

**UNIVERSITY OF TORONTO STUDENTS' UNION  
APPELLATE BOARD**

**BETWEEN:**

**We the Students**  
Appellant  
and  
**Elections & Referenda Committee**  
Respondent

*We the Students v. ERC (Ruling 022)*

**Hearing:** March 24, 2017

**Written reasons:** April 24, 2017

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

**Appearances:**

André Fast, for We the Students

Ryan Gomes, for the Elections & Referenda Committee

Appeal from Ruling 022 (20 March 2017) of the Elections & Referenda Committee, setting aside Ruling 028 (17 March 2017) of the Chief Returning Officer. Appeal dismissed, Panelist Nash dissenting.

The reasons of Chairperson Boutilier and Sun, Kidd and Bryce were delivered by

PANELIST SUN —

Introduction

1. In this appeal, the Board is called upon to consider the application of the “Non-Arm’s-Length Party” provisions of the *Elections Procedure Code* (“Code”). Specifically, under what circumstances can the activities of the directors of a student club be attributed to the club generally as a Non-Arm’s-Length Party?
2. The Chief Returning Officer (“CRO”) investigated social media activities by four individuals, who were directors of the Chinese Undergraduate Association of the University of Toronto Mississauga (“Association”), a Non-Arm’s-Length Party supporting the Demand Better slate. Finding that the activities violated the *Code* to the benefit of Demand Better, the CRO assigned demerit points against that slate. The Elections & Referenda Committee (“ERC”), however, set aside the CRO’s decision on the basis that the individuals’ actions did not represent the Association.

3. The appellant, the We the Students slate, now challenges the ERC's decision before the Board.
4. This appeal was heard on March 24, 2017. At the conclusion of the hearing, the Board deliberated and informed the parties that a majority of the Board were of the opinion that the appeal should be dismissed, with written reasons to follow.
5. These reasons are provided below. In what follows, I explain the majority's conclusion that the ERC's decision was reasonable. The directors' activities could not be attributed to the Association and consequently there was no basis for the CRO to assign any demerit points against Demand Better. In light of this finding, it is unnecessary to consider whether the activities in question violated the provisions of the *Code*.

### Facts and Prior Proceedings

6. At the outset, it is important to note that both parties accepted that the Chinese Undergraduate Association of UTM, as a whole, was a Non-Arm's-Length Party ("NALP") of Demand Better, having endorsed the slate on social media prior to the alleged events: *ERC Ruling 022* (20 March 2017); Appellant's Written Submissions, at p. 2 and Exhibits; Respondent's Written Submissions, at para. 9.
7. On March 16 and 17, the CRO investigated complaints by the We the Students slate that four individuals, who were directors of the Association, engaged in campaigning on WeChat on behalf of the Demand Better slate: *CRO Ruling 028* (17 March 2017).
8. WeChat is a mobile messaging service similar to WhatsApp and Facebook Messenger, with the ability to send messages to groups of people.
9. The CRO found that the four individuals had shared Demand Better's campaign materials on WeChat groups. As the ERC later clarified, some of these materials had been shared in a WeChat group used by the Association, which comprised the Association's 88 executives, directors and officers: see *ERC Ruling 022, supra*.
10. In addition, the CRO found that the individuals had utilized a "red envelope" functionality on WeChat to send money to users in the group. The red envelope function allows WeChat users "to provide money in the form of virtual credits and then money is deposited into a user's WeChat pay account": *CRO Ruling 028, supra*.
11. The CRO found violations of the *Code* including:
  - Article VI(g)(v) ("General sabotage of the campaigns of other candidates");
  - Article VI(g)(vi) ("Malicious or intentional breach of elections policy");
  - Article VI(g)(viii) ("Any attempt to undermine the electoral process"); and
  - Article VI(k) ("No Distribution of Goods").

The CRO assigned each candidate from the Demand Better slate three demerit points for each violation, amounting to twelve demerit points for each candidate, because the Association was a NALP of Demand Better: *CRO Ruling 028, supra*.

