Court of Queen's Bench of Alberta

Citation: Walker v Alberta (Election Commissioner), 2022 ABQB 499

Date: 20220720
Docket: 1903 17743
Registry: Edmonton

Between:

Robert Walker

Appellant

- and -

Lorne R. Gibson, Election Commissioner of Alberta; Office of the Election Commissioner

Respondents

Memorandum of Decision
of the
Honourable Madam Justice D. J. Kiss

Introduction

[1] The Appellant, Robert Walker, was assessed an administrative penalty of $1,600.00 by the Respondent, the Election Commissioner, for contributing $800.00 over the statutory political contribution limit of $4,000 under the *Election Finances and Contributions Disclosure Act* [EFCDA], RSA 2000, c E-2. He now appeals that administrative penalty under s 51.03 of the EFCDA, asserting that the Election Commissioner failed to correctly apply two of the factors set out in s 51.01(4) of the EFCDA for assessing the administrative penalty. Further, he argues that the Election Commissioner, by routinely assessing the maximum penalty -- double the amount of any overpayment -- failed to apply the mandatory seven factors in the EFCDA.

Facts

[2] Between January 28, 2018 and October 16, 2018, Mr. Walker made the following nine payments to two political parties and one leadership contestant that totaled $4800.00:

$ 25.00 to the Alberta Party on January 28;
$ 250.00 to the Alberta Party on February 13;
$ 1,500.00 to an Alberta Party leadership contestant on February 14;
$ 25.00 to the Alberta Party on February 28;
$ 25.00 to the Alberta Party on March 28;
$ 100.00 to the Alberta Party on March 30;
$ 300.00 to the Alberta Party on April 19;
$ 2,075.00 to the Alberta Party on October 10; and
$ 500.00 to the Alberta New Democratic Party on October 16.

[3] Elections Alberta, by letter dated March 1, 2019, informed Mr. Walker that:

- His total contributions exceeded the $4,000.00 limit by $800.00 set under section 17(1) of the EFCDA, and
- They were aware the Alberta Party had issued him a refund cheque for $300.00, the amount the Alberta Party calculated he had overpaid them;
- He was required to arrange for a refund of the remaining $500.00 over-contribution;
- He was required to provide Elections Alberta with a copy of his correspondence to the political party (or parties) advising of his over-contribution and requesting a further refund; and
- The matter had been referred to the Election Commissioner and may be subject to administrative penalties.

[4] Mr. Walker provided a copy of the Elections Alberta letter to the Alberta Party on March 14, 2019 and requested a further refund of $500. The Alberta Party issued him a $500.00 refund on March 19, 2019. Mr. Walker subsequently provided Elections Alberta with a copy of the refund cheque.

[5] Mr. Walker was informed that the Office of the Election Commissioner was investigating the over-contribution under s 44.95 of the EFCDA in July 2019. Mr. Walker responded, providing copies of the refund cheques. The Senior Manager of Investigations at the Office of the Election Commissioner, Steve Kay, replied that the refund did not "diminish or eliminate the fact that you made a contribution in excess of the limits, as defined in section 17(1) of the EFCDA."

[6] On July 29, 2019, Mr. Walker emailed Mr. Kaye and advised that exceeding the contribution limit had been inadvertent and the result of two factors:

- Poor bookkeeping and not keeping track of how much he donated through the year; and
- He was an old friend of Stephen Mandel and he supported Mandel's political efforts when asked.

[7] Mr. Walker further explained that he had never over-contributed in the past and that it had not been done intentionally, or with any malice. He explained that he had now created a

spreadsheet that would clearly show him the total he has donated throughout the year, allowing him to ensure that the overpayment would not occur again.

[8] On the same day, July 29, 2019, the Office of the Election Commissioner wrote to Mr. Walker, informing him that their investigation found that his political contributions amounted to $4,800.00, exceeding the contribution limit by $800.00. The letter identified the relevant statutory provisions and noted the seven factors set out in s 51.01(4) of the EFCDA that the Commissioner must consider when assessing the appropriate penalty.

