



Judgment of the USC Appeals Board in the matter of:

Shedeed v Elections Governance Committee, 2021:1

Hearing Date: By written submission (received January 31, 2021)

Judgment Date: February 1, 2021

Panel: Zohaib Ahmed (Chair), Misha Apel, Alysia Sainas

Reasons for Judgment: Ahmed (Apel and Sainas concurring)

PART I: INTRODUCTION

[1] This is an appeal by Adam Shedeed in response to a decision by the Elections Governance Committee (“EGC”) to remove his name from the list of candidates for an upcoming University Student Council (“USC”) election. The *Elections Governance Committee Nominations Procedure* (“*Nominations Procedure*”) governs the nomination process for USC elections. For some positions, the *Nominations Procedure* dictates that students who wish to run for those positions must remit a bond payment to the USC. Payment must occur in advance of starting one’s campaign. Failure to do so renders a prospective candidate ineligible. In the case at bar, the EGC removed the appellant’s name from the list of candidates as he failed to submit the bond payment prior to opening his campaign, rendering him ineligible to run for election. For the reasons below, the

Appeals Board allows the appeal. Consequently, the Board orders the appellant's name be added to the list of candidates with the condition that the appellant first pays his bond.

[2] At the outset, we find it beneficial to make some preliminary remarks. First, we commend the effort put in by both parties so that this appeal could be disposed of in a timely fashion. Second, we recognize that the EGC took no pleasure in removing the appellant's name from the list of candidates. The EGC saw itself bound by a routine and strict interpretation of the *Nominations Procedure* and other relevant elections documents. To the EGC, removing the appellant's name was the only option. This is not a case of vindictive application of the law. Rather, it is a case where the strict and sometimes rigid USC elections documents fail to align with realities of the present day. This brings the Board to its third and final preliminary remark: This case is heard at the height of the COVID-19 pandemic – at a point in time where rules are being relaxed, or amended on-the-fly, to adapt to quickly changing situations and circumstances.

PART II: FACTS

[3] On January 12, 2021, nominations for the USC's Science Councillor position opened. The position was to be filled by way of election. Before nominations closed on January 19, the appellant submitted a completed nomination form.

[4] On the same day, the appellant claims that he attempted to remit the bond payment. The appellant submits that "the page reloaded for about 15 seconds" before he was sent back to the homepage. He also submits that he thought the payment had gone through because "some portals do not show a payment confirmation[s]". It was only after the appellant believed he successfully submitted his bond payment that he began campaigning.

[5] Both parties agree that the bond payment was not submitted. The appellant states that the bond payment may have failed to go through because of technical difficulties; he states he has an unreliable computer and an unreliable internet connection. Unreliable technology, the appellant states, has been a problem for him in the past, particularly due to increased home internet use with online learning. He points to problems with connecting to Zoom and troubles with submitting assignments to OWL as examples.

[6] We note that, as per the facts provided to us, this was the first time an online portal was used for USC election bond payments. Under the *Nominations Procedure*, in a regular election cycle, bond payments and nomination forms are submitted in-person.

[7] Both the respondent and appellant agree that after nominations closed the appellant was listed as a candidate on the website for the USC Science Councillor elections. This website was and is accessible to Western University's student body. However, as noted above, the appellant is no longer listed on the site (or the ballot). It is unclear for how long the appellant was incorrectly listed as a candidate for on the website.

[8] The respondent submits that on January 20, one day after nominations closed, the appellant was sent an e-mail notifying him that his bond payment had not been received. Proof of this e-mail has been provided to the Board. To this, the appellant said that the e-mail had gone to his spam inbox, and so it was left unseen. It was only after the appellant learned from a colleague that he had been removed from the candidates list that he looked in his spam folder and read the e-mail.

[9] The respondent also submits that, upon speaking with their IT representative, nothing on the EGC's end showed that the appellant had attempted to make a payment. The respondent

submits that had the appellant attempted to submit the payment but that it failed to go through, this would have been recorded in the ledger.

