appeal*”. The use of the word *appeal* here is telling.

[18] Bearing in mind the above, it is clear that appeals of decisions made under *ByLaw #2* or the *Elections Procedure* are borne out of statutory right. In turn, those appeals must be reviewed on the appellate standards of review.

### **(B) The Appellate Standards of Review**

[19] What are the appellate standards of review? There are two appellate standards of review. The standard that applies depends on whether the Appeals Board is examining a legal conclusion, a factual conclusion, or a conclusion of mixed fact and law.<sup>8</sup>

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<sup>8</sup> Normally, the two appellate standards of review attach to questions of law, questions of fact, and questions of mixed law and fact. For the sake of clarity, I have reframed the analysis in terms of conclusions.

### (i) Legal Conclusion

[20] When examining a legal conclusion, the standard of review is correctness. Broadly speaking, a legal conclusion is a conclusion that involves interpretation of legal principles or the USC bylaws, procedures, or regulations. If the Appeals Board finds that a legal conclusion arrived at by the CGB or EGC is incorrect, then the Appeals Board may substitute its own legal conclusion in its place. For a decision to be correct, it must be the only right answer in light of the law and facts.

[21] For example, in *Shedeed v Elections Governance Committee*, 2021:1 (“**Shedeed**”), the EGC argued that under the *Elections Governance Committee Nominations Procedure* (“**Nominations Procedure**”) there was no exception to the rule that failure to pay one’s nomination form bond rendered a person ineligible to run for election without exception. This was a *legal conclusion* because it was the EGC’s interpretation of the scope and effect of the USC’s *Nomination Procedure*.

### (ii) Factual or Mixed Factual and Legal Conclusions

[22] Factual conclusions and conclusions of mixed fact and law are reviewed on the same standard. The Appeals Board may reject these conclusions only if the CGB or EGC has made a palpable and overriding error in coming to that conclusion. A palpable error is one that is plainly seen or obvious.<sup>9</sup> An overriding error is one that affects the outcome of the case; it is not insignificant.<sup>10</sup> A factual conclusion is a conclusion about what actually took place. A conclusion

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<sup>9</sup> *Housen v Nikolaisen*, 2002 SCC 33 (CanLII).

<sup>10</sup> See Bereskinparr, Amrita Singh, [Federal Court applies Vavilov Standard of Review for the first time in an Opposition Decision Appeal](#).

of mixed fact and law is conclusion about whether a certain fact or set of facts satisfy some legal test.

[23] For example, in *Shedeed*, the EGC concluded that ‘the Appellant had failed to submit his bond payment’. This was a factual conclusion. When the EGC took this fact and applied it to s. 4(2) of the *Elections Governance Committee Nominations Procedure*, which stipulates that all nomination forms must be submitted with a bond payment, it concluded that the Appellant’s failure to submit his bond payment rendered him ineligible to run for election. This was a conclusion of mixed fact and law.

### **(C) Procedural Review**

[24] In Canada, review of administrative decisions comes in two parts: substantive review and procedural review. Substantive review looks at the merits of the case, the decision of the administrative decision-maker, and the reasons provided in support of that decision. Procedural review looks at how the decision was made, procedurally. This type of review examines whether the decision-making process was fair.

[25] Until now, the Appeals Board has only ever reviewed the CGB or EGC’s decisions by conducting a substantive review. This is not in line with Canadian jurisprudence. Review of an administrative decision requires scrutinizing the substance of a decision **and** the procedures that led to that decision.

[26] A survey of all the previous cases before the Appeals Board reveals that there were no significant procedural fairness issues at play. Therefore, the failure to have conducted a fairness review does not jeopardize the legitimacy of past decisions. The case at bar, however, does involve significant procedural fairness issues and therefore requires a procedural fairness review.

In this way, the case at bar provides an opportune time to introduce this analysis into the Appeals Board review framework.

(i) What is Procedural Fairness

[27] Generally, administrative decision-makers owe a duty to the subjects of their decisions to make the decision-making process fair. This is sometimes called the ‘duty of fairness’. In the context of the USC, this means that the EGC and CGB have a duty to employ a fair decision-making process.