[9] Effectively, this list of factors set out the Election Commissioner's reasons for the penalty with notations for each factor. At the third factor, whether there were any mitigating factors, the Commissioner's notation said "none." At the fourth factor, whether any steps had been taken for prevent re-occurrence, the Commissioner's notation was: "the political contribution limit was brought to the contributor's attention." The notation made no mention of Mr. Walker's assertion that he had prepared the spreadsheet to avoid re-occurrence.

[10] The letter concluded by advising Mr. Walker that all the information obtained during the investigation had been considered and that, based on all of the factors, the Election Commissioner had decided to impose an administrative penalty of $1,600.00. This was the maximum penalty that could have been imposed on Mr. Walker.

Statutory provisions

[11] The relevant provisions of the EFCDA are set out in Appendix A.

[12] In ***Rumpel v Alberta (Election Commissioner)***, 2019 ABQB 938, Justice Dario provides a very helpful summary of the statutory framework (at paras 9-15). Essentially, the Election Commissioner conducts an investigation under s 44.95 of the EFCDA, using the powers of a commissioner under the *Public Inquiries Act*, RSA 2000, c P-39, and is required to give notice of the investigation under s 44.97 unless he believes that giving notice would compromise or impede the investigation. The Election Commissioner cannot make any adverse findings against a person unless they have had reasonable notice of the allegations and "a reasonable opportunity to make submissions and present evidence to the Election Commissioner" (s 44.97(3)).

[13] Sections 45-50 of the EFCDA set out the offences that are subject to the administrative penalties specified in s 51.01. Of particular relevance to Mr. Walker's appeal are the factors the Election Commissioner must consider in assessing the appropriate administrative penalty (s 51.01(4)):

> (4) In determining the amount of an administrative penalty required to be paid or whether a letter of reprimand is to be issued, the Election Commissioner must take into account the following factors:
>
> (a) the severity of the contravention;
>
> (b) the degree of wilfulness or negligence in the contravention;
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> (c) whether or not there were any mitigating factors relating to the contravention;
>
> (d) whether or not steps have been taken to prevent reoccurrence of the contravention;

> (e) whether or not the person or entity has a history of non-compliance;
>
> (f) whether or not the person or entity reported the contravention on discovery of the contravention;
>
> (g) any other factors that, in the opinion of the Election Commissioner, are relevant.

[14] Section 51.01(5) sets out the maximum penalty that may be imposed. Subsection (5)(a) is relevant here:

> **(5)** The amount of an administrative penalty that may be imposed under subsection (2) must not exceed
>
> > (a) in the case of a contravention referred to in subsection (2)(a), twice the amount by which the contribution or contributions exceed the limit prescribed by section 17(1), (1.1) or (1.2) or 18(1), as the case may be, and in no case may the amount of the administrative penalty exceed $10 000 for each contravention;

[15] Section 51.03 provides for an appeal to the Court of Queen's Bench from an administrative penalty. Section 54 provides for judicial review of a decision by the Election Commissioner within 30 days of his decision or order. The EFCDA does not set out an express standard of review for either an appeal or judicial review.

Issues

[16] The issues raised by Mr. Walker are:

(a) What is the standard of review?
(b) Did the Election Commissioner err when he concluded there were no mitigating factors related to the contravention?
(c) Did the Election Commissioner err in failing to consider whether Mr. Walker took any steps to prevent reoccurrence of the contravention?
(d) Did the Election Commissioner err by failing to apply the mandatory statutory factors in the EFCDA by inflexibly imposing the maximum penalty on virtually all over-contributions?

Analysis

Standard of review

[17] While judicial review is available for review of the Election Commissioner's decision (s 54), Mr. Walker's application was filed pursuant to s 51.03, an appeal of an administrative penalty.

