Court of Queen's Bench of Alberta

Citation: Rumpel v Alberta (Election Commissioner), 2019 ABQB 938

Date: 20191206
Docket: 1901 08050
Registry: Calgary

Between:

Glen Rumpel

Applicant

- and -

Election Commissioner of Alberta

Respondent

Reasons for Decision
of the
Honourable Madam Justice C. Dario

Introduction

[1] This is an appeal by Mr. Rumpel of the penalty imposed upon him by the Election Commissioner for an over-contribution to a political party. This matter comes before me as a morning chambers application.

[2] Through amendments to the ***Election Finances and Contributions Disclosure Act***, RSA 2000, c E-2 (the "***EFCDA***" or the "***Act***") in late 2016, political contributions for each Alberta resident were reduced to $4,000 per year: *EFCDA*, as amended by the ***Fair Elections and Financing Act***, SA 2016, c 29, s 19.

[3] In 2018, the Applicant donated a total of $9,000 to a registered political party. In February 2019, in accordance with the *Act's* requirements, $5,000 (being the funds in excess of the allowable amount) were returned to him by that political party. The Election Commissioner subsequently imposed a $10,000 administrative penalty on him - the maximum penalty permitted under the *EFCDA*.

Issues

[4] This statutory appeal raises two issues:

a) Should this Court confirm, rescind or vary the penalty imposed?

b) Should the Court direct the Office of the Election Commissioner to remove Mr. Rempel's name from the list of over-contributors on its website?

Background

[5] The Election Commissioner is appointed under the ***Election Act***, RSA 2000, c E-1. The Commissioner's mandate is to carry out the functions and duties under both of the *EFCDA* and the *Election Act*, including enforcement of those acts: *Election Act*, ss 153.04 and 153.09.

[6] Although the *EFCDA* has been in place since 2000, the donations cap in question was revised late in 2016 by the *Fair Elections and Financing Act* (the "**2016 Amendment**"). Prior to that, persons (including individuals) could contribute $15,000 to each registered party, and $1,000 to any registered constituency association, and $5,000 in the aggregate to the registered constituency associations of each registered party. Further, in campaign periods (as defined in the *Act*), those amounts increased to $30,000 to each registered party (less any amounts already contributed to the party in that calendar year), and $2,000 to any registered candidate, and $10,000 in the aggregate to the registered candidates of each registered party.

[7] The 2016 Amendment limited the allowable contributions made per contributor to $4,000 in aggregate per year for all contributions made to a registered political party, constituency association, candidate, nominee contestant and/or leadership contestant (whether or not a campaign period fell within that year).

[8] The 2016 Amendment resulted in a marked decrease in the permissible contributions amount. The next Provincial election after this amendment was in April 2019. Counsel for the Election Commissioner acknowledged that many members of the public are still unaware of this revision to the law, although, pursuant to section 15.1 of the *Act*, the contributor bears the obligation to understand the contribution limits.

Statutory Framework

[9] Each political party is tasked with ensuring that any over-contributions are returned to the contributor: s 19. The *Act* grants the Election Commissioner additional powers to penalize contributors in the event of an over-contribution.

[10] The Election Commissioner may conduct an investigation into any matter that might constitute an offence under the *Act*: s 44.95(b). Prior to completing its investigation, it *must* notify any person or organization who it investigates pursuant to section 44.95(b), and inform the person or organization of the nature of the matter being investigated, unless the Election

Commissioner believes that doing so would compromise or impede the investigation: s 44.97(1.1). The *Act* requires meaningful notice of the investigation and an opportunity to respond: s 44.97(3).

[11] Although the *Act* defines "recorded mail" as "a form of document delivery by mail or courier in which receipt of the document must be acknowledged in writing": s 1(1)(l.1), the *Act* does not specify how service of either the notice of investigation or the notice of administrative penalty/letter of reprimand is to be made other than that the requirement for reasonable notice provided in section 44.97(3) and that the contributor be provided a reasonable opportunity to respond.