[28] What the duty of fairness requires varies case-by-case. For example, in some areas of the law, the duty of fairness demands oral hearings, or a right to counsel selected by the claimant. In other areas, written submissions and a court appointed representative may be sufficient. The content of the duty of fairness is somewhat elusive. Like a web, Canadian jurisprudence on procedural fairness is sticky and complex; the content of the duty of fairness depends on statute, past case law, and the particular circumstances of the case at bar.

[29] In some situations, an exhaustive analysis is necessary to uncover the content of the duty of fairness. However, such an analysis would be a waste of resources and unnecessarily confusing given that the Appeals Board deals with relatively simple facts and legal procedures. Integrating an all-encompassing procedural fairness framework into the Appeals Board jurisprudence is ill-advised. Instead, the Appeals Board finds that the content of the duty of fairness is better defined by looking at the almost universally accepted components of the duty of fairness **and** the USC documents.

[30] It is generally accepted that the duty of fairness has two components: First, a party subject to an administrative decision has the right to be heard. Second, a party subject to an

administrative decision has the right to an independent and impartial decision-maker.<sup>11</sup> The USC documents also set out some of the content – adding or subtracting from these two components. I take these two sources of law in turn.

### *1. Right to be Heard*

[31] What does it mean to have the right to be heard? At minimum, this right entails the opportunity to try to meet the case. In other words, students or clubs must be given a chance, be it through an oral hearing or written submissions (or both), to respond to the EGC and CGB’s investigations and arguments.

[32] The right to have an opportunity to try and meet the case brings with it a corollary right. This is the right to know the case, or, as its commonly known, disclosure. A student must be given disclosure so that they may prepare for written or oral argument. Without disclosure, there is no real or genuine opportunity to respond. In practice, this means that a student or club must be told what facts, statements, documents, and law the EGC or CGB will rely on to make its decision before written or oral arguments are made.

[33] The disclosure right, at least in the context of CGB decisions, is suggested by the USC documents. Section 3.04 of the *Sanctions Procedures* states that “where a complaint has been filed against a club, said Club’s executive committee shall be permitted to review the complaint documents...”. Thus, s. 3.04 suggests one portion of the right to be heard; disclosure is at the heart of a legitimate sanctions’ procedure.

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<sup>11</sup> *Vavilov*, *supra* note 6; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC); see also <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/procedural-fairness.html>.

[34] These subcomponents of the right to be heard accord with the common law; in Canadian jurisprudence the right to be heard is comprised of these two additional rights. This also reflects past EGC and CGB practice. In every case that that has come before the Appeals Board – be it about election violations or club sanctions or ratifications – disclosure was provided, and it predated the opportunity to respond.

### *2. Right to an Independent and Impartial Decision-Maker*

[35] What does it mean to have an independent and impartial decision-maker? Simply put, this right demands that when a party goes through an EGC or CGB investigation, the members of the decision-making panel will be impartial and unbiased in their treatment of the student or group.

### *3. The USC Documents – Policies, Bylaws, and Procedures*

[36] In the name of judicial restraint, this section will be limited to a discussion of the *Sanctions Procedure*, the document that empowered the CGB to sanction the Ski and Snowboard Club. Other constating documents not relevant to the case at bar will not be discussed.

[37] Under the *Sanctions Procedure*, students who are concerned that a club has violated clubs policy may file a complaint with the CGB. When a complaint is filed, the executive committee of the club under inspection is given notice and disclosure of the details of the complaint (ss. 3.02 and 3.04 of the *Sanctions Procedure*, respectively). The executive committee is then provided an opportunity to submit a written response to the complaint (s. 3.03, *Sanctions Procedure*). After reviewing the complaint, the written submissions, and possibly conducting an investigation of its own, the CGB may issue a preliminary decision. If the preliminary decision finds that the club violated clubs policy, the club may be sanctioned. This process is called a ‘Preliminary Hearing’.

[38] A club that wants to challenge a preliminary decision may ask for a ‘Judicial Hearing’.<sup>12</sup> A Judicial Hearing has two steps. At the first step, the Appellant and the Respondent are given an opportunity to provide written submissions in support of their positions.<sup>13</sup> The Respondent typically comprises of one or more members of the CGB. At the second step, the parties appear before the rest of the CGB to make oral submissions. The oral submissions ‘meeting’ is colloquially referred to as a Judicial Hearing. Thus, a Judicial Hearing refers to both the meeting where oral submissions take place and the entire process of the first appeal (the second appeal is heard by the Appeals Board). Some time after, the CGB issues a judicial hearing decision that, like a preliminary decision, may sanction the club if violations were found.

