Court of Queen's Bench of Alberta

Citation: Aheer v Alberta (Election Commissioner), 2022 ABQB 513

Date:
Docket: 1901 08635
Registry: Calgary

Between:

Leela Aheer

Applicant

- and -

Office of the Election Commissioner

Respondent

Endorsement
of the
Honourable Justice J.T. Eamon

Overview

[1] On May 22, 2019 the Office of the Election Commissioner imposed a $2000 administrative penalty on the Applicant for contravening s 17(1) of the *Election Finances and Contributions Disclosure Act*, RSA 2000, c E-2.

[2] Section 17(1) provides that no person in Alberta may contribute more than $4000 in any year to a registered party, a registered constituency association, a registered candidate, a registered nomination contestant or a registered leadership contestant (ie, political contributions).

[3] The Election Commissioner found that the Applicant made political contributions of $5000 in 2018 and sanctioned her for double the amount of the excess contributions above $4000.

[4] The Applicant appeals the Election Commissioner's decision under s 54.02 of the *Act* and seeks judicial review under s 54 of the *Act*. The appeal/judicial review application arises from the

Election Commissioner's finding that two payments of $500 each were political contributions under s 17(1) of the *Act*.

[5] The Applicant submits the Election Commissioner breached her right to fairness in the administrative penalty proceeding, because the Election Commissioner did not notify her of the investigation and did not provide her an opportunity to respond to the allegations. Further, she did not make political contributions in excess of the limit. The two $500 payments were nomination fees. These fees are not counted as political contributions (*Act*, s 13(3)).

[6] For the reasons set out herein the appeal is allowed, and the administrative penalty is set aside. In summary, the Election Commissioner breached its obligations of procedural fairness owed to the Applicant. New evidence on the appeal – that the Applicant would have provided the Election Commissioner if she had been notified of the investigation and given a reasonable opportunity to respond to the allegations – was a meritorious response to the complaint, thus the unfairness seriously and negatively affected the Applicant. The failure to consider the evidence was a palpable and overriding error. The decision must be set aside.

Facts

[7] The Applicant was a registered nomination contestant in the nomination contest for selection and endorsement as the official candidate of the United Conservative Party for the Chestermere-Strathmore electoral division in 2018.

[8] The Respondent's investigation was initiated by a complaint from Elections Alberta dated April 4, 2019 regarding 2018 political contributions. In the Applicant's case, a spreadsheet submitted by Elections Alberta indicated that she made contributions of $1000, $500, and $3000 in 2018 for a total of $5000 [sic]. A second list, apparently also supplied by Elections Alberta with the complaint, added a second $500 payment.

[9] The Election Commissioner prepared a notice dated April 11, 2019 alleging the Applicant contributed $4500, being $500 in excess of the statutory limit. This notice stated the deadline for response was April 26, 2019. The Election Commissioner purported to send the notice to the Applicant by regular mail. It did not provide a correspondence log or other record confirming that it mailed the letter.

[10] The Applicant did not receive the letter. The Election Commissioner did not contact the Applicant to inquire if she had received the notice or wished to respond to it, although her whereabouts would have been apparent because she was a serving member of the Alberta Legislature at the time the commissioner decided the complaint.

[11] The Applicant did not respond to the notice of investigation because she was not aware of the investigation and did not receive the notice.

[12] The Respondent issued its decision on May 22, 2019. It found that the Applicant contributed $5000, exceeding the limit in s 17(1) of the *Act*. The contributions consisted of four payments, in the amounts of $3000, $500, $500 and $1000 respectively. It imposed an administrative monetary penalty and published its decision on its internet site, as required by s 5.2(3)(a) of the *Act*.

[13] On the Applicant's receipt of the decision, communications were sent on her behalf requesting information why the Election Commissioner characterized the $500 payments as

contributions and raising the issue that the $500 payments were nomination fees, not political contributions. These included a letter from the Applicant's lawyer of June 12, 2019, requesting details of the Election Commissioner's investigation and the alleged excessive contributions.

[14] The Election Commissioner advised on June 13, 2019 that the over-contributions may have resulted from "changes which were implemented by Elections Alberta", and that it had contacted Elections Alberta for additional information. The Elections Commissioner suspended the matter pending further information from Elections Alberta. In response, counsel invited the commissioner to withdraw the penalty and proceed later if necessary. The Election Commissioner did not provide a response to this suggestion.

[15] The Applicant did not receive particulars of the alleged over-contributions until the Election Commissioner filed the certified record in the appeal/judicial review application in September 2020 – more than 14 months after counsel filed and served the Notice of Appeal/Application for judicial review.