[18] The standard of review in an appeal of an administrative tribunal decision was set out in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 37:

> Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory

> interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see ***Housen***, at paras. 10, 19 and 26-37.

[19] The application of a legal standard to a set of facts is a question of mixed fact and law (***Housen v Nikolaisen,*** 2002 SCC 33 at para 27). Here, the first error alleged by Mr. Walker, whether the Election Commissioner erred when he concluded there were no mitigating factors related to the contravention, required the Election Commissioner to consider what constituted a mitigating factor and then apply that standard to Mr. Walker's submissions. Similarly, the second alleged error, whether there were any steps taken to prevent reoccurrence of the contravention, required the Election Commissioner to consider whether the steps taken by Mr. Walker met the standard set out in s 51.01(4)(d). Finally, the third error, whether the Election Commissioner applied the mandatory statutory factors in calculating the administrative penalty, required the Election Commissioner to apply the statutory factors to the facts to determine the nature and amount of the penalty.

[20] I conclude that each of these are questions of mixed fact and law subject to the standard of palpable and overriding error.

[21] Mr. Walker further argued that the Election Commissioner erred by routinely imposing a penalty of twice the over-payment, up to the maximum allowable. As noted by Justice Dario in ***Rumpel***, at para 22-23, administrative law principles apply to statutory appeals, citing ***Mouvement laïque québécois v Saguenay (City),*** 2015 SCC 16 at para 38.

[22] In administrative law terms, applying discretion inflexibly or unlawfully restricting a decision-maker's discretion is called fettering discretion (***Power v Alberta (Law Enforcement Review Board***, 2020 ABCA 77; ***Sarg Oils Ltd. v (Alberta) Environmental Appeal Board***, 2007 ABCA 215; ***Lac La Biche (County) v Lac La Biche (Subdivision and Development Appeal Board***), 2014 ABCA 305 at para 11), an argument first raised by Mr. Walker in his oral submissions. Fettering discretion has been found to be a breach of the duty to be fair: ***Halfway River First Nation v British Columbia (Ministry of Forests***), 1999 BCCA 470 at para 58; ***Cidex Developments Ltd v Calgary (City),*** 2018 ABQB 519 at para 30; ***Lac La Biche*** at para 11.

[23] Many cases have indicated that a breach of the duty to be fair is subject to a correctness standard (***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817; ***Dunsmuir v New Brunswick***, [2008] 1 SCR 190, at para 79 and at para 129 per Binnie J concurring; ***Lac La Biche (County) v Lac La Biche (Subdivision and Development Appeal Board)***, 2014 ABCA 305 at paras 11-12). See also ***Anand v Anand***, 2016 ABCA 23 at para 8; ***Mission Institution v Khela***, 2014 SCC 24 at para 79; ***Rumpel v Alberta (Election Commissioner)***, 2019 ABQB 938 at para 24. The standard of review analysis set out in ***Vavilov*** does not apply (see ***Vavilov*** at para 23).

[24] However, there are some cases that suggest that a breach of the duty to be fair is subsumed into the reasonableness analysis: ***Delta Air Lines Inc. v Lukács***, 2018 SCC 2, [2018] 1 SCR 6 (at para 13); ***Stemijon Investments Ltd. v Canada (Attorney General),*** 2011 FCA 299 at para 24; ***Austin v Canada (Minister of Citizenship and Immigration),*** 2018 FC 1277 at para 16.

[25] Notwithstanding these decisions, I conclude that the weight of the case law favours a correctness standard on questions of procedural fairness, at least until there is a more definitive statement from the Supreme Court of Canada.

Did the Election Commissioner err when he concluded there were no mitigating factors related to the contravention?

[26] Mr. Walker argues that the Election Commissioner erred when he concluded there were no mitigating factors to consider.

[27] A palpable and overriding error is a plainly seen error (***Housen v Nikolaisen***, [2002] 2 SCR 235 at para 6).