[39] It is only after both a Preliminary Hearing and a Judicial Hearing that an aggrieved party may appeal to the Appeals Board. By the time a CGB club sanction decision reaches the Appeals Board, the case has already been decided twice. To put it in layman’s terms, a case before the Appeals Board is an appeal of an appeal.

[40] Thus, there are two stages to the decision-making/appellate structure of the USC: the Preliminary and Judicial Hearing comprise stage one (with the Judicial hearing having two steps) and the Appeals Board hearing comprises stage two. This two-stage model is commonly referred to as a “Bipartite Decision Model”.

#### **(D) Practice Directions**

[41] At this juncture, it is useful to provide some direction on how parties and subsequent Appeals Board panels must approach future disputes.

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<sup>12</sup> *Sanctions Procedure*, s. 4.01.

<sup>13</sup> *Sanctions Procedure*, s. 4.03(2). (I note that the *Sanctions Procedure* uses the term “Petitioner” instead of “Appellant”. The terms are interchangeable. For the purposes of this case, only the latter will be used).

[42] A student or group can challenge an EGC or CGB decision on both procedural and substantive grounds. When a party challenges a decision on procedural grounds, it should identify what right was interfered with (e.g the right to be heard, the right to an impartial and independent decision-maker, a right USC-given right). Of course, the party should explain how that right was violated. When a party challenges a decision on procedural ground, it should clearly identify what conclusions it contests and why those conclusions are wrong. Parties are encouraged to characterize those conclusions as either legal, factual, or conclusions of mixed fact and law.

[43] I recognize that some of the above may be difficult. Even lawyers with a wealth of experience misidentify procedural or substantive issues when preparing for an appeal. Thus, if a party finds it too difficult to frame its submissions in the way just described, **it may submit its submissions in any form of written or oral argument** (depending on mode of appeal selected). No party will be prejudiced for not having specified and/or identified procedural or substantive issues.

[44] Regardless of how submissions are organized, when an Appeals Board panel drafts its decision, it should try to identify any procedural or substantive issues and use them as guideposts for its analysis.

### **PART III: FACTS**

[45] Due to COVID-19, Western University issued a directive that prohibited all in-person extracurricular activities. This appeal is about SSB Club activities that were alleged to have taken place in violation of this directive.<sup>14</sup>

[46] The SSB Club was the subject of three complaints. The first complaint alleged that members of the SSB Club went on a trip to Mt. Tremblant. The second complaint alleged that the SSB Club hosted an in-person skating event. The third complaint alleged that throughout the year, the club had hosted in-person events, pictures of which could be found on its Instagram page. The complaint referred to Instagram posts about a ski jump in President Omer Abdalla's backyard and a group campfire (again in Abdalla's backyard). The complaints were received on February 17, March 15, and March 17, respectively.

[47] At the second step of the Judicial Hearing stage, the CGB stated that the first and third complaints were dismissed. This dismissal was further acknowledged in the judicial hearing decision and on appeal during oral argument. Thus, the second complaint, the complaint regarding the skating event, is the focal point of this appeal.

[48] On March 15, the CGB received a complaint that the SSB Club held an in-person skating event that was promoted on a Facebook Messenger group chat associated with the club. If this skating activity constituted a club event it would have violated the prohibition.

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<sup>14</sup> Technically speaking, the CGB found that the Appellant had had violated s. 4 of the *Clubs Covid Policy*, a newly enacted policy that set out strict guidelines for hosting in-person events. However, by the time the appeal was heard, the question became whether the alleged in-person events violated the outright ban rather than s. 4 of the *Clubs Covid Policy*.

[49] The complaint included a screenshot of the group chat. In the group chat, SSB Club's president Omer Abdalla sent the following messages:

Hey Guys. I'm gonna be renting out an indoor skating rink for the club. Half is for shinny and half for ice skating. Would really love to have u guys join us ! Gonna be Sunday night like 8/9 ish. DM me for Deets. You're welcome to bring housemates or whatever. We do have limit so first come first served...