[10] The appellant's central argument is that the decision of the EGC was unreasonable because it failed to account for issues of equity. The appellant submits that he and his family have faced severe negative financial consequences as a result of COVID-19 and that his faulty internet connection and the glitch-prone laptop are a product of this financial situation. In short, the appellant argues that when the EGC removed his name from the list of candidates it failed to account for the disproportionate effect of COVID-19 on certain students. Thus, the appellant argues that he failed to submit the bond payment because he could not afford more reliable technology (an issue of equity and accessibility) and because he assumed the payment went through.

[11] Before we begin our legal analysis this Board finds it necessary to make findings of fact on the following question: Was the appellant's failure to submit the bond payment in a timely manner in fact a consequence of his financial status?

[12] Unfortunately, providing proof of weak financial status, which might support the claim that the appellant had unreliable technology, requires disclosing sensitive and personal information. After a careful examination of the Appeals Board's constating documents, we do not believe it is appropriate to demand such information be disclosed. Accordingly, the evidentiary threshold that appellants must meet to prove a claim regarding sensitive and personal information is relatively low.

[13] Nevertheless, parties must still provide some evidence supporting their factual claims on sensitive and personal issues. It would be unjust for this Board to accept a factual claim having not

seen some credible support that backs that claim. Lowering the evidentiary so much that mere assertions are accepted as true cuts against the interests of justice.

[14] While the Board did not ask the appellant to share financial records that verify his and his family's financial status, it did ask for some non-sensitive and non-personal information that supported his claim. The appellant presented us with screenshots of a discussion he had with his internet provider. This discussion occurred some weeks ago. The discussion can be summarized as follows: The appellant called his internet provider claiming that he could not connect to the internet. The provider opened up a case, sent a signal to the appellant's modem, and confirmed that the appellant was now online. Relying on this conversation, the appellant persuaded his professor to let him attend a tutorial he missed while his internet was down. The tutorial was worth 1% of his grade.

[15] The above evidence provides some indication that the appellant was faced with unreliable technology. There remains some doubt as to whether the appellant could not in fact afford better technology, and whether this was the cause of his failure to submit his bond payment. It stands to reason, however, that if we accept that the appellant could not afford better technology that this technology would interfere with his ability to connect to the internet as it had in the past.

[16] The appellant points to the financial impact of the COVID-19 pandemic as a driver for his unreliable technology. All across the country, Canadians have suffered financially due to the pandemic. In turn, it is reasonable to assume that a significant portion of Western University's student body may also be feeling financially stressed due to COVID-19.

[17] Thus, because of the low evidentiary threshold for factual claims on sensitive and personal issues, the discussion provided by the appellant with his internet provider, and the impact that

COVID-19 has had on Western University’s student body, this Board accepts that the appellant was unable to submit his bond payment due to unreliable internet which in turn was a product of his financial status.

[18] What then do we make of the respondent’s evidence that no payment attempt was recorded on the ledger? Making the above factual finding responds to this proof. It is reasonable to conclude that no attempt was recorded because the unreliable technology stood as a roadblock to connecting to the relevant EGC server. If no connection was ever established, it follows that no attempt would be recorded.

[19] We turn now to the issues and legal analysis.

PART III: ISSUES

1. There are two issues in this appeal:
 1. What is the appropriate standard of review?
 2. Was the EGC’s decision to remove the appellant’s name from the list of candidates reasonable?

PART IV: ANALYSIS

What is the appropriate standard of review?

[20] In *Unload Western v Clubs Governance Committee*, 2020:1 (“*Unload Western*”) and *Craft Lover Club v Clubs Governance Board*, 2020:2 (“*Craft Lover Club*”), this court recognized that the USC is not a product of a legislative statute and therefore does not fall squarely under the umbrella of administrative law. However, this Board has an established practice of binding itself to the prevailing administrative law frameworks. This is relevant because under the landmark

administrative law decision in *Canada v Vavilov*, 2019 SCC 65 (“*Vavilov*”), the presumed standard of review is reasonableness.