[28] In ***Mandel v Alberta (Chief Electoral Officer***), 2019 ABQB 157, Kendell J held that mitigating reasons under s 44(4)(b) for non-compliance include (at para 43):

- Acting in good faith;
- External or extenuating circumstances, such as illness or issues with the postal service;
- Campaign deficits being less central to electoral legitimacy than campaign contributions and campaign expenses;
- The size of the deficits;
- The length of the delay;
- Timeliness in addressing the non-compliance; and
- The importance of volunteers to our election process.

[29] She further noted that this was not a closed list and that there could be more mitigating factors depending on the facts of each case.

[30] While Kendell J was dealing with s 44 of the EFCDA, and not s 51.01(4)(c), I conclude that her analysis is equally applicable here. Kendell J cited Veit J's discussion of mitigation in ***Bildhauer v Alberta (Chief Electoral Officer***), 2017 ABQB 54. Veit J noted the following:

- The legislature does not intend unjust or inequitable results to flow from its enactments (***Bildhauer*** at para 37);
- The EFCDA should be interpreted in light of the values the legislature was attempting to foster and enshrine (***Bildhauer***, at para 29); and
- Dictionary definitions of "mitigate" and "mitigating circumstances" include "to abate the rigour or severity of a law" and "a fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce the damages or punishment." (***Bildhauer***, at para 44).

[31] I accept this analysis as applicable to s 51.01.

[32] The Election Commissioner's decision stated there were no mitigating factors. This is a clear and palpable error. Mr. Walker responded to the investigation saying that he had acted in good faith, and that the error was inadvertent and the result of poor bookkeeping. Further, the payments themselves were in varying amounts spread out over time, and the overpayment was the result not of a single donation, but several donations to three different entities – the Alberta Party, the Stephen Mandel Leadership, and the New Democratic Party. The question of

inadvertence should at least have been addressed by the Election Commissioner as a mitigating factor.

[33] In my view, these are factors that could reduce the degree of Mr. Walker's culpability in these circumstances. His contributions to the political process were in good faith and the legislation should be interpreted as encouraging involvement in the political process. There were mitigating factors that required some analysis, and it was clearly and palpably wrong to say there were none.

Did the Election Commissioner err in failing to consider whether Mr. Walker took any steps to prevent reoccurrence of the contravention?

[34] In regard to the fourth factor under s 51.01(4), whether "steps have been taken to prevent the reoccurrence of the contravention" the Election Commissioner's letter simply noted "the political contribution limit was brought to the contributor's attention."

[35] In my view, this response also constitutes a palpable and overriding error. At issue under s 51.04(4) is the nature of the penalty imposed on someone found to have contravened the EFCDA. The focus of each of the factors are on the actions and responses of the person under investigation and who will be required to pay the administrative penalty. The fact that Elections Alberta brought the contribution limit to Mr. Walker's attention after the overcontribution was found is totally irrelevant to this consideration.

[36] The starting point for statutory construction has been repeatedly noted. In ***Re Rizzo & Rizzo Shoes Ltd.,*** [1998] 1 SCR 27 at para 21, the Supreme Court noted:

> Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] In ***Vavilov***, the Supreme Court considered statutory interpretation in the context of administrative law, noting (at paras 118-120):

> This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context.... Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.
>
> ... The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations

> that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.
>
> But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

[38] While s 51.04(d) is framed in a passive voice, it makes no sense to interpret this provision as referring to steps taken by someone other than the person who must pay the penalty. The fact that Elections Alberta told Mr. Walker the contribution limit should have no impact at all on the amount or nature of the penalty imposed on Mr. Walker.

[39] Keeping in mind the text, context, and purpose of s 51.04 and the EFCDA as a whole, s 51.04(4)(d) must refer to whether the person who must pay the administrative penalty has taken any steps to prevent re-occurrence of the overpayment. Here, Mr. Walker responded to the investigation indicating he had created a spreadsheet to keep track of his political contributions to ensure that he did not over-contribute in the future.