...

**DISCLAIMER: THIS IS NOT A SKI CLUB EVENT**

[50] A concerned student filed a complaint with the CGB, providing a copy of the above messages. These screenshots were shared with the SSB Club shortly after the complaint was filed. Following this, on March 19, the CGB met with Abdalla, who, as president of the club, served as its representative. At this meeting, Abdalla was given the opportunity to make oral submissions in response to the complaint.

[51] Next, the CGB made modification to the adjudicative process outlined in the *Sanctions Procedure*. Rather than issuing a written preliminary decision with reasons as is the norm, the CGB folded the Preliminary Hearing into the Judicial Hearing. No written preliminary decision was provided in advance of the Judicial Hearing nor were any sanctions levied at that point. Accordingly, when the Appellant appeared before the CGB for the Judicial Hearing, it was relying only on the information orally relayed to it on the March 19 meeting. In the Analysis section of this decision, I explain why this ad hoc change was fatal to the decision-making process with respect to procedural fairness.

[52] After the March 19 meeting, the Appellant requested a Judicial Hearing. Oral submissions took place on March 26. The Appeals Board was able to watch the Judicial Hearing in its entirety due to it being recorded. The Judicial Hearing decision was issued

on March 29. In it, the CGB levied a series of sanctions against the SSB Club and Abdalla after finding four violations, each of which violated six policies.

[53] With respect to the CGB, its Judicial Hearing decision is problematic. In it, the CGB provided a list of evidence it relied on to come to its decision. For some reason, the CGB includes in that list the dismissed complaints. Dismissed complaints should not be included in the list of evidence. Inclusion of dismissed complaints, even when followed by the caveat that the complaints were in fact dismissed, gives the appearance that those complaints negatively impacted the decision of the CGB. It gives the impression that the complaints, although dismissed in theory, played a role in the decision. Furthermore, it unnecessarily prejudices the club under investigation. A student reading a decision that includes in it reference to dismissed complaints may view the club unfavourably. This is unfair because were dismissed and therefore should have no impact on the club or its public appearance.

[54] The CGB's decision is also problematic because it does not clarify what specific violations led to what sanctions. The CGB found that there four in-person events, each of which violated five policies, with one event violating an additional sixth policy. In the list of evidence, the CGB identifies a total of five in-person events: the trip to Mont Tremblant (the first complaint), the skating event (the second complaint), an in-person campfire and a backyard ski jump (the third complaint), and a ski jump on UC Hill where SSB Club members jumped off someone's back. Later, in the substantive review portion of my analysis, I explain why only the skating event constitutes a violation and why only the sanctions tied to this one violation are justified.

#### PART IV: ISSUES

[55] The facts reveal the following issues:

#### **Procedural Review – Duty of Fairness**

1. Were the Appellant's procedural rights respected?
  - a. Right to be heard
    - i. Was the SSB Club given disclosure?
    - ii. Did the SSB Club have an opportunity to provide written or oral submissions?
  - b. Was the CGB an independent and impartial decision-maker?
  - c. Were the rights granted by any relevant policies, bylaws, and procedures respected?

#### **Substantive Review**

1. What is the standard of review?
2. What conclusions were at the heart of this decision, and should they be overturned?

#### PART IV: ANALYSIS

#### **(A) Procedural Review**

[56] Recall that, under the common law, the duty of fairness provides parties' the right to be heard and the right to an independent and impartial decision-maker. In addition to these rights, clubs enjoy the rights conferred by the USC documents.

##### (i) The Right to Be Heard

[57] The right to be heard has two components: First, the right to disclosure. Second, the right to respond/to an opportunity to meet the case.

##### *1. Was the SSB Club given disclosure?*

[58] Meaningful disclosure requires disclosure of all relevant information. Meaningful disclosure also requires ongoing disclosure; the duty to disclose continues throughout the

decision-making process – new, relevant information must be disclosed even if initial disclosure has been given. A good rule of thumb to determine whether a piece of information requires disclosure is that if the information *could* play a role in decision-making process, then it should be disclosed.