12. On appeal to the ERC, Demand Better argued that the CRO erred in finding that there had been a violation of the *Code*. Ultimately, the ERC set aside the demerit points assigned against Demand Better, on the basis that “the individuals making the red envelope posts were not non-arm’s length parties of Demand Better”: *ERC Ruling 022, supra*.
13. Furthermore, the ERC dismissed the allegation that the incident involved “a severe case of bribery”. It noted that, on the evidence before it, the highest amount of money obtained through a single red envelope sent on WeChat was 0.33 Chinese yuan, amounting to approximately \$0.06 Canadian dollars: *ERC Ruling 022, supra*.
14. The originator of the complaint, We the Students, appealed the ERC’s decision to the Appellate Board. Prior to the hearing of this appeal, both parties investigated further. Although the role of two of the four individuals in the Association was unclear, the ERC found that the other two individuals served as event directors reporting to an executive of the Association. We the Students further alleged that in addition to the 88-person WeChat group, attempts to solicit votes occurred in a separate 500-person WeChat group that included the general members of the Association.

## Analysis

### *Standard of review*

15. In *Demand Better v. ERC (Ruling 020)*, 24 April 2017, the Board held that the applicable standard of review for decisions of the Elections & Referenda Committee on the interpretation and application of the *Code* is reasonableness: para. 21. However, we noted that reasonableness “takes its colour from the context” and that the ERC must remain within the “range of possible, acceptable outcomes”: para. 24. A decision of the ERC may fall outside this range if it “misapplied the relevant Bylaws and/or Policies, or otherwise breached the principles of fundamental justice”: UTSU Bylaw XVIII(9)(a).
16. I add that similarly constituted Boards at other Canadian universities have also concluded that the applicable standard of review for decisions of electoral officers in student union elections is reasonableness: see, for example, *Khan v. Elections SSMU*, 29 April 2014 (Students’ Society of McGill University Judicial Board), at paras. 6-7; *Crompton v. AMS Elections Administrator*, 2008 UBCSC (University of British Columbia Student Court), at para. 8.

### *The definition of “Non-Arm’s-Length Party”*

17. In this appeal, the first question is whether the activities of the Association’s directors could render the Demand Better slate liable at all. Under the *Code*, a candidate or slate

may be assigned demerit points for violations of the *Code* committed by a Non-Arm's-Length Party of that candidate or slate.

18. The definition of a Non-Arm's-Length Party is set out in Article I(1) of the *Elections Procedure Code*:

**Non-Arm's-Length Party** means an individual or group that can be shown to have:

- i. publicly campaigned with a Candidate
- ii. campaigned using a Candidate's approved physical materials
- iii. performed Campaign-related tasks that are not Campaigning on behalf of the Candidate
- iv. had their actions which are deemed in violation of the Code publicly defended by the Candidate
- v. in the context of an election, had their online content shared or substantively endorsed by a Candidate or by another Non-arm's-length Party.

This does not apply if the Candidate has publicly stated that they do not desire or condone the party performing such tasks.

19. On appeal to the Board, the appellant challenged the reasonableness of the ERC's determination that the individuals making the WeChat posts were not NALPs of Demand Better. First, the appellant argued that the ERC erred by not recognizing that all executives, directors and officers of the Association were NALPs of Demand Better. Second, it argued that the ERC erred by denying that the actions of the four directors in this case were attributable to the Association itself; this could then render Demand Better liable for any violations of the *Code* committed by the Association's directors, since the Association was a NALP of Demand Better.

20. As I will discuss, however, neither of these arguments are tenable in my opinion.

*Whether the directors were personally NALPs*

21. As outlined above, an individual or group must fall within one of the five categories set out under Article I(1) of the *Code* in order to be considered as a NALP. During the hearing before the ERC, both parties had agreed that the directors "were not non-arm's length parties in their personal capacity": *ERC Ruling 022, supra*.
22. On appeal, the appellant withdrew this concession and submitted that the four directors of the Association could themselves be considered NALP under category (iii), since in its view, the directors' activities amounted to "Campaign-related tasks that are not Campaigning". In response, as the respondent observed, the definition of "Campaign-related tasks" excludes "Campaigning", which includes "any attempt to solicit votes for or against a candidate": Article I(1) of the *Code*.
23. In my opinion, since the activities of the directors could be properly characterized as an "attempt to solicit votes for" the Demand Better slate, the ERC's reasonably concluded that the directors could not have been NALPs under category (iii). Nor can it reasonably

be said that the directors fell under category (ii), since the electronic WeChat activities did not utilize the “approved physical materials” of Demand Better (emphasis added).