[12] The *Act* at section 51.01(2) gives the Election Commissioner discretion to serve notice of an administrative penalty or letter of reprimand if it believes the contributor has violated certain of the contribution limit provisions of the *Act*. The *Act* does not however provide parameters on the exercise of this discretion. The absence of such parameters raises questions around the Election Commissioner's appropriate use of discretion; however, this issue is not directly before the Court in this case.

[13] The notice of administrative penalty requires "the person or entity to pay to the Crown the amount set out in the notice": s 51.01(2). In assessing the amount of the administrative penalty, the *Act* mandates that the Election Commissioner take into account six factors, plus any other factors it considers relevant: s 51.01(4). These factors and the limits of the penalties are addressed further below.

[14] The funds obtained by way of penalty are paid to the Province's General Revenue Fund: s 51(3). Subject to appeal rights, if not paid, the penalty can, on application to this Court, be converted to the equivalent of a judgment: s 51.01(8).

[15] The Respondent notes that if a person seeks a reduction or other variation of the penalty or any other appeal of the findings or penalty, the Election Commissioner does not have the jurisdiction or discretion under the *Act* to make such variations. The only avenue is for the applicant to file an appeal in the Alberta Court of Queen's Bench: s 51.03. This is a costly option for appellants seeking a review of the findings of the Election Commissioner.

Facts

[16] On April 11, 2019, the Election Commissioner sent a notice of investigation (the "**Notice of Investigation**"), which provided Mr. Rumpel until April 26 to respond. This is a 15-day period, less the time for the Notice of Investigation to be delivered. As a copy of this notice was not provided to the Court, the content of the Notice of Investigation and the method of service is unknown to the Court. Mr. Rumpel was out of the country from April 5 until April 29, and provided evidence of his attempts by email and phone to reply to the notice as soon as he returned. He states his email and calls went unanswered. The Election Commissioner sent him a Notice of Penalty (the "**Decision**") by registered mail on May 22, 2019. The Decision indicated he would be subject to a $10,000 administrative penalty. The Decision provided a timeframe of until June 12, 2019 to pay, or 30 days from the Decision to file an appeal. Mr. Rumpel filed his appeal on June 10, 2019, within the allowable time. This is the decision of that appeal.

[17] As a matter of procedure, I note that, while the Applicant formally filed a Notice to Obtain the Record of Proceedings in this case, no such record was produced. The Respondent

submits that the record was not produced as this is a statutory appeal and not a judicial review and therefore a full record of proceedings is not required. In fact, the Respondent has not filed any materials at all for this appeal, not even a copy of the Notice of Investigation. The Court therefore has no evidence before it of the manner in which the Notice of Investigation was sent, or the reason for the short response period. The only information the Court has with respect to this issue are the submissions of the Respondent's counsel that providing the Applicant an opportunity to respond would not have changed the outcome.

[18] A copy of the Decision (the notice of penalty), was provided to the Court: s. 51.03(2). In addition to this, counsel for the Election Commissioner provided the Court printouts from parts of its website and made various submissions on behalf of the Election Commissioner. These website printouts list certain persons whom the Office of the Election Commissioner has identified over-contributed in each of 2017 and 2018, together with their over-contribution amount and the penalty imposed. The Election Commissioner submits that this is evidence of its consistent manner of treatment in terms of assessing fines. In each case so far, the fine imposed is double the over-contribution, regardless of the contribution amount.

[19] Although these website printouts and other submissions were not supported by affidavit evidence, given this is the first appeal of a fine imposed pursuant to this provision of the *Act*, and given that I find the evidence provided by the Election Commissioner is in essence an admission against its interest and its admission was unopposed by the Applicant, I will consider these materials in this case in order to address the substantive issues of this appeal. In future cases, however, the Election Commissioner ought to be properly filing this information as it is bound by the same rules of evidence as any other party.

