

Decision of the IEC

October 22, 2010

Complainant: N/A
Respondent: SFSS Board of Directors; Diego Reyerros as representative
Issues: Campaign period; Campaign material approval
Decision: \$100 fine in the form of a donation to the SFU Food Bank

Reasons: para. 1
Concurring: para. 7
Dissenting: para. 16

Per **Jessica Burch**, Jason Chan and Marc Fontaine (CEO) concurring

- [1] We find the facts of the case to be that the SFSS Board of Directors (hereafter, the Board) purchased an advertisement for a referendum campaign side that was printed in The Peak prior to the opening of campaign period and without going through the IEC's approval process for campaign materials. This is an infraction contrary to By-law 14, section 13(a) and Rule 17, section 10(d).
- [2] By-law 14, section 13(a) establishes that all campaign material must be approved by the IEC; Rule 17, section 12(a)(2) clarifies this rule, stating that "Campaign materials must be clearly confirmed as the candidate's materials by the candidate in the Independent Electoral Commission approval process before being distributed or displayed." This did not occur in this case.
- [3] Rule 17, section 10(d) states that "no campaigning shall occur until the Chief Electoral Officer officially opens the campaign period." The campaign period officially opened at 12 noon on Monday, October 18, after the time at which the advertisement was first displayed.
- [4] These policies are put in place to allow a level playing field for all referendum campaigns and to ensure that the IEC will be able to screen out inappropriate campaign materials before they are posted. For the Board to breach these policies is particularly serious, as other candidates and fellow students look to the Board to set an example.
- [5] While we accept that the rule violations were inadvertent, a finding that no infraction occurred could create perceptions of favouritism due to the institutional relationship between the Board and the IEC. That the proposed wording had been previously vetted and approved by other bodies is largely irrelevant in this case. Should the Board be allowed to post campaign materials without the IEC's approval, it sends a message to other candidates that this approval process is optional or unimportant. Such a belief would severely compromise the IEC's ability to monitor campaign materials for compliance with election policies.
- [6] By-law 14, section 8(e) states that the IEC "may rule any referenda invalid, or may impose a fine of up to \$100 for any violation of the By-laws or referenda regulations, which may from time to

time be established”. Rule 17, section 1(n) states that the appropriate deciding criteria between these two penalties is whether or not the infraction compromises the legitimacy of the vote. In our opinion, although severe in principle, the infraction in question is not severe enough to justify ruling the referendum invalid. Therefore, it is our decision that the Board will be subject to a \$100 fine, which shall take the form of a donation to the SFU food bank.

Per Chen Shen

- [7] I have had an opportunity to read the decisions of both Commissioners Jessica Burch and Joshua Lo. I agree with the levying of a fine of \$100 – the maximum allowed under By-Law 14 – in the form of donations to the SFU Food Bank. However, I disagree with the reason for the pursuance of the infraction. I also feel that it is necessary to discuss the severity of the breach.
- [8] In the majority opinion, Commissioner Burch wrote that “a finding that no infraction occurred could create perceptions of favouritism”. With respect, I do not believe that it is necessary to consider public appearance in finding the Board liable for the infraction. It is sufficient that the advertisement was placed under the capacity of a registered side to a referendum question, thus subject to the same electoral rules as all candidates and referenda sides. Furthermore, as both my colleagues have observed, it is particularly egregious that the Board is the offending party, since – having passed the electoral policies in their current form – they ought to be familiar with the relevant rules.
- [9] The facts of this case are undisputed; the only issue to be determined is the severity of the infraction, which is relevant to the appropriate penalty to impose. In considering the severity, it is helpful to review the Electoral and Referenda Policy, R-17, which prescribes the lesser penalty of fines for infractions that will not likely sway the outcome of the vote, and the more severe penalty of disqualification for infractions that will. It is clear that the legitimacy of the vote, or – if interpreted broadly – other factors which impact the fairness of the electoral process, are the only relevant considerations.
- [10] In the general case, the infractions at issue would tend to result in significant advantages to the offending party. Although the Commission makes every effort to keep the turn-around time low for campaign material approvals, it necessarily involves delays. A candidate or referendum side who bypasses this process will be gaining several hours of time. Though this may seem insignificant, it would be accomplished only by also bypassing the SFSS Copy Centre services, resulting in differential pricing and the ability to “jump the queue” of other candidates’ print jobs.
- [11] Publishing *Peak* ads in advance of the campaign period also results in significant advantages. Since *The Peak* only publishes on Mondays, and arrives on stands before noon, the earliest time an advertisement could be purchased while remaining wholly within the campaign period is during second week of campaigning. The several hours of actual infringement of electoral policy in fact enables a week-long lead over compliant advertisements.