24. Even if the directors could have been NALPs personally, however, there was no evidence that the Demand Better slate had knowledge of their WeChat activities at the time they occurred. The appellant faces the difficulty of explaining why a candidate or slate should be assigned demerit points when they were unaware of the actions of a NALP.
25. On this point, the appellant submitted that it was not necessary for a candidate or slate to have knowledge of the activities of a NALP in order to be held liable under the *Code* for violations committed by the NALP. Generally, a reasonable interpretation of the *Code* is one that does not lead to absurd results: *Demand Better, supra*, at para. 32. Yet this proposed interpretation would lead to an absurd result, given that it would effectively allow any individual to sabotage a candidate by conducting themselves as a NALP of that candidate and deliberately violating the *Code*.
26. Therefore, in the absence of any suggestion that the directors could fall under any of the other categories of NALP defined in the *Code*, I consider that the ERC made a reasonable determination that none of the directors was a NALP in their personal capacity.

*The attribution of the activities of the directors to the Association*

27. Under the *Code*, where a student club endorses a candidate or slate, and that candidate or slate then publicizes the endorsement, the club is considered a NALP of the candidate or slate. As previously mentioned, neither party to the appeal contested the characterization of the Association itself as a NALP of Demand Better.
28. The appellant submitted that, as the Association was a NALP of Demand Better, any acts committed by the Association’s directors, staff and executives would “represent the club”: Appellant’s Written Submission, at p. 2. Because the activities of the four directors violated the *Code*, it argued, their activities should have been treated as acts committed by the Association. Thus, the appellant submitted that the ERC erred in setting aside the demerit points assigned to Demand Better.
29. The *Code* does not address the circumstances under which the acts of the executives, directors and officers of a NALP club can be considered as acts of the club itself. Faced with this novel issue, the ERC concluded that “the unlawful actions of four directors cannot reasonably be considered to represent the club unless officially endorsed by the club or its president”: *ERC Ruling 022, supra*.
30. In my view, the ERC made a reasonable determination on this issue that was supportable by “justifiable, transparent, and intelligible” reasons: *Demand Better, supra*, at para. 22.
31. The ERC rejected the view that merely by virtue of being a director or officer of a student club, an individual’s acts are necessarily to be regarded as acts on behalf of that club.

Although I acknowledge the appellant's correct observation that the Association can only effectuate its policies through the actions of its directors, it does not follow that all of their actions are actions in their capacity as the Association's representatives.

32. In arriving at its conclusions, the ERC considered the practical reality of student clubs and student union elections, an area where it possesses a particular familiarity and on which it should be accorded a degree of deference by the Board. To automatically attribute a director's actions to a club would, as the ERC contended, permit a director to undermine his or her club's endorsement of a slate by taking actions that deliberately violate the *Code*. Given the significant disagreement that might exist within a club over its internal policy concerning election endorsements, I would hesitate to suggest that clubs invariably have an obligation to monitor and/or proscribe certain social media activities by their executives, directors and officers.
33. Moreover, club directors or officers are not always obliged to take actions to support a slate that their club endorses. The presumption that all directors are representing their club whenever they make comments in relation to a student union election is therefore unwarranted, and accordingly, the ERC was justified in rejecting the appellant's argument on this point. An act committed by an individual who happens to be a director of a student club cannot, without more, be regarded as an act of the club itself.
34. On the facts of this appeal, the ERC decided that the specific WeChat activities in question did not occur under circumstances in which they could be attributed to the Association as a whole.
35. First, the ERC found that none of the four directors were listed as executives of the Association. Second, given that at least two of the individuals were listed as "event directors" for the Association, it was not apparent that their roles related to the Association's relationship with the Students' Union or the election. Third, the ERC argued on appeal that there was no indication that the Association adopted any internal policy on statements made by its executives, directors and officers regarding the election. The ERC also suggested that it was beyond the capacity of the Association to oversee the comments of each individual director and could not control the WeChat activities of all of its directors.
36. Regrettably, I cannot agree with my colleague Panelist Nash that the ERC's determination, that the WeChat activities of the four directors was not attributable to the Association, was unreasonable and fell outside a range of acceptable outcomes. As outlined above, the ERC had relied on a number of objective factors to support its finding.
37. In particular, I find the absence of control by the Association over its directors' expressions of support for a candidate or slate, both as a matter of club policy and as a practical matter, to be a convincing basis for the ERC's decision. In light of this fact, its

Ruling that the “four directors cannot reasonably be considered to represent the club” was justifiable.