The Parties' Positions

[20] Mr. Rumpel argues that he did not have a reasonable opportunity to present his views. He attests that the over-contribution was not an intention or willful violation of the contribution limits; he was not aware of the change in the legislation. He states he is remorseful for the non-compliance, and that he did not have the intent of thwarting the democratic process. He argues that he did not receive any gain or benefit from the over-contribution, such as a tax benefit, or otherwise. As the over-contribution was refunded, the level of penalty he argues is severe and excessive; a letter of reprimand would have been appropriate. In oral submissions, he confirmed his intent to comply with the restrictions in the future.

[21] The Respondent noted that Mr. Rumpel did not report his excess in contributions to Elections Canada. As mentioned, counsel for the Respondent acknowledged that, while responsible to be so informed, many members of the public are still unaware of this revision to the law lowering the aggregate cap on political contributions. Additionally, the Election Commissioner acknowledged that there was no evidence that Mr. Rumpel was acting wilfully in contravention of the Act, and confirmed that it was his first offence under the Act. The Respondent however submits that these arguments would not have changed the penalty imposed, even if Mr. Rempel had been given more notice and a chance to respond. The Election Commissioner's submits that nothing in the Applicant's reply would have affected the outcome. Pointing to the website printouts of all fines applied by the Election Commissioner against all over-contributors in 2017 and 2018, the Respondent argues that the penalty imposed in every instance was double the over-contribution amount.

Administrative Law Principles Applicable to Statutory Appeal

[22] This matter comes before me as a statutory appeal under section 51.03(1) of the *Act*, rather than an application for judicial review. Even though this is not an application for judicial review, administrative law principles still apply:

> ...[T]he standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal.
>
> ***Mouvement laïque québécois v Saguenay (City),*** 2015 SCC 16 at para 38 (citations omitted).

[23] Therefore, the application before me must be determined on the basis of administrative law principles. I will address procedural fairness first, followed by a review of the merits of the Election Commissioner's decision.

Procedural fairness

[24] Under administrative law, "[i]ssues of procedural fairness are reviewed for correctness": ***Anand v Anand***, 2016 ABCA 23 at para 8 (citations omitted), see also ***Mission Institution v Khela***, 2014 SCC 24 at para 79 **["Khela"]**.

[25] To assess the procedural fairness of the Election Commissioner's decision, I must determine "whether the proceedings met the level of fairness required by law...without affording deference": ***Nortel Networks Inc v Calgary (City)***, 2008 ABCA 370 at para 32 (Slatter JA dissenting reasons, but not on this point; citations omitted). This is the standard I will apply to the portion of the application dealing with procedural fairness, specifically the notice of the investigation provided by the Election Commissioner.

[26] The analysis begins with examining what protections of procedural fairness are owed to the applicant in the unique circumstances. It is not necessary in this case to turn to the protections that would be owed at common law because "a statutory regime expressed in clear and unequivocal language...prevails over common law principles of natural justice": ***CUPE v Ontario (Minister of Labour)***, 2003 SCC 29 at para 117.

[27] In the case before me, there is clear language in the *Act* requiring reasonable notice. The *Act* provides that:

> The Election Commissioner shall not make any adverse finding against a person or organization unless that person or organization has had reasonable notice of the substance of the allegations and a reasonable opportunity to present his or her or its views.
>
> *EFCDA*, s 44.97(3) (emphasis added).

[28] A breach of a statutory requirement of fairness can render a decision procedurally unfair: ***Khela*** at para 5. Not every breach of a statute will do so: ***Khela*** at para 90; however, it is "up to the reviewing judge to determine whether a given breach has resulted in procedural unfairness": ***Khela*** at para 90.

