UNIVERSITY OF TORONTO STUDENTS' UNION
APPELLATE BOARD

BETWEEN:

Demand Better
Appellant
and
Elections & Referenda Committee
Respondent

Demand Better v. ERC (Ruling 020)

Hearing: March 21, 2017
Written reasons: April 24, 2017

Panelists: Chairperson Boutilier and Sun, Nash, Kidd and Bryce

Appearances:
Daman Singh, for Demand Better
Aidan Fishman, for the Elections & Referenda Committee

Appeal from Ruling 020 (16 March 2017) of the Elections & Referenda Committee, setting aside Ruling 018 (15 March 2017) of the Chief Returning Officer. Appeal allowed.

The following is the judgment delivered by

THE BOARD –

Introduction

1. The sole issue in this appeal is how to apply Article VI(3)(b) of the *Elections Procedure Code* (the "Code") to violations that occur before the start of the demand period. For the reasons indicated below, we find that the interpretation of this provision offered by the appellant Demand Better is reasonable and the interpretation offered by the respondent Elections & Referenda Committee ("ERC") is unreasonable. Accordingly, we would allow the appeal.

2. Article VI(3)(b) of the *Code* reads as follows:

> **Allegations of Violations**
> Any allegations of violations of this Code must be submitted to the CRO. Allegations must be made within forty-eight (48) hours of the violation, and within ninety-six (96) hours of the close of the Voting Period.

Facts and Prior Proceedings

3. The Chief Returning Officer ("CRO") received a complaint of pre-campaigning against Demand Better. The complaint alleges that William Graydon, a Non-Arm's-Length Party associated with Demand Better, deliberately engaged in pre-campaigning. The complaint was made within 96 hours of the close of the Voting Period. However, it was submitted well after 48 hours of the alleged incidents involving Graydon. It was also submitted after 48 hours of the start of the campaign.

4. The CRO found that Graydon violated Article VI(1)(a) of the *Code* for pre-campaigning and awarded 10 demerit points against each of the executive candidates of Demand Better. The CRO's reasons did not address Article VI(3)(b) of the *Code*: *CRO Ruling 018* (15 March 2017).

5. Demand Better appealed the CRO's ruling to the ERC. On March 16, the ERC confirmed the demerit points awarded by the CRO and issued additional demerit points for a violation of Article VI(1)(k): *ERC Ruling 020* (16 March 2017).

6. On appeal to the ERC, Demand Better argued that the complaint should be dismissed under Article VI(3)(b) because it was submitted well after 48 hours of the impugned incidents involving Graydon. The ERC rejected this argument in *ERC Ruling 020*, *supra*:

> This provision obviously cannot strictly apply to pre-campaigning violations, since these will typically occur more than 48 hours before complaints can even be submitted.

7. Demand Better then moved to appeal the Ruling to this Board.

Arguments on Appeal

Demand Better

8. On appeal to the Board, Demand Better stated that it was not contesting the factual findings of the CRO and the ERC that Graydon had engaged in pre-campaigning activities. Instead, it restricted its arguments to whether the complaints should be dismissed because they were made outside the time limit prescribed by Article VI(3)(b) of the *Code*.

9. Demand Better argued that the ERC's interpretation of Article VI(3)(b) was not consistent with the text of that provision. Demand Better submitted that the fact that the provision uses the word "and" to link the two components of that provision indicates that the complaint must be made both within forty-eight hours of the violation and within ninety-six hours of the close of the Voting Period.

10. Demand Better argued that the purpose underlying Article VI(3)(b) was to ensure that complaints are addressed in a timely manner and to prevent strategic complaint-dumping.

11. Demand Better then submitted that the ERC's interpretation would lead to an absurd

result inconsistent with the underlying purpose of Article VI(3)(b). It would create a situation in which a candidate could wait until losing an election and then complain about an instance of pre-campaigning that occurred months beforehand.

12. Finally, Demand Better proposed an interpretation of how Article VI(3)(b) would apply to pre-campaigning violations. It submitted that an instance of pre-campaigning becomes an offence under the Code at the point at which the beneficiary of the pre-campaigning officially becomes a candidate. Demand Better submitted that only when an individual officially becomes a candidate is this provision of the *Code* engaged. If an individual pre-campaigned but then decided not to run, Demand Better observed that the *Code* would never be violated since an essential element of the pre-campaigning offence is that the pre-campaigning is directed at actual candidates in the Campaign Period.

