

# Decision of the IEC

November 4, 2010

Complainant: N/A  
Respondent: Jay Chen  
Issues: Campaign during voting period; Campaign materials  
Decision: Disqualification

Per **Chen Shen**; Jessica Burch, Jason Chan, Marc Fontaine (CEO), and Joshua Lo concurring

## Facts

- [1] On November 2nd, shortly after the beginning of voting, a Commissioner discovered that candidate Jay Chen's Facebook event was still available online. The event remained online until at least 2:47am, at which time he sent a message to all members, stating "OK GUYS! I have to get rid of this event! Violating SFSS voting rules. => Remember to vote!" The event was also "private" at the time of discovery and until its removal.
- [2] These actions contravene the prohibition on campaigning during voting period in By-Law 14 s.15(a), R-17 s.10(e), and R-17 s.12(g); the requirement for Facebook materials to be public in R-17 s.10(c)(1); and the prohibition against unsolicited messages in R-17 s.10(c)(2).
- [3] The candidate did not attend the infraction hearing, nor did he attempt to reschedule or otherwise communicate with the IEC. No explanation, justification, or excuse has been offered.

## Electoral Policy

- [4] As the infractions are evident, the only issue to consider is the appropriate penalty to impose. The Electoral & Referenda Policy, R-17, defines two general classes of infractions: those that compromise the legitimacy of the vote, and those that do not. The former category is sufficient to ground a disqualification (or nullification in the case of referenda) while fines or directed actions are available for lesser infractions. The determination of an infraction's category is made by the IEC, but there is not yet a clear guideline with which to assess the impact of infractions. I will therefore endeavour to explicate such a guideline at this time.
- [5] The two classes of infractions are defined in R-17 s.1(n). Both subsections (2) and (3) focus on the "legitimacy of the vote" as the crucial point of distinction, which warrants expounding upon. In the *Board of Directors* (Oct. 22, 2010) decision, I implicitly assumed two components: the actual outcome of the vote, and general fairness of the electoral process. I believe that this is a good interpretation, though I would now rephrase it in more certain terms.
- [6] When assessing an infraction's impact on the legitimacy of the vote, then, these factors should be taken into account: 1) Does the infraction call the reliability of the results into question? For example, direct or indirect tempering with the polling process or data, or unfairly obtaining votes from the infraction in close races. 2) Does the infraction result in substantial unfairness, such as

a significant advantage or disadvantage for any candidates? For example, the distribution of campaign materials while other candidates abide by campaigning restrictions.

- [7] It is likely that in many circumstances, an infraction meeting one criterion will also meet the other, though I anticipate the second factor to be more commonly applicable. Only one of the two factors must be met for the legitimacy of the vote to be compromised. If either the reliability of the result is called into question or a substantial unfairness arises, it is sufficient to impact the legitimacy of the vote.
- [8] Finally, I must address whether the prospective or actual impact of the infraction ought to be assessed. The language in R-17 s.1(n)(3), “Disqualification for actions that... compromise the legitimacy of the vote”, suggests an assessment of actual impact. However, when read together with subsection (2), “Fines... for policy violations that do not result in any *probable impact* on the legitimacy of the vote”, and with recognition that it is impossible or at least impracticable to ascertain the actual impact of an infraction, it is clear that the proper interpretation is that of a prospective assessment. If the infraction can reasonably be foreseen to compromise the legitimacy of the vote, it shall be considered to have done so. The fact that it did not in actuality compromise the vote’s legitimacy – perhaps by chance – should not benefit the infringer.
- [9] This general test should, of course, be reasonably flexible and receptive to special circumstances that may arise, the merits of which could only be assessed on a case-by-case basis.

#### Disposition

- [10] In the present case, there is no issue with the reliability of results, save perhaps certain indirect and remote influences. The infractions do, however, rise to the level of substantial unfairness.
- [11] The failure to remove the Facebook event, as well as the reminder message well into voting period, provided significant advantages over other candidates who by that time no longer had any public online presence or communication with their supporters. They were only able to remind supporters to vote prior to the opening of polls, so some – unfortunately – are bound to forget. Maintaining an online presence and sending a reminder message during voting period serves to mitigate such forgetfulness, which other candidates must contend with. Although it could properly be argued that such substantial unfairness arises artificially from the prohibition of campaigning during voting period, it is pertinent so long as the prohibition exists. These infractions therefore compromise the legitimacy of the vote.
- [12] The further infractions of the event not being open to all Society members, and the mass-messaging to all invited guests rather than solely those attending, increases the total severity of these infractions. In light of the foregoing conclusion, however, I will decline to consider whether they are independently sufficient to compromise the legitimacy of the vote.
- [13] I would disqualify Jay Chen for the reasons above.