[29] Thus, I must determine if the reasonable notice required in the *Act* was given, and if not, if that breach resulted in procedural unfairness. In the present case, the Notice of Investigation

provided 15 days (less delivery time) for a response and, although the notice was not received by Mr. Rumpel within that period, the Election Commissioner proceeded to conclude its investigation. It would appear the method of service employed by the Election Commissioner did not take into consideration whether the contributor actually received the notice before the investigation was concluded or an adverse finding was made. It is unclear whether the method of providing notice present case is indicative of the Election Commissioner's practice, although there were no submissions to indicate otherwise.

[30] Neither party disputes that the maximum amount of time the notice was available to the Applicant could have been was 15 days. Neither party disputes that the Applicant in fact did not receive the notice until after the deadline to respond was over, and his subsequent attempts to contact the Office of the Election Commissioner after the deadline had passed were disregarded. For the reasons that follow, I find that reasonable notice was not given, in breach of the statute, which resulted in procedural unfairness.

[31] There was insufficient evidence before me of the manner of delivery and when the Notice of Investigation was actually arrived at the Applicant's address. Such evidence is not, however, necessary for my decision. The Election Commissioner's obligation is to provide reasonable notice of the substance of the allegations and a reasonable opportunity for the recipient to present his views. Neither happened in this case. The Applicant did not receive the notice until after the response period was over and he was given no opportunity to present his views. The Election Commissioner must either provide a longer notice period and opportunity to respond to account for the possibility that the notice is not immediately received (for example, if the party in question is out of town as in the present case, or in the hospital, has recently moved addresses or otherwise unable to access mail), or send it in a manner in which notice of receipt is tracked (such as registered mail) with the notice period commencing upon receipt. Further, even if the Applicant had received the Notice of Investigation with fifteen days to reply, this may not be sufficient time for an individual to adequately respond to an investigation under the *Act*, particularly where a sizable fine (of up to $10,000) is a possible outcome.

[32] The *Act* permits the Election Commissioner to serve the letter of reprimand up to three years after the date on which the alleged contravention occurs: 51.02(1). Thus, there is certainly time for the contributor in question to be served a notice of investigation with more than 15 days for a response to enhance the likelihood that the recipient actually receives the notice of the investigation prior to its conclusion, and has a meaningful period of time to provide his views. As there were no submissions on the appropriate period for notice and the method of delivery, it is not possible to definitively state what an appropriate period would be: however, pending proper submissions on this issue, 60 days could be seen as a reasonable period if sent by regular mail.

[33] Thus, the notice provided by the Election Commissioner breached the statutory requirement to provide reasonable notice. I further determine that this is a breach of procedural fairness. In this case, adequate notice of the allegations against the contributor and the opportunity to present a response is an important aspect of being treated fairly by administrative decision makers and should not be breached lightly.

[34] The Election Commissioner's submits that its failure to provide better notice is irrelevant as nothing in the Applicant's response would have affected the outcome. This suggest any response, no matter This justification is not satisfactory in the present case. The assessment of

procedural fairness in this case does not turn on the Respondent's confirmation of the findings in hindsight. Rather, as will be discussed below, the Election Commissioner's *ex post facto* justification signals a further issue with how the Election Commissioner applies the statutorily mandated criteria for assessment.

[35] While a breach of procedural fairness is sufficient for me to exercise the jurisdiction to rescind or vary the administrative penalty under section 51.03(5) of the *Act*, the merits of the Election Commissioner's decision also warrant discussion. I will assess the merits of the arguments of the Election Commissioner as it does not change the outcome of this particular case, and I also understand there is no existing case addressing this type of appeal under the *Act*.