[59] For the SSB Club to have had meaningful disclosure it would have had to have received disclosure of all three complaints. The SSB Club received disclosure of the three complaints in advance of the Judicial Hearing. However, the SSB Club did not receive disclosure of the incident on UC Hill. It was only after the Judicial Hearing had concluded did the CGB, after conducting investigations on its own volition, discover that some members of the SSB Club had been snowboarding on UC Hill.

[60] Nothing in the USC documents precludes the CGB from conducting investigations after oral arguments at step two of the Judicial hearing have closed. Nevertheless, relying on new evidence to find violations, without providing disclosure, is in clear violation of the USC documents.

[61] This was an unprecedented move. When asked for previous cases where the CGB had done this, it could provide no examples. This practice is worrying. This rid the Appellant of any opportunity to make submissions on the UC Hill evidence; it rid the Appellant of the opportunity to respond.

[62] If the CGB conducts an investigation after a Judicial Hearing takes place, and it uncovers evidence it intends to rely on to make its decision, it *must* disclose that evidence and give an opportunity to respond. Failing to do so grossly undermines the duty of fairness. If the CGB fails to provide such disclosure, the only possible solution is to deem the evidence inadmissible and

any violation that flowed from that evidence is rejected. In the case at bar, this means that the incident at UC Hill cannot constitute a violation. In turn, this significantly reduces the sanctions that follow.

2. *Was the SSB Club given the opportunity to respond?*

[63] As noted, failure to give disclosure with respect to the UC Hill incident interfered with the SSB Club's opportunity to respond. Aside from that, the SSB Club was given an opportunity to respond.

(ii) Was the CGB an Independent and Impartial Decision-Maker?

[64] The facts do not call into question the independence or impartiality of the CGB at any point in the process.

(iii) Were the Rights Granted by the USC Documents respected?

[65] Recall that the *Sanctions Procedure* provides that a club has the right to make its case at a Preliminary Hearing *and* a Judicial Hearing. The CGB's decision to fold the two hearings into one is problematic for two reasons. First, it went against the procedures laid out by the USC. The bipartite decision model is enshrined into the USC documents. The students, through its legislature, the USC, have decided that a two-stage process is the best way to evaluate alleged club violations. Folding the two hearings into one procedure ignores the will of the students.

[66] Second, and more importantly, it leads to procedural unfairness. The Preliminary Hearing decision must be separate and come before the Judicial Hearing because it gives the club under investigation some basis to make its Judicial Hearing arguments. Without a Preliminary Hearing decision, a club wades in dark waters; what points it needs to address are not made clear until the

oral argument portion of the Judicial Hearing. This creates a significant disadvantage as opposed to a situation where, after having received a Preliminary Hearing decision, the club has some ammo to fuel its arguments. In the case at bar, this ad hoc change limited the SSB Club's opportunity to respond, resulting in an unfair process.

## **(B) Substantive Review**

[67] This part of the analysis comes in two parts. First, the standard of review is identified. Second, the conclusions at the heart of the decision are reviewed.

### (i) What is The Standard of Review?

[68] Substantive review is conducted on the appellate standards of review. There are two appellate standards of review – one for legal conclusions and one for factual conclusions and conclusions of mixed fact and law.

[69] The standard of review for legal conclusions is correctness. If a legal conclusion arrived at by the CGB is incorrect, it may be rejected. The standard of review for factual conclusions and conclusions of mixed fact and law the standard of review is palpable and overriding error. A palpable error is one that is plainly seen or obvious.<sup>15</sup> An overriding error is one that affects the outcome of the case; it is not insignificant.<sup>16</sup> Similarly, if a factual conclusion or a conclusion of mixed fact and law suffers from overriding and palpable error, then it will be rejected.

### (i) The Conclusions at the Heart of this Decision

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<sup>15</sup> Housen

<sup>16</sup> <https://www.bereskinparr.com/doc/pdf/federal-court-applies-vavilov-standard-of-review-for-the-first-time-in-an-opposition-decision-appeal#:~:text=Justice%20Kane%20noted%20that%20the,the%20outcome%20of%20the%20case.>

[70] There are three conclusions central to the reasoning of the CGB that warrant inspection: First, the skating event constituted an official club event. Second, Abdalla had “little to no understanding or interest in further education on clubs policy”<sup>17</sup>. Third, Abdalla showed “clear and direct intention... to hold events against USC policy, saying ‘following USC rules means letting our club die’”. The second and third conclusions play a very important role – they are central to why the CGB decided to bar Abdalla from running for an executive position in the future.