[40] This is the relevant factor that the Election Commissioner should have considered when assessing the amount of the administrative penalty. His failure to consider this when reaching his conclusion is a further palpable and overriding error.

> **Did the Election Commissioner err by failing to apply the mandatory statutory factors in the EFCDA by inflexibly imposing the maximum penalty on virtually all over-contributions?**

[41] Having concluded that the Election Commissioner committed two palpable and overriding errors in applying the third and fourth factors under s 51.04(4), it is unnecessary to consider the question of whether the Election Commissioner also failed to apply the mandatory statutory factors by inflexibly imposing the maximum penalty on virtually all over-contributions. I characterized this argument under the administrative law principle of fettering discretion and a breach of the duty to be fair. However, the parties did not deal with this question under a duty to be fair characterization. As a result, my conclusions on this ground are provided as guidance only.

[42] Mr. Walker's counsel cited the Election Commissioner's website publication of its decisions in 2017 and 2018[1], noting:

> Seventy-eight out of the seventy-nine individuals (99%), who exceeded the contribution limit by over $100, received the maximum penalty permitted under the statute (double the penalty up to $10,000.00). The decision to impose the maximum penalty was made regardless of whether the individual exceeded the allowable limit by $105.00 (the penalty as $210.00) or $5,000 and more (the penalty was $10,000). There was only one instance where an individual received less than the maximum, and in that case the penalty was only $50 less than maximum. Further, every individual that exceeded the allowable limit by $100 or less received a letter of reprimand.

[1] I was not directed to, nor have I looked at, the subsequent years of the Election Commissioner's decisions.

[43] Counsel for the Election Commissioner argued that this was new evidence that was not in the Record before the Election Commissioner and therefore should not be admitted unless it meets the test for new evidence (the ***Palmer*** rule).

[44] I disagree. I see no difference between the Election Commissioner's website publication of its decisions and any court or tribunal publishing their decisions on-line as precedents. It is not necessary to admit decisions of the tribunal or court as evidence for a court to consider them.

[45] Further, the previous decisions of a tribunal may well be relevant to an appeal or judicial review, as noted by the Supreme Court of Canada in ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***, 2011 SCC 61, [2011] 3 SCR 654 (at paras 27-28). There the Supreme Court held that while the Privacy Commissioner had not decided a timeliness decision in the case before it, he had addressed the issue in other cases, and that it was not necessary to admit further evidence on the issue. It held that the chambers judge and the Court of Appeal had not erred and were entitled to rely on the Commissioner's previous decisions.

[46] Moreover, in ***Rumpel***, the same issue of inflexibly applying the maximum penalty was raised before Justice Dario as a question of whether the Election Commissioner's decision was reasonable. The overcontribution made by Mr. Rumpel to a registered political party in that case was, like Mr. Walker, made in 2018. The Election Commissioner's decision was very similar to the decision here— a listing of the factors accompanied by short answers to each factor.

[47] During the hearing before Justice Dario, counsel for the Election Commissioner conceded that that its policy was to impose the maximum penalty regardless of the amount of the over-contribution and indicated there had not yet been a circumstance in which a penalty lower than the maximum had been assessed. Counsel for the Election Commissioner then speculated that a satisfactory reason for varying from the maximum penalty might be in a circumstance where the wrong person had been charged. As Justice Dario noted (para 56): "This flies in the face of the factors set out in s 51.01(4) of the *Act*." She continued (at para 57):

> Merely listing the factors and the Election Commissioner's findings, without taking the next step of assessing how those findings impact the amount of the penalty does not meet the requirements of the statutory framework. This is mere lip-service to the statutorily imposed requirements on the Election Commissioner; it "contradict[s] the relevant enactment…[and] unreasonably fetter[s] the discretion of the decision maker": ***L'Hirondelle*** at para 26.