38. That is not to say that clubs are never responsible for the activities of their executives, directors and officers. In some cases, it will be appropriate for the ERC or this Board to infer that given the context, club directors must have been acting in their capacity as directors and not in their personal capacity. However, I would respectfully disagree with my colleague when she suggests, at paragraph 60 of her dissenting reasons, that the Board should recognize a responsibility on clubs to oversee all the activities of their members or directors. While some clubs may adopt policies concerning the conduct of their directors in relation to campaigning, or possess the ability to oversee and sanction inappropriate campaigning, a club that lacks these features should not automatically be assumed to condone all the election-related activities of its directors.
39. Without compelling countervailing factors on the record, I conclude that the ERC decided reasonably that the activities of the four directors could not be attributed to the Association.

*Whether the Association violated the Code by failing to moderate its WeChat groups*

40. The remaining issue is whether the Association, by virtue of having failed to moderate its internal WeChat groups, violated the *Code* as a NALP of Demand Better. On the evidence available to the Board, it was unclear whether the Association had the power to remove messages or posts in its groups.
41. At the hearing of this appeal, the ERC submitted that the Association did not possess the capacity, from a technical perspective, to retract or recall offending posts on WeChat. Given that this submission was not contradicted by the appellant, it would be unwarranted for the Board to intervene on this point.
42. There is no basis for assigning demerit points against the Demand Better slate for violations of the *Code*, both because the directors of the Association were not personally NALP of Demand Better and because the activities in question could not be regarded as acts committed by the Association, the only NALP of Demand Better implicated in this appeal. For this reason, it is unnecessary to consider whether the individuals’ activities violated the provisions of the *Code*.

Disposition

43. The ERC concluded that there was no basis for assigning demerit points against Demand Better, and it set aside the CRO’s decision. Its decision regarding the interpretation and application of the *Code* was reasonable. Accordingly, I would dismiss the appeal.
44. I thank the parties for their presentations, which greatly assisted the Board.

Kerry Sun

The following is the opinion of

PANELIST NASH (dissenting) —

Introduction

45. This is an appeal from from Ruling 022 (20 March 2017) of the Elections & Referenda Committee (“ERC”), setting aside Ruling 028 (17 March 2017) of the Chief Returning Officer (“CRO”). After receiving several complaints, the CRO concluded that the Demand Better slate should be held liable for the actions of four members (Livia, Renee, Savannah, and Justin) of the Chinese Undergraduate Association of UTM (CUA UTM), which were in contravention of provisions in the University of Toronto Students’ Union Elections Procedure Code (“EPC”). Central to this matter was whether Demand Better could be held responsible for the actions of certain members of the CUA UTM as a non-arm’s length party within the meaning of the term as set out in Article I.1 of the EPC.
46. The complaints made to the CRO were in respect of the exchange of “red envelopes” by CUA UTM members in an internal chat group. It was purported that the red envelopes, which contain small amounts of money, were being sent to persuade individuals to vote for the Demand Better slate. Since Panelist Sun has already outlined the facts in his majority judgment, and the facts are largely agreed upon by all parties, I will not reiterate the facts or procedural history.
47. The issues to be determined on this appeal are whether the ERC’s decisions with respect to the following were reasonable:
  - i. Whether the conduct of the CUA UTM members constitutes a violation of the Articles VI(g)(v), VI(g)(vi), VI(g)(viii), and VI(k) of the EPC;
  - ii. Whether the CUA UTM members’ actions are attributable to CUA UTM as a whole, or whether they were acting in an individual capacity;
  - iii. Whether CUA UTM’s failure to condemn the actions of the specific members constitutes a violation of the EPC provisions; and
  - iv. Whether Demand Better is liable for the actions of the specific CUA UTM members and/or the Association as a whole, as Non-Arm’s Length Parties (“NALPs”).
48. I conclude that the ERC’s decision not to sanction was unreasonable. It is evident that, to any objective observer, the impugned conduct was highly suspicious. While I think that the conduct did amount to bribery in violation of the EPC, even on a charitable reading of events, CUA UTM and the members in question flouted the provisions in the EPC that undermines the appearance of fairness and propriety, which is integral to the validity of the electoral process.