Elections & Referenda Committee

13. The ERC agreed with Demand Better that the complaint in question was made to the CRO much longer than 48 hours after the events had taken place and more than 48 hours after the start of the campaign.

14. The ERC also agreed with Demand Better that the underlying purpose of Article VI(3)(b) is to ensure that violations of the *Code* are reported swiftly and in a timely manner.

15. The ERC defended its previous ruling on the basis that a literal reading of Article VI(3)(b) would lead to an absurdity, since pre-campaigning violations might be committed more than 48 hours before the campaign period begins. Since the CRO and the ERC are in no position to rule on these violations before the campaign begins, this would render most pre-campaigning violations unenforceable.

16. In its view, since a literal interpretation would lead to an absurd result, the ERC submitted that the 48-hour requirement of Article VI(3)(b) should have no application to pre-campaigning violations.

17. The ERC also submitted that it would be unfair to accept Demand Better's proposed interpretation of how Article VI(3)(b) should apply to pre-campaigning violations. The ERC argued that potential complainants would have no way of knowing that they had to submit pre-campaigning complaints within 48 hours of the campaign commencing.

<u>Analysis</u>

The Narrow Issue: The Interpretation of Article VI(3)(b)

18. Since Demand Better did not challenge the factual findings of the CRO and the ERC about Graydon's pre-campaigning activities on appeal to the Board, these issues are not before the Board and we make no comment on them.

19. Instead, the sole issue before the Board is the interpretation of Article VI(3)(b) of the *Code*. This issue can be expressed as follows: Was the ERC's interpretation of Article

VI(3)(b), that pre-campaigning offences are not subject to the requirement that complaints must be made within forty-eight hours of the violation, reasonable?

Standard of Review

20. The Board finds it helpful to draw on the jurisprudence of the Supreme Court of Canada to identify the standard of review. According to *Black's Law Dictionary* (10th ed., ed. Brian A. Garner (St. Paul, MN: Thomson Reuters, 2014)), the standard of review can be defined as:

> "The criterion by which an appellate court…measures the…propriety of an order, finding, or judgment entered by a lower court." [p. 1624]

21. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, the Supreme Court of Canada established that the standard of review for an administrative body interpreting its own enabling legislation is generally reasonableness: para. 54. Article VI(3)(a) of the *Code* provides that the ERC may enforce the *Code* when the CRO does not make a ruling and that the ERC can modify any ruling of the CRO. The *Code* is the ERC's own statute and gives the ERC the authority to interpret it. Accordingly, the Appellate Board will review the ERC's interpretations of the *Code* on the standard of review of reasonableness. We note that the Students' Society of McGill University Judicial Board has also applied the reasonableness standard of review, which reinforces the our conclusion that reasonableness is the appropriate standard: see *Khan v. Elections SSMU*, 29 April 2014 (Students' Society of McGill University Judicial Board), at paras 6-7.

22. Reasonableness is a deferential standard. It has two main components:

    1) Is the administrative decision justifiable, transparent, and intelligible?

    2) Does the administrative decision fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law? (*Dunsmuir*, *supra*, at para. 47)

23. There may sometimes be multiple reasonable interpretations of the same statutory provision. In such cases, the administrative decision maker – in this case the ERC – is best placed to make the choice among those multiple reasonable interpretations: see *McLean v British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, 2013 SCC 67, at paras. 32-33. Accordingly, it is not enough for Demand Better to show that its proposed interpretation of Article VI(3)(a) is reasonable. It must also show that the ERC's interpretation of that same provision is unreasonable: *McLean*, *supra*, at para. 70.

24. At the same time, reasonableness "takes its colour from the context": *Canada (Minister of Citizenship and Immigration) v Khosa*, [2009] 1 S.C.R. 339, 2009 SCC 12, at para. 59. That context, which includes the text, context, and purpose of the statute, determines the range of possible, acceptable outcomes that a reasonable decision must fall within: *Canada (Human Rights Commission) v Canada (Attorney General)*, [2011] 3 S.C.R. 471, 2011 SCC 53, at para. 64.

Textual Analysis of Article VI(3)(a)

25. The starting point of our analysis is the text of Article VI(3)(a).

26. As the appellant submits, the use of the word "and" to link the phrases "within forty-eight (48) hours of the violation" and "within ninety-six (96) hours of the close of the Voting Period" would indicate that both requirements must be met on a plain reading of the provision.

27. As the ERC correctly submits, though, a strict reading could lead to the absurd result of making pre-campaigning violations unenforceable.