[48] I conclude that were it necessary to decide this issue, I could consider both the Election Commissioner's website's description of its previous decisions and the description of the Election Commissioner's decision-making history outlined in ***Rumpel*** in determining whether the Election Commissioner was inflexibly applying the maximum penalty.

[49] As in ***Rumpel***, the Election Commissioner appears to have simply paid "lip service" to the factors set out in s 51.04. If both a $105 and a $5000 over-contribution are subject to the maximum penalty, what role does the severity of the contravention play (s 51.01(4)(a))? If, as here, there is no evidence of wilfulness and no history of non-compliance, and the maximum penalty is still imposed, what role do these factors play in assessing the amount of the penalty (ss 51.04(4)(b) and (e))?

[50] Were it necessary to address this issue, I would conclude that the Election Commissioner breached the duty to be fair by fettering his discretion and applying the maximum penalty as a matter of course.

Conclusion

[51] I conclude that the Election Commissioner committed palpable and overriding errors by:

- Concluding there were no mitigating factors without considering Mr. Walker's submission that the over-contribution was the result of poor record-keeping. A further mitigating factor included the fact that there were nine separate contributions paid over the course of a year to three different entities, supporting Mr. Walker's contention that he had difficulty accurately tracking how much he had contributed; and
- Concluding that the steps taken to prevent reoccurrence were the steps taken by Elections Alberta, rather than considering the steps Mr. Walker had taken, including the preparation of a spreadsheet to better track his contributions.

Remedy and costs

[52] The administrative penalty was assessed against Mr. Walker in July 2019. At that time s 51.03(5) provided:

> On hearing the appeal, the Court of Queen's Bench may confirm, rescind or vary the amount of the administrative penalty.

[53] This section was amended in 2021: *Election Statutes Amendment Act, 2021 (No. 2),* SA 2021, c24 s5(72). Today, the section reads:

> On hearing the appeal, the Court may confirm, rescind or vary the amount of the administrative penalty**, or remit the decision back to the Election Commissioner for reconsideration.**

[54] New legislation that affects substantive rights presumptively has only prospective effect, unless there is clear legislative language indicated that it is to apply retrospectively; new legislation that is procedural is presumed to apply to both pending and future cases, unless those procedures affect substantive rights: ***R v Dineley***, 2012 SCC 58, [2012] 3 SCR 272 at paras 10-11.

[55] Moldaver and Brown JJ writing for the majority (on the nature of procedural and substantive legislative changes) in ***R v Chouhan***, 2021 SCC 26, at para 92, addressed the distinction between procedural and substantive amendments:

> Broadly speaking, procedural amendments depend on litigation to become operable: they alter the method by which a litigant conducts an action or establishes a defence or asserts a right. Conversely, substantive amendments operate independently of litigation: they may have direct implications on an individual's legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal.

[56] In my view, the amendment to s 51.03(5) is purely procedural. It does not attach new consequences or change the substantive content of a defence, right, or cause of action, and is therefore not substantive. It only becomes operable on the instigation of the litigation, here the appeal, and it changes the kinds of remedies a litigant can assert when asserting a right of appeal. Thus, I conclude that the authority to remit the decision back to the Election Commissioner has retrospective effect and I remit the decision back to the Election Commissioner to consider and address the factors set out in s 51.04(4) properly and more fully.

[57] Even if the provision could be said to be substantive by giving Mr Walker the right on a successful appeal to only the rescission or variation of the amount of the administrative penalty, I would still find that this Court has the authority to remit the matter back to the Election Commissioner. This is because there is no express provision prohibiting such a remedy, and s 8 of the *Judicature Act*, RSA 2000, c J-2 grants the Court general jurisdiction to grant, on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to the parties so that all matters between them can be completely determined.

[58] In making this finding, I note that the Election Commissioner is best situated to address:

- what properly constitutes mitigation and how such mitigation should affect the penalty,
- what steps taken by the subject of the investigation constitute steps to prevent reoccurrence of the contravention and how such steps should affect the penalty; and
- how the factors under s 51.01(4) should be applied on an individual basis, without fettering its discretion.