## Violations of the EPC

49. The respondents contended that the exchange of red envelopes was merely a symbol of appreciation for taking part in the voting process, rather than an attempt to buy votes. The ERC considered the cultural context of the red envelopes and the very small monetary amount (only as much as \$0.06), in determining that the red envelopes were better characterized as a “game,” and therefore not seriously contravening any provisions within the EPC.

50. The relevant provisions in the EPC are as follows:

Article VI(g) -

**Fair Play**

Candidates shall campaign in accordance with the rules of Fair Play: Breaking the rules of fair play includes, but is not limited to any of the following, and shall be considered more severe if based on any of the Grounds of Discrimination as defined in the Ontario Human Rights Code:  
[...]

(v) - General sabotage of the campaigns of other candidates;

(vi) - Malicious or intentional breach of elections policy;

[...]

(viii) - Any attempt to undermine the electoral process [...]

Article VI(k) -

**No Distribution of Goods**

Candidates may not campaign by distributing goods.

51. The ERC held that the red envelopes did not necessarily violate the EPC because the individuals were not conspiring to tamper with the election, since the exchange of money was only nominal and tokenistic. While I do not wish to delve into the precise level of intent that is required for these offences, I think it is satisfactory to say that the individuals here knew or ought to have known that their actions were *prima facie* breaches of EPC provisions and policy. A reasonable person, unacquainted with the cultural meaning behind the red envelopes, would reasonably conclude that the exchanges constituted distribution of goods, contrary to Article VI(k), and an attempt to improperly influence voters’ decisions, which would fall within the meaning of the offences outlined in Article VI(g)(v),(vi), and (viii).

52. The prohibition on the distribution of goods is not qualified in any way. As such, the provisions amount to an absolute prohibition, where no party is permitted to exchange goods in relation to the elections, no matter how small the value of the goods happens to be. Therefore, it is immaterial whether the red envelopes were symbolic or part of a game, as they are nonetheless a good within the meaning of the provision.

53. I would conclude that the individuals were in violation of the aforementioned provisions of the EPC. Their actions fell squarely within the prohibition on the distribution of goods, since the provision is unconcerned with the amount of or meaning behind the goods.

Having distributed goods contrary to this provision, a reasonable person would conclude that the goods were meant to unduly influence the outcome of the election, violating specific provisions as well as the purpose of the “Fair Play” section of the EPC.

54. The ERC also found that there were some additional postings and red envelope exchanges seemingly supporting the We the Students slate. The appellant argued that this was an attempt to “cover up” the bribery that was occurring for the Demand Better slate. I find these additional postings for We the Students irrelevant to the matter at hand. The CRO was asked to investigate and rule on complaints made with respect to Demand Better, and these We the Students exchanges do nothing to mitigate or justify the individuals’ conduct in promoting Demand Better.
55. Strict adherence and enforcement of the provisions in the EPC is essential in ensuring that the integrity of the elections process remains intact, thereby validating the outcomes of the elections. If an objective observer could reasonably conclude that the electoral process might be compromised, it is not necessary to prove that the impugned actions had an actual effect on any vote or the results of the elections. Unless constituents are entirely confident that elections are completely sound, then the elections can hold no authority.
56. Although the actions of the CUA UTM members here might not have been intended to unduly influence votes, this matter raises concerns about impropriety that undermines the legitimacy of the electoral process. Accordingly, we should be highly critical of their conduct.

#### CUA UTM’s Responsibility in Relation to Individuals’ Actions

57. The ERC found that the individuals were acting in a personal capacity, and therefore the actions could not be attributed to CUA UTM. I must disagree with the majority opinion and hold that the individuals cannot be said to have been acting in a personal capacity, but were acting as representatives of CUA UTM. In addition, CUA UTM is responsible for not moderating the chat group and thereby failing to censure the improper conduct of the members.
58. There is some contention about the precise position of the CUA UTM members in question. However, it is sufficient to say that they occupied some sort of position above that of a general member. I accept the appellant’s argument that the four individuals were part of a chat group that was reserved for executive members of CUA UTM. Since this group contained only executive members of CUA UTM, I must infer that the chat group exists to discuss matters pertaining to the operations of CUA UTM. All the evidence suggests that the purpose of this chat group was not for personal matters, and I must therefore conclude that any postings made by the individuals in this particular chat group were done in their capacity as representatives of the CUA UTM and not in a personal capacity.