Merits of the Decision

Standard of Review

[36] The standard of review for a court reviewing the merits of an administrative decision is either correctness or reasonableness: ***Dunsmuir v New Brunswick***, 2008 SCC 9 **["*Dunsmuir*"]** at para 34. The analytical framework to determine which standard applies was set out in ***Dunsmuir***, and has been refined by case law since then. It may be further revised by the anticipated decision of the Supreme Court of Canada in the *Bell/NFL/Vavilov* trilogy: ***Bell Canada v Attorney General of Canada***, 2017 FCA 249, leave to appeal granted, [2018] 1 SCR v; ***National Football League v Attorney General of Canada***, 2017 FCA 249, leave to appeal to SCC granted, [2018] 1 SCR viii; and ***Minister of Citizenship and Immigration v Alexander Vavilov***, 2017 FCA 132, leave to appeal to SCC granted, [2018] 1 SCR viii.

[37] The first step in this analytical framework is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question": ***Dunsmuir*** at para 62. The existing case law on the *Act* has not yet established a standard of review.

[38] The second step in the framework is the standard of review analysis. If the administrative body interprets its enabling statute, or statutes closely connected to its function, then the standard of review is presumed to be reasonableness: ***Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd***, 2016 SCC 47 at para 22 **["*Capilano*"]**.

[39] The *Act* outlines the duties and powers of the Election Commissioner and governs the investigation which is now under appeal. Thus, the presumption of reasonableness applies.

[40] The presumption may be rebutted if one of the following is established:

> (1) issues relating to the constitutional division of powers; (2) true questions of *vires*; (3) issues of competing jurisdiction between tribunals; and (4) questions that are of central importance to the legal system *and* outside the expertise of the decision maker (*Capilano*, at para. 24; *Dunsmuir*, at paras. 58-61).
>
> ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)***, 2018 SCC 31 **["*HR Commission*"]** at para 28.

[41] As this was a morning chambers application, there were limited submissions, including on the issue of the standard of review and whether one of the grounds for rebutting the presumption applies in this case, such as whether the fettering of the Election Commissioner's own discretion becomes a question of *vires*.

[42] The Respondent advocates for the standard of reasonableness to apply, citing ***HR Commission*** at para 55, as well as ***Angus Partnership Inc v Salvation Army (Governing Council)***, 2018 ABCA 206; and ***Fuhr v Parkland (County)***, 2018 ABCA 442 at para 23, citing ***Capilano*** at para 30. Lacking the benefit of more fulsome submissions, I will apply the presumptive and more deferential standard of reasonableness, as advocated for by the Respondent, noting however that this determination may not be the appropriate standard of review in future cases dealing with decisions of the Election Commissioner under the *Act*. I note that on the facts of this case, the standard of review applied will not affect the outcome: the Respondent fails under either standard.

[43] Under the reasonableness standard of review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": ***Dunsmuir*** at para 47; ***Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62 at para 14.

[44] The premise, when applied to a statutory interpretation exercise, is that this standard recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute, if such ambiguities exist. Reviewing courts are to refrain from reweighing and reassessing the evidence considered by the decision maker: ***Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at paras 59, 61 and 64, while recognizing the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution. While the focus is on the existence of justification, transparency and intelligibility within the decision-making process, it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Application

[45] Under the reasonableness standard of review, I find that the Respondent's decision to the apply the maximum penalty against Mr. Rempel does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[46] The Respondent's decision fails because its practice of calculating the penalty by routinely doubling the amount of the over-contribution unreasonably fetters its discretion and results in the decision being unreasonable.

[47] The *Act* does not give the Election Commissioner discretion as to whether to consider the factors listed in section 51.01(4), rather, it gives the Election Commissioner discretion to determine how these factors impact the amount of an administrative penalty, within the prescribed limits.

[48] Counsel for the Election Commissioner made submissions, which I accept, that the Respondent imposes the maximum penalty amount of double the over-contribution on any person to whom a notice of administrative penalty is sent. Counsel further indicated that the maximum penalty is imposed regardless of the amount of the over-contribution or other circumstances. I accept that this is the policy of the Election Commissioner. The website information clearly demonstrates this is its practice.