[21] In *Unload Western* and *Craft Lover Club*, this Board suggested that, if there are sufficient reasons, it may depart from the established practice of applying administrative law frameworks. In the case at bar, there are insufficient reasons to depart from Board case law and *Vavilov*. Accordingly, this court will assess the EGC’s decision on a standard of reasonableness.

[22] A brief overview of how to assess reasonableness is necessary. The standard of reasonableness requires the Appeals Board to determine if there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the required degree of justification, intelligibility and transparency. A decision can be unreasonable when there is a failure of rationality internal to the decision process, or the decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it (*Vavilov* at paras 100-101). In other words, flawed reasoning can doom an otherwise seemingly reasonable decision; if the reasons provided rely on incorrect assumptions or conclusions the decision is unreasonable.

Was the EGC’s decision to remove the appellant’s name from the list of candidates reasonable?

[23] A review on the reasonableness standard begins with the reasons given by the administrative decision-maker (the EGC). The EGC removed the appellant’s name from the list of candidates because: First, a strict reading of the *Nominations Procedure* requires a remitting bond payment before opening one’s campaign, something the appellant failed to do. Second, the appellant received an e-mail notifying him of his lack of remittance and he still failed to make the payment. Third, allowing the appellant to run in the election would compel the EGC to allow other candidates who were ineligible because they failed to pay their bond to also run. Fourth, loosening

the law to permit the appellant to run may damage the democratic institutions of Western University. Fifth, the EGC has no ledger record of the appellant attempting to make a payment. This fifth point has been addressed in paragraph 18. As such, it will not be re-addressed in this section.

b) A Strict Reading of the *Nominations Procedure*

[24] The respondent argues that the “rules are clear: to be considered a valid candidate in a USC election, one must submit a nomination form with valid signatures *and pay their bond*” (emphasis added). The respondent states that the EGC does not have the power to make exceptions or amend the rules. In essence, the respondent argues that it had no choice but to follow the rules, rules that clearly state a failure to pay a bond payment disqualifies a prospective candidate from running in a USC election.

[25] This Board sympathizes with the respondent’s reading of the *Nominations Procedure* and its belief that it had no discretion on this matter. Indeed, the EGC’s motive is noble. However, this strict reading of the law is unreasonable. As it is currently written, the *Nominations Procedure* does not allow for electronic filings of nomination forms or electronic payment of bonds. Nonetheless, this year, the EGC and the USC allowed for electronic submissions. Of course, these on-the-fly modifications are in response to the COVID-19 pandemic. Still, these modifications show that, in the COVID-19 era, the EGC does have some leeway in the way it applies the *Nominations Procedure*, and that a strict rule, if it leads to a disqualification, can be relaxed on the good judgement of the EGC. In other words, not all exceptions or modifications need to be explicated in the *Nominations Procedure* for the EGC to rely on such exceptions or modifications. We note that this new flexibility must be tempered by the good judgement of the EGC and is limited to decisions during the pandemic era.

[26] Section 4.4 of the *Elections Governance Committee Campaign Finances Procedure* (“*Finances Procedure*”), another document that governs USC elections, is further proof that the EGC has discretion under the *Nominations Procedure*. Section 4.4 stipulates that prospective candidates who “cannot pay the bond at the time they hand in their nomination form shall make prior arrangements with the [Chief Returning Officer]”. The Board acknowledges that this section asks prospective candidates to request accommodations prior to, or simultaneous to, submitting their nomination form. Still, the inclusion of this provision shows that failure to pay the bond payment is not as fatal as it seems. Clearly, the USC agrees that exceptions to the rule must exist.

[27] Accordingly, given that due to the pandemic election rules have been relaxed or modified without official amendments, and that an exception to the bond payment already exists, the Board finds the EGC’s interpretation of the *Nominations Procedure* unreasonable.

b) The Appellant’s Failure to Read the EGC’s E-mail

[28] The respondent argues that the appellant was given notice that he did not pay his bond payment and still failed to rectify the situation. The appellant responds by claiming that the e-mail was sent to his spam folder and therefore it was not read. We need not make a finding of fact on this issue. Rather, we turn to the actions of the respondent.