- [12] For these reasons, I would suggest that there is a *prima facie* situation of unfairness where these infractions occur. Whether such unfairness rises to the level of impacting on the legitimacy of the vote remains to be decided on the facts of each case.
- [13] The representative for the Board offered several defences at the hearing of October 20th. Reasons which I do not find relevant to the issue include: honesty of mistake; importance of the question; work and expenses expended in putting the question to referendum; or that the materials have been approved by other university bodies. I accept, however, the pertinence of the fact that there is so far no registered opposition to the referendum. Where – as noted above – the early publication of *Peak* ads would generally result in a week-long advantage, in the absence of opposition there is no party to be disadvantaged. The infringing impact of the ad would therefore be limited to the few hours prior to campaign period.
- [14] I would also take into account the fact that the Board has, through motion, increased the campaign budget from \$300 to \$5000 for this referendum question. I would caution against construing this observation to suggest that the Board should use more liberties with their discretion to suspend rules; rather, I take it to indicate the scope of this campaign. When viewed in combination with the arguably common knowledge that the Board is highly in favour of the health plan, it is clear that this is intended to be a widespread campaign involving multiple mediums of communication for the complete duration of the campaign period.
- [15] Taking all the circumstances into account, I find it highly unlikely that the infringing impact of several hours of unauthorized advertisement would threaten the legitimacy of the referendum question. However, it is nevertheless necessary to communicate that electoral infractions will not be tolerated, especially of the Board. I would therefore impose the maximum fine allowable under By-Law 14, to the amount of \$100.

Per **Joshua Lo** (dissenting)

- [16] I am in complete agreement that the available facts have established that the Board, acting as the proponents to the health plan referendum question, has violated By-Law 14 S-13(a) under the SFSS Constitution and By-Laws. I am also in complete agreement about the violation of Rule 17 S-10(d) under the SFSS Policy Manual. As my colleagues have indicated, these are serious violations.
- [17] Rule 17 S-1(n) governs the application of penalties for violations. The discretion provided for selecting one of the three outlined penalties is based on the severity of the issue, and I side with the penalty of disqualification. As this is not a candidature infraction, I argue for a dismissal of the referendum question. The posting of the advertisement in “The Peak” newspaper constitutes an *[action] that clearly [indicates] infractions of policy or the by-laws that are demonstrable in fact.*
- [18] The issue in disagreement is the materiality of these violations and their ability to compromise the legitimacy of the vote. The impact of the violation need not have occurred, and can be

purely hypothetical, so long as it is a reasonable outcome *in the judgment of the Independent Electoral Commission*. I outline my rationale below without order of importance.

- [19] The Board is responsible for approving the current election policies and it is reprehensible for the Board to authorize the violation of the same policies. Although it has been raised that this may have been a result of an administrative oversight and an accident, I see this violation of absolute liability. The possible occurrences of an accident or mishaps are not mitigating factors.
- [20] The Board has passed a motion to suspend Rule 17 S-7(c) to raise the spending limit for this particular referendum question. However, there was also an opportunity for the Board to also suspend the policies in question. This was not done, and therefore, I am left with no doubt that the Board has every intention of retaining such policies.
- [21] The Board support for a referendum side can be threatening to the opposing side. This is compounded by the placement of a costly advertisement (full-page colour) as part of a campaign that is expected to greatly exceed the standard \$50 budget. The financial dedication unmistakably indicates the seriousness and the internal support of the Board for the proponent side. The suspension of Rule 17 S-7(c) emphasizes this overwhelming Board support.
- [22] The dismissal of the referendum question will undoubtedly impact the student body. However, this is not a relevant factor for the decision that I am to make, and therefore, I can only advise that the violations were committed by the very body of students who ought to have read and understood the relevant policies, and also ensure that their actions are in the best interest of the students. The consequences of any violations should not be reduced by holding the students' well-being hostage.