59. The ERC considered arguments that the administrators of the CUA UTM chat group had limited technical ability to delete postings or otherwise moderate discussion. The ERC found that “This creates the impression that CUA UTM simply failed to enforce the EPC within their WeChat groups, rather than in any way condoning or supporting WeChat activity aimed at helping Demand Better”: *ERC Ruling 022, supra*.
60. I see no reason why the administrators of the chat group could not have notified members that it was inappropriate to make personal postings or postings that violated the EPC. I also see no reason to differentiate here between failing to enforce the EPC and implicitly condoning the activity. The administrators of the group are expected to monitor the group discussions that take place within their group, and therefore, even if they did not know that this activity was taking place, they ought to have known in their capacity as moderators. Thus, their failure to ensure that the EPC was being complied with amounts to reckless disregard of elections policy and procedure.
61. The activity and failure to reprimand it occurred entirely within the purview of the CUA UTM as a student organization. The individual members can reasonably be expected to comply with the EPC and the administrators of the group can reasonably be expected to ensure that their discussions are not violating UTSU policies. I find CUA UTM responsible for the activity in question.

#### CUA UTM as a Non-Arm’s Length Party to Demand Better

62. CUA UTM publicly endorsed the Demand Better slate, who accepted and publicized the endorsement. Therefore, as was agreed upon by all parties, CUA UTM is a NALP to Demand Better. As set out in Article I.2(c) and Article II.1 of the EPC, all the provisions within the EPC apply to candidates and their NALPs. Furthermore, Article VI.1(c) provides that “candidates are responsible for actions and violations of any Non-Arm’s Length Party.”
63. As I have discussed, the actions of the individuals are attributable to CUA UTM, since they were acting in the context of CUA UTM affairs. The chat group in which the postings were made existed for CUA UTM staff and executives, and the individuals were included in this group precisely because they occupied official positions within the association. Furthermore, as a NALP, CUA UTM undertook to comply with all EPC provisions and policies. Although, I understand that the postings were made by only four members out of the 88-member chat group, and all of them were relatively junior members, this does not excuse CUA UTM’s failure to moderate postings that violated several EPC provisions. CUA UTM therefore violated the EPC and, because they are a NALP, Demand Better is responsible for those violations.
64. I do not find it necessary to discuss whether Demand Better knew or ought to have known whether these violations were occurring. In accepting an endorsement, it is incumbent upon a candidate or slate of candidates to ensure that NALPs are aware of their responsibilities, which are clearly set out in the EPC. I am aware that there is a

concern that holding candidates responsible for the actions of every member of a NALP opens up the candidates to too much liability. However, the individuals here were not merely general members of CUA UTM, but held official positions, and the failure to condemn the postings occurred within an executive-level group. While it may be open in the future to find candidates responsible for the actions of general members of a group acting as a NALP, the facts before us only require determining the liability for executive members. Acting as an executive member for a club or association involves accepting a higher level of responsibility for your actions as they pertain to the organization.

65. CUA UTM, including its executive members, were required to comply with the EPC and their violation of EPC provisions renders Demand Better liable for those actions, since Demand Better had accepted their endorsement, which established CUA UTM as a non-arm's length party.

#### Disposition

66. The ERC overturned the CRO's decision to hold Demand Better liable for CUA UTM's conduct. The majority of this Board would uphold that decision, but I must respectfully disagree and hold that the ERC's decision was unreasonable.
67. As was noted in the majority decision, reasonableness "takes its colour from the context." The context in this case is one of great significance, since the legitimacy of the UTSU elections rests on the faithful adherence to the provisions set out in the EPC by all candidates and their non-arm's length parties. Thus, while I wish to show deference to the ruling of the ERC, I would find their decision outside of the appropriate range of reasonable decisions available in this case.
68. I would allow the appeal and restore the decision of the CRO in Ruling 028.

Amanda Nash  
24 April 2017

*Appeal dismissed, Panelist Nash dissenting.*