*1. Did the CGB err in finding that the skating event constituted an official club event?*

[71] Clubs policy dictates that all official club events require an event proposal.<sup>18</sup> Failure to submit an event proposal is a violation of clubs’ policy.

[72] The Appellant argues that the group chat used to advertise the skating event is not an official channel of communication and therefore events promoted in the group chat do not constitute official events. The Appellant also argues that, unlike official club events, the skating event was not promoted on the club’s Facebook or Instagram pages, which are its official channels of communication. The Respondent argues that the Facebook chat is an official channel of communication because the chat uses the club’s name and logo and that the main criteria for entering the group chat was that the student is a current, or prospective member of the SSB Club.

[73] The Respondent’s arguments are persuasive. The chat is the primary venue for communication between club executives and is an expeditious and effective way to reach to any current or prospective members of the SSB Club. That the chat used the name and logo of the

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<sup>17</sup> Written submissions para 13.

<sup>18</sup> S. 2.01

SSB Club shows that chat is more than an unofficial venue of communication; any reasonable person who reads chat messages that promote events is likely to view these events as official SSB Club events. The Appellant's argument that all official events are advertised on the Facebook and Instagram pages holds little weight. While the SSB Club may view these channels of communication as more official, what matters here is not the subjective opinion of the SSB Club but rather how a reasonable person would view events on different social media.

[74] The CGB's conclusion that the skating event constituted a club event is a factual one. Therefore, this finding can only be overturned if it was plagued with an overriding and palpable error. The Respondent's arguments coupled with the reasonable person analysis suggest that the finding was not subject to overriding and palpable error. Accordingly, the finding is upheld and the

[75] The Respondent also argues (in its written submissions) that "[i]n accordance with the precedent set by the Appeals Board in [*Vegan Society v CGB*], participation and promotion are sufficient criteria to constitute a club event, thus requiring an event proposal". Thus, the Respondent argues, the SSB Club's promotion of the event in the chat and the Club's subsequent participation is sufficient for a finding that this is an official club event.

[76] With respect to the CGB, this is a mischaracterization of the law. *Vegan Society* does not stand for the principle that participation and promotion are sufficient to constitute a club event. *Vegan Society* stands for the principle that *participation* is sufficient to constitute a club event. In fact, the word "promotion" never appears in the decision. Therefore, the CGB cannot rely on *Vegan Society* to argue that posting in Facebook group chat was enough promotion to constitute a club event because promotion does not play a role in the *Vegan Society* analysis.

[77] The skating event constitutes an official club event simply because it was advertised through an official channel of communication and the target audience was current or prospective members of the SSB Club. These two facts are sufficient for a finding that this was an official club event.

*2. Did the CGB err in finding that Abdalla had little to no understanding or interest in further education on clubs policy?*

[78] It is true that Abdalla had a limited understanding of clubs policy. Abdalla's failure to submit an event proposal was due to a misunderstanding on his part of what constitutes a club event. Abdalla had resources before him to receive clarification on whether the event qualified as an official club event – he could have contacted the CGB or looked at clubs resources available to executives on the USC website.

[79] Although I agree that Abdalla showed little understanding of clubs policy, that he showed no interest in further education does not align with the facts. At various point in the Judicial Hearing Abdalla expressed genuine interest in educating himself on clubs policy.<sup>19</sup> On Appeal, he showed even more interest, specifically asking the Board and the CGB where he could find resources to avoid a similar situation the following year.

[80] As this conclusion was a factual one, it can only be overturned if there was an overriding and palpable error. Because Abdalla repeatedly expressed genuine interest in educating himself on clubs policy, this half of the conclusion must be rejected. That he showed a genuine interest in educating himself was plain and obvious. Furthermore, because this conclusion spoke to the culpability of Abdalla, and served as justification for his ban, the error was overriding in nature.