[49] This doubling was the case for Mr. Rumpel. The administrative penalty of $10,000 is double the over-contribution of $5,000. The Respondent argues that it just so happens that the Applicant's over-contributions of $5,000, when doubled, amount to $10,000 – the absolute cap per contravention

[50] An administrative policy which provides guidance on the exercise of discretion can be helpful; however, the decision maker should not fetter its discretion by treating the guidance as mandatory requirements: ***Kanthasamy v Canada (Citizenship and Immigration)***, 2015 SCC 61 at para 32. As long as a policy "does not incorporate irrelevant considerations, contradict the relevant enactment, offend constitutional imperatives, or unreasonably fetter the discretion of the decision maker, policies are unobjectionable": ***L'Hirondelle v Alberta (Minister of Sustainable Resource Development)***, 2013 ABCA 12, leave to appeal to SCC refused, [2013] 2 SCR x [***"L'Hirondelle"***] at para 26.

[51] If a decision maker applies a standard which eliminates its own discretion, such an approach can unreasonably fetter its discretion and therefore render the decision itself unreasonable: see ***Delta Air Lines Inc v Lukács***, 2018 SCC 2 at para 13.

[52] The Election Commissioner's policy of doubling the fine regardless of other factors fetters its statutory discretion, rending it unreasonable for three reasons.

[53] First, listing factors is not the same as applying them. While the Election Commissioner listed the factors it must consider under section 51.01(4) of the *Act* and its findings for each factor, it is arguable that the factors were actually "considered" in assessing the penalty to be imposed. These factors are reproduced below and I have included in italics after each factor the specific findings of the Election Commissioner in the Applicant's case, from the Decision sent to the Applicant:

> (a) the severity of the contravention; - *the amount of the excessive contribution was $5,000 in relation to the contribution limit*
>
> (b) the degree of wilfulness or negligence in the contravention; - *there was no evidence of wilfulness*
>
> (c) whether or not there were any mitigating factors relating to the contravention; - *none*
>
> (d) whether or not steps have been taken to prevent reoccurrence of the contravention; - *the political contribution limit has been brought to the contributor's attention*
>
> (e) whether or not the person or entity has a history of non-compliance; - *the contributor has no known history of making excessive contributions*
>
> (f) whether or not the person or entity reported the contravention on discovery of the contravention; - *the contributor did not report their excessive contribution to Elections Canada*
>
> (g) any other factors that, in the opinion of the Election Commissioner, are relevant. – *none*

[54] The Respondent acknowledged that there was no evidence that the Applicant was acting wilfully in contravention of the *Act*, and confirmed that it was his first offence under the *Act*.

[55] The Respondent, however, submits that although the Decision cites the factors mandated to be considered under the *Act* and the findings of the Election Commissioner with respect to those factors, regardless of those findings, the method of determining the fine imposed has not varied: in every case, it is the maximum - double the over-contribution.

[56] The Respondent submitted that that there has not yet been a circumstance in which a penalty lower than the maximum has been assessed; however, it speculates that a possible example of what might be a satisfactory reason to reduce the penalty is if the wrong person was charged with the offence (wrong identity). I find the position of only considering reducing the penalty in the limited circumstances of if the Election Commissioner got the wrong person seems to be a problematic response in evaluating the Election Commissioner's reasonableness in implementing this statue. This flies in the face of the factors set out in s 51.01(4) of the *Act*.

[57] While the Respondent purports to have considered the factors enumerated in the *Act*, it in fact did not do so in the manner directed, being to determine the amount of an administrative penalty. 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.

[58] It appears that by listing the factors and the findings, the Election Commissioner is attempting to create the illusion of justification, transparency, and intelligibility within the decision making process. But that is all it is – an illusion. In reality the maximum penalty is imposed regardless of the findings on the factors.