[29] The respondent admitted that the appellant was inadvertently put onto the candidates list. This list was accessible and viewable on the USC Science Councillor elections webpage. The appellant argued that he relied on this to conclude he had a valid nomination. This is a persuasive argument. The appellant should have been able to rely on the EGC, the election authority, to confirm whether he was validly nominated.

[30] Further, as mentioned above, this was the first that time this platform was used for bond payments. This is relevant because the appellant was unfamiliar with the software and was unsure of whether he would receive confirmation of payment. This unfamiliarity, coupled with the fact that any doubts he had about his payment were quashed when he saw his name on the candidates list, is sufficient to understand why he did not check his spam folder.

[31] Therefore, because the appellant did not expect confirmation of payment due to his unfamiliarity with the program, and because he had no reason to check his spam folder as the EGC placed him on the list of nominees, the EGC's claim that he failed to check his e-mail does not support their decision.

c) Allowing the Appellant to run Compels the EGC to allow other Candidates to run

[32] The respondent argues that allowing the appellant to run forces the EGC to permit other candidates who were disqualified because they failed to pay their bond payment to also run. The appellant made no submissions on this issue.

[33] Simply put, this is not the case. The EGC is not under any imperative to re-add to the candidates list all the students who were disqualified due to failure to pay bond payments. This case is about Mr. Shedeed – it is not about other candidates.

[34] It is true that those other candidates may see this judgment and appeal to this Board to have the EGC's decision overturned. However, any potential appeals will be evaluated on a case-by-case basis. The Board may find that the EGC was reasonable in making some of those decisions. In any event, it would be unjust for this Board to reject the appeal on the basis that it might lead to other justified appeals.

[35] Accordingly, this argument cannot form the basis of a reasonable decision as allowing this appeal does not in law compel the EGC to allow all other candidates to run for election.

d) The Democratic Institutions of Western University

[36] The respondent argues that “the bottom line is that the rules ... must be held consistent for each and every candidate, regardless of circumstance. If we do not do this, we are not able to uphold the democratic institution... necessary to keep Western [University] governed”. To this, the appellant submits that failing to adjust the rules to student’s potentially weak financial status is too rigid of an application of election rules.

[37] The respondent is incorrect when it claims that circumstances cannot be taken into account. The vision statement of the most expansive USC elections document, *Bylaw #2*, clearly states that allowing “any student to be a candidate in an election[n], regardless of financial status” is a foundational principle of USC elections. Having found that the appellant’s financial status did lead to his failure to pay his bond payment, the EGC’s decision directly contradicts this principle. That the appellant could not afford technology reliable enough to successfully pay his bond payment should not preclude him from running for elections.

[38] The desire to protect the democratic institutions of Western University is laudable. However, allowing this appeal does not have the far-reaching consequences the respondent suggests. This is not a case where the USC’s elections rules are being thrown away. This is a narrow exception that has foundations in the *ad hoc* changes to the *Nominations Procedure*, the s. 4.4 exception in the *Finances Procedure*, and the need for flexibility in the COVID-19 era. This is also not a case that will lead to mistrust, doubt, and lack of faith in the democratic process of Western University. In fact, the Board suggests that, upon reading this decision, Western

University's student body may have more faith in the democratic process, as the decision rectifies an honest mistake on the part of the appellant.

[39] Thus, because this decision is a narrow exception to routine procedure, and it may lead to increased faith in the voting process at Western University, this reason does not support the conclusion that the EGC's decision was reasonable.

Conclusion

[40] For the above reasons, this Board finds that it was unreasonable for EGC to remove the appellant's name from the list of candidates, thereby removing him from the USC Science Councillor election ballot. While the EGC did engage in a reasoning process, the flaws in the reasons provided makes its decision an unreasonable one.

PART V: DISPOSITION and ORDER

[41] The appeal is allowed. The Appeals Board orders that the appellant's name be re-added to the list of candidates and that he be listed on the ballot. This order is conditional on the appellant first paying his bond payment.