Purpose of Article VI(3)(a)

28. This brings us to the purpose underlying Article VI(3)(b). As both parties agreed, the purpose of the provision is to ensure that complaints are brought forward in a timely manner.

29. The question is thus whether there is a reasonable interpretation of Article VI(3)(b) that avoids the absurd result pointed to by the ERC while simultaneously giving meaning to its text and purpose.

Flaws of the ERC's Interpretation

30. The ERC's proposed interpretation does avoid the absurd result of making pre-campaigning violations unenforceable. However, it does so at the cost of giving no effect to the "within forty-eight (48) hours of the violation" requirement that the text specifically establishes.

31. As the appellant submits, the ERC's proposed interpretation also undermines the purpose of Article VI(3)(b), namely to ensure that complaints are submitted to the CRO in a timely manner. Since under ERC's proposed interpretation the forty-eight hour requirement does not apply to pre-campaigning violations, it would be possible for a candidate to learn about a pre-campaigning violation months in advance and report it strategically after the polls had closed.

32. The absurdity that this interpretation would lead to is exemplified through the following hypothetical. If a violation occurred on the first day of campaigning, the complaint must be made within 48 hours or it is barred by Article VI(3)(b). This ensures that complaints are made in a timely manner. Yet if a violation occurred a day before the start of campaigning, the complaint could be made up to four days after the polls close and still be admitted under the ERC's interpretation. This result is anomalous and indicates that the ERC's interpretation does not further the purpose of ensuring timely complaints that the ERC agreed underlies Article VI(3)(b).

Merits of Demand Better's Alternative Interpretation

33. Moreover, the alternative interpretation that the appellant has proposed gives meaning to the text and purpose of Article VI(3)(b) while avoiding the absurd result pointed to by the ERC.

34. The alternative interpretation is more in keeping with the text of Article VI(3)(b) because it does not eliminate the "within forty-eight (48) hours of the violation" textual requirement in regard to pre-campaigning violations.

35. The alternative interpretation is more in keeping with the purpose of Article VI(3)(b) because it ensures that pre-campaigning complaints are made in a timely manner once the campaign period begins.

36. The alternative interpretation also avoids the absurd scenario pointed to by the ERC. The ERC's main concern was that a literal interpretation of Article VI(3)(b) would render pre-campaign violations unenforceable. Demand Better's interpretation avoids this because it starts the ticking of the 48-hour clock at the beginning of the campaign period. It is thus incorrect to say that pre-campaigning violations would be unenforceable under these circumstances, as persons would be free to bring complaints after the campaign begins at a time when the CRO and ERC would be in a position to adjudicate them.

37. The result, of course, is that complaints made after this 48-hour limitation would be dismissed. This is in keeping with the purpose of Article VI(3)(b) of ensuring timeliness.

38. The Board rejects the ERC's argument that this would be unfair to individuals bringing complaints about *Code* violations. The ERC argued that there would be no way the complainant could have known of the time limitation. In this regard, we make two points:

    1) An individual who read the text of Article VI(3)(b) would see the 48-hour requirement and would recognize the need to bring a complaint sooner rather than later; and

    2) A complainant's mistake of law regarding the proper meaning of Article VI(3)(b) is not relevant to its interpretation. As the ERC itself acknowledged during oral argument, if a complaint was made about a violation that occurred during the campaign, the complaint would have to be dismissed, and the fact that the complainant was unaware of the time limitation would be irrelevant.

Conclusion

39. In conclusion, we find that the ERC's interpretation of Article VI(3)(b) is inconsistent with both the text and purpose of that provision. We find that Demand Better's alternative interpretation of that provision is consistent with the provision's text and purpose while avoiding the absurd result pointed to by the ERC. Accordingly, we conclude that the ERC's interpretation of Article VI(3)(b) does not fall within the range of possible, acceptable outcomes defensible in light of the facts and law and is therefore

unreasonable. We accept Demand Better's proposed alternative interpretation of the provision as reasonable.

Disposition

40. For the reasons indicated above, we would allow the appeal. Accordingly, we direct the ERC to remove all demerit points awarded against Demand Better in ERC Ruling 20 on the basis that the complaint was not made within 48 hours of the start of the campaign.

41. We note that the University of Toronto Students' Union is free to amend the *Code* if it wishes to modify or remove the requirement of Article VI(3)(b) that allegations must be made within 48 hours of the violation as it applies to pre-campaigning violations.

Appeal allowed.