[59] It is the Election Commissioner who has been given the legislative authority to make these decisions based on his expertise in these issues.

[60] In his written submissions, counsel for Mr. Walker sought costs against the Respondents. He withdrew that application at the hearing. There will be no costs awarded.

Heard on the 6th day of May, 2022.
Dated at the City of Edmonton, Alberta this 20th day of July, 2022.

D. J. Kiss
J.C.Q.B.A.

Appearances:

David Sims
Royal & Company
for the Appellant

Paula D. Hale
Shores Jardine LLP
for the Election Commissioner of Alberta

Appendix A

17.**(1)** Contributions by a person ordinarily resident in Alberta shall not exceed in any year $4000, as adjusted in accordance with section 41.5, in the aggregate to any of the following or to any combination of them:

(a) a registered party;

(b) a registered constituency association;

(c) a registered candidate;

(d) repealed 2021 c24 s5(24),

(e) a registered leadership contestant.

(1.1) Subject to subsection (1.2), contributions by a person ordinarily resident in Alberta shall not exceed in any year $4000, as adjusted in accordance with section 41.5, in the aggregate to any nomination contestant or combination of nomination contestants.

51.01 **(2)** After completing an investigation referred to in section 44.97, if the Election Commissioner is of the opinion that

(a) a person has made one or more contributions in excess of a limit prescribed by section 17(1), (1.1) or (1.2) or 18(1),

(b) a person or entity has made a contribution in contravention of section 16,

(b.1) a person, a political party, a constituency association or a third party fails to comply with a direction of the Election Commissioner,

(c) a person or entity has made an election advertising contribution in contravention of section 44.2(1), a political advertising contribution in contravention of section 44.2(2), a Senate election advertising contribution in contravention of section 44.943(1) or a referendum advertising contribution in contravention of section 44.94995, or

(d) a person or entity has contravened a provision of this Act, otherwise than as referred to in clauses (a) to (c),

the Election Commissioner may serve on the person or entity either a notice of administrative penalty requiring the person or entity to pay to the Crown the amount set out in the notice, or a letter of reprimand.

...

(4) In determining the amount of an administrative penalty required to be paid or whether a letter of reprimand is to be issued, the Election Commissioner must take into account the following factors:

(a) the severity of the contravention;

(b) the degree of wilfulness or negligence in the contravention;

(c) whether or not there were any mitigating factors relating to the contravention;

(d) whether or not steps have been taken to prevent reoccurrence of the contravention;

(e) whether or not the person or entity has a history of non-compliance;

(f) whether or not the person or entity reported the contravention on discovery of the contravention;

(g) any other factors that, in the opinion of the Election Commissioner, are relevant.

(5) The amount of an administrative penalty that may be imposed under subsection (2) must not exceed

(a) in the case of a contravention referred to in subsection (2)(a), twice the amount by which the contribution or contributions exceed the limit prescribed by section 17(1), (1.1) or (1.2) or 18(1), as the case may be, and in no case may the amount of the administrative penalty exceed $10 000 for each contravention; ...

51.03**(1)** A person or entity who is served with a notice of administrative penalty under section 51.01 may appeal the Election Commissioner's decision.

...

(5) On hearing the appeal, the Court may confirm, rescind or vary the amount of the administrative penalty, or remit the decision back to the Election Commissioner for reconsideration.

(6) The appeal must be based on the evidence considered by the Election Commissioner as part of an investigation under section 44.97, including any submissions made or evidence presented under section 44.97(3), the notice referred to in section 44.97(3) and the notice of administrative penalty served under section 51.01(2).

54 An application for judicial review of a decision or order of the Chief Electoral Officer or the Election Commissioner under this Act must be filed with the Court of Queen's Bench and served on the Chief Electoral Officer or the Election Commissioner, as the case may be, no later than 30 days from the date of the decision or order.