[59] The second reason the Election Commissioner's approach results in an unreasonable decision is that it relies on faulty reasoning about punitive effect. The comments of the Respondent on the need for a punitive element to the penalty are surprising. It notes that when the overcontribution is identified by the political party, the over-contribution amount is returned to the contributor. Thus, it argues, unless the penalty is greater than the over-contribution, there is no punitive effect. It states that only the penalty amount over and above the initial over-contribution is the actual penalty to the contributor.

[60] The rationale of the Respondent is faulty. No evidence was provided that contributors view contributions to assist the political party of their choice as equally desirable as paying more taxes; or that contributors are indifferent as to whether such contributions are applied to the campaign efforts of that political party as opposed to Province's general revenue fund (where the penalties imposed are directed). I am doubtful such evidence could be gathered; this reasoning defies logic. Every dollar of the penalty has a punitive effect. Where is the logic in doubling the amount in each case in order for an effect to be felt by the contributor?

[61] The third reason the decision is unreasonable (which is closely tied to the first factor) is that the practice of applying the maximum penalty in each case runs afoul of the presumption that the legislature does not speak in vain: ***Attorney General of Quebec v Carrières Ste-Thérèse Ltée***, [1985] 1 SCR. 831, ***R v Morrison***, 2019 SCC 15 at para 89, and ***Canada (Attorney General) v JTI-Macdonald Corp***, 2007 SCC 30 at para 87. The legislature chose to include the factors for consideration in assessing the penalty and a meaningful opportunity for the contributor to be heard. An approach which reaches the same result regardless of these factors or the input of the contributor renders those legislative provisions meaningless. By way of example,

one factor for consideration is whether there is a history of non-compliance and another factor is the degree of wilfulness or negligence. If first time offenders who are contributing within the former limits but not within the recently establish limits are treated the same as repeat offenders contributing substantially over the former limits, then what purpose do the statutory factors serve?

[62] Another factor to be considered is the severity of the over-contribution. While the over-contribution in Mr. Rempel's case may be larger than other individuals who have received Notices of Penalty, there is no opportunity for a progression in the event that the contribution was larger. Mr. Rempel's penalty would be no different than for someone who donated $10,000, $25,000 or $50,000 above the permitted contribution limits. In short, when the maximum is always imposed, there is no possibility for the factors to make a difference: there is no greater penalty for repeat offenders or those who contribute in excess of $5000 over the prescribed limits.

[63] If the intent of these provisions in the *Act* is to promote fair elections, as argued by the Respondent, applying a maximum penalty in every instance against individuals engaged in the process who were merely uninformed of the change in the contribution limits does little to enhance the democratic process. It only promotes a sense of disproportionality and unfairness in the government's response. This is particularly true given that the over-contributions are disgorged by the political party in any event.

[64] Using the reasonableness standard of review, this Court must consider whether the decision to apply the maximum penalty falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. The simple answer is no.

[65] I find that the Respondent has only created an illusion of justification, transparency, and intelligibility within the decision-making process by listing the factors for consideration, without actually taking them into consideration. Its practice of applying the maximum penalty as a matter of course is based on faulty logic and is a failure to comply with its statutory obligations. Particularly in light of the limited path for appeal, being filing a claim with this Court, the decision and approach of the Election Commissioner demonstrates a tremendous remedial overreach in enforcing this *Act*. This approach fetters its discretion and renders its decision unreasonable.

[66] While I have done my analysis under the reasonableness standard, the Respondent's decision would have failed under the less deferential standard of correctness, which admittedly is plausible when viewed as a *vires* problem. It is neither reasonable nor correct to interpret a statute contrary to its express wording, which in this case, requires factors to be considered in assessing the penalty amount. And on top of this, procedural fairness is an overriding concern: see ***Baker v Canada (Minister of Citizenship and Immigration),*** [1999] 2 SCR 817.