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<sup>19</sup> For example, see 26:00 of the Judicial Hearing recording.

[81] The consequence of rejecting this conclusion is that it cannot be used as a reason to support the ban.

*3. Did the CGB err in finding that Abdalla showed a clear and direct intention to violate USC policies by saying that “following USC rules means letting our club die”?*

[82] Malicious intent can result in more severe sanctions. Finding intention in the context of CGB decisions requires a careful analysis of the facts. Student or club’s words or actions should be evaluated considering context.

[83] While it is true that Abdalla did say – in a Facebook chat – that “following USC rules means letting our club die” – this statement was taken out of context, context that severely undermines the finding of “clear and direct intention to violate USC policies”. The statement was made during a heated Facebook chat conversation between Abdalla and an SSB Club executive. During that conversation, even while being subject to profanity, Abdalla maintained his composure and professionalism.

[84] The reasons provided by the CGB failed to indicate where the words were taken from; there was no mention of the heated argument. In addition, it was Abdalla, on his own initiative, who showed the CGB this Facebook chat. This indicates that Abdalla tried to be honest and forthcoming. The only reason Abdalla showed the Facebook chat is because the other executive was to serve as the Chief Returning Officer for the SSB Club’s upcoming election and Abdalla was worried the other executive was biased. Eventually, the CGB did find that the student was biased against Abdalla and removed him from his position, only reinforcing the idea that the inculpatory statements taken from a conversation between Abdalla and the student lack

reliability. That the CGB's reasons for this finding of fact do not reflect the context of the statement resulted in overriding and palpable error.

[85] I note that any shortcoming with the CGB's use of this statement to find intention may have been avoided had they provided Abdalla with an opportunity to make submissions on the statement. In other words, the CGB should have indicated to Abdalla that it found the statement determinative in finding intent. This would have also respected Abdalla's right to procedural fairness.

### **(C) Summary**

[86] I find it useful to take stock:

Recall that first and third complaints against the SSB Club were dismissed (the Mont Tremblant trip and the backyard fire and ski jump, respectively). Also recall that the UC Hill ski jump could not be used as evidence to find a violation. This was because no disclosure was provided with respect to that incident. Thus, the only incident that qualifies as a violation was the skating event.

[87] On substantive review, the conclusion that the skating event constituted an official club event was adopted. In turn, this results in the violation of five policies on one count. The conclusions that Abdalla had no intention to educate himself on clubs policy and that he showed a clear and direct intention to violate USC policies was rejected. Therefore, two major reasons for barring Abdalla from running or executive positions with the SSB Club have no pull.

[88] The sanctions must reflect these developments.

[89] I pause here to comment on the fine. Of course, given that the number of violations has reduced, fine must also be reduced. However, a comment on the original financial penalty must be made. Section 5.10(2) of the *Sanctions Procedure* suggests that fines should not exceed 10% of the largest account balance held by the club over the previous 12 months. \$1200 is substantially over 10% of the SSB Club's bank account. Of course, the *Sanctions Procedure* only provide a suggestion – it does not set a ceiling. For this reason, and to deter other clubs from hosting in-person events during the COVID-19 pandemic, the Board finds it appropriate to add a 3% *COVID factor*, to the 10% guideline. This brings the total fine to 13% of the largest account balance held by the Club over the previous 12 months.

#### **PART IV: DISPOSITION AND ORDER**

[90] The appeal is allowed in part. The Appeals Board orders as follows:

First, the SSB Club pay a fine to the USC in the amount of \$910

Second, an order that the Club remove all posts on its social media accounts that show unsanctioned, in-person events held during the 2020-2021 academic year.

Third, an order that the Club be placed on probation for one year; probation requires that the Club check-in with the USC's Student Organization Support Staff once a month; any violation of USC clubs policy during the probationary period will be adjudicated with heightened scrutiny.

Fourth, an order that the Club's election nominations for the 2021-2021 academic year be invalidated and that the election and campaign period for said academic year be administered by the USC.

Fifth, an order that the Club's executive team write an apology letter to all club members, apologizing for holding unsanctioned, in-person events.

Sixth, an audit of the Club's finances

Seventh, the barring of Omer Abdalla, which comprises the seventh sanction, is rejected and quashed.