Variation of the Penalty

[67] As the *Act* does not provide the Respondent the authority to revise the penalty, that task falls to this Court. The *Act* authorizes the Court to vary or rescind the penalty: s. 51.03(1). I recognize that there is a benefit both in terms of efficiency and transparency for the Election Commissioner to apply the same standard to the same circumstances in assessing the administrative penalties. There is however a range of acceptable ways to enhance uniformity of results under the existing provision of the *Act* that do not require applying the maximum penalty

in each case. By way of example only, one principle that could be applied is to issue letter of reprimand only (and no penalty) for each first-time offender below a *de minimus* threshold dollar amount (such as $200). For first time offenders above that threshold amount, either a set dollar fee or some percentage of the over-contribution could be used to determine the penalty. Again, by way of example only, a penalty of 10-25% of the over-contribution or a set amount of between $100 to $1,000 would be sufficient to alert first time offenders of the requirements, of course, dependent on the amount of the over-contribution. Imposing the maximum penalty in every case is unnecessarily punitive and contrary to the Respondent's obligations under the law. The set fee or percentage could be increased (however not to more than 200%) for repeat offenders to the cap of $10,000 per violation. In each example, the amount could be reduced (including to zero) if there are extenuating mitigating circumstances, and should be reduced to zero if the issue is one of incorrect identity.

[68] Even though an assessment of this nature may be additional work for the agency enforcing the *Act*, compliance with section 51.01(4) of the *Act*, requiring consideration the enumerated factors for the purpose of determining the amount of the administrative penalty, is a mandatory obligation imposed on the Respondent.

[69] In this case, however, as there is an issue of procedural fairness, I rescind Mr. Rempel's penalty.

[70] I further note that since the time of hearing this appeal, *Bill 22*, the *Reform of Agencies, Boards and Commissions and Government Enterprises Act* came into effect on November 22, 2019, dissolving the Office of the Election Commissioner and transferring all its responsibilities to the Office of the Chief Electoral Officer (Elections Alberta). The Chief Electoral Officer will no doubt adopt its own policies and practices in administering this legislation, and in light of the above reasons, ought not to replicate the aforementioned problematic policies and practices of the Election Commissioner.

Publication on Website

[71] The authority of the Respondent to post the names of the individuals who have been assessed an administrative penalty is found at section 5.2(3) of the *Act*:

> 5.2(3) Findings and decisions, and any additional information that the Election Commissioner considers to be appropriate, shall be published on the Election Commissioner's website in the following circumstances:
>
> > (a) subject to section 51.02(2), if an administrative penalty is imposed or a letter of reprimand is issued under section 51 or 51.01;

[72] Mr. Rempel seeks to have his name removed from this list. Had the outcome of this case rested on the Court overturning the merits of the decision and substituting a lesser administrative penalty, posting Mr. Rempel's name in this manner would not run afoul of the statute. Thus, removal of his name from this posting would not be relief granted by this Court. In this case, however, given the issues with procedural fairness, as a result of denying Mr. Rempel the opportunity to respond, this Court rescinds the penalty and does not substitute it with a letter of reprimand and therefore Mr. Rempel's name should be taken off the website.

Conclusion

[73] The Election Commissioner is charged with complying with the legislation, and in particular ss 44.95(b), 44.97(3) and 51.01(4) of the *Act*. The Election Commissioner has failed to comply with its obligations under the *Act*. In light of the circumstances of this case, including an issue of procedural fairness, I rescind Mr. Rempel's penalty, and his name is to be removed from the website posting.

[74] Had there not been an issue of procedural fairness, I would have reduced Mr. Rempel's penalty to $500, being 10% of his over-contribution. In that instance, I would decline to grant the relief he requests to remove his name from the publication of over-contributions.

[75] The parties shall attend before me within 45 days of this decision to determine cost if they are unable to reach their own agreement.

Dated at the City of Calgary, Alberta this 6th day of December, 2019.

C. Dario
J.C.Q.B.A.

Appearances:

Glen Rumpel
Self-Represented Litigant

Joseph Rosselli, Q.C.
for the Respondent