[16] On the present appeal/judicial review, the Applicant filed evidence to demonstrate what her response would have been had she been notified of the investigation. Although there are strict limitations on allowing new evidence on an appeal or judicial review, evidence of this nature is permissible in some judicial review cases to demonstrate what the Applicant's answer to the allegations would have been if they had received the required procedural fairness (see ***Walton v Alberta (Securities Commission)***, 2014 ABCA 273 at paras 145-146). The Applicant meets this test. Further, new evidence is admissible on the appeal if it meets the well-known ***Palmer*** criteria. As explained below, the evidence is admissible in the appeal as well.

[17] The new evidence shows that the Applicant contributed $4000 in 2018. The two $500 payments were not political contributions. They were nomination fees, paid by her campaign officers through her campaign nomination account (set up to receive contributions for and paying expenses of the nomination contest). The payments were evidenced by two cheques dated June 1, 2018, each in the amount of $500 and specifically noted on the face of the cheques to be in payment of party and constituency association fees. These payments were required by the United Conservative Party Candidate Selection Rules and Procedures.

[18] The Election Commissioner did not have copies of the cheques or bank record, or evidence from the payors, because the Applicant was not notified of the investigation or given an opportunity to respond before the Election Commissioner decided to sanction her.

Standard of review

[19] Different standards of review apply depending on the issue.

[20] Procedural fairness issues. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all the circumstances, including the choices of procedure made by the administrative decision maker itself (***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 77). The court considers this information and decides as a matter of law the required standard of fairness (***Rebel News Network Ltd v Alberta (Election Commissioner)***, 2021 ABCA 376 at para 10; ***Edmonton (City of) Library Board v Edmonton (City of)***, 2021 ABCA 355 at para 28; and authorities cited therein).

[21] Appeal on merits of decision. The following principle from ***Vavilov*** applies:

> [37] ... [W]here the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. 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. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[22] Judicial review of merits of decision. For the judicial review the presumptive standard of reasonableness applies (***Vavilov*** at paras 16, 17, 23, 30; ***Anglin v Alberta (Chief Electoral Officer)***, 2020 ABQB 131 at para 24; rehearing allowed in part, 2021 ABQB 353).

Breach of the duty of procedural fairness

[23] The *Act* required the Election Commissioner to notify the Applicant, before completing the investigation, of the existence of the investigation and the nature of the matter being investigated (*Act*, s 44.97 (1.1)). The Election Commissioner was prohibited from making an adverse finding against the Applicant unless she had reasonable notice of the substance of the allegations and a reasonable opportunity to present her views (*Act*, s 44.97(3)).

[24] The Applicant relied on ***Rumpel v Alberta (Election Commissioner)***, 2019 ABQB 938 at paras 28-33. In that case, the subject of the investigation did not receive a notice sent by the Election Commissioner by ordinary mail until after the deadline for response and after the commissioner had made the adverse findings. Dario J found that the 15 day notice period for response was too short when sent by regular mail. She found the applicant had not received notice or a meaningful opportunity to respond.

[25] In ***Rumpel***, the applicant received the notice though it was late. In the present case, the Applicant never received notice. Who should bear the consequences? Ms Aheer, who was not aware of the investigation? The Election Commissioner, who chose ordinary mail without a means of confirming receipt and without a record on the Applicant's complaint file that it was sent?

[26] The Election Commissioner must act with due diligence to discharge the fundamental duties of notice and reasonable opportunity to respond. The administrative penalties in these proceedings can amount to thousands of dollars. The *Act* is part of the regulation of elections – a fundamental aspect of our democracy. Thus, the Election Commissioner's findings can seriously affect the reputation of the person found to have contravened the *Act*. These consequences help inform what is reasonable in providing notice of the proceedings.

[27] Merely sending a letter by regular post, without any follow up, was not sufficient procedural fairness in view of the potential consequences to individuals under investigation. The commissioner did not select a trackable form of post such as recorded mail or produce a correspondence log indicating the letter actually was mailed. The commissioner did not check to see if the Applicant actually received the letter before proceeding to decide the complaint.

[28] I find that the Election Commissioner did not take adequate steps to notify the Applicant of these matters, did not provide reasonable notice of the substance of the allegations, and did not provide the Applicant a reasonable opportunity to respond to the allegations. This was a serious breach of procedural fairness.

[29] The breach had a serious impact on the Applicant.

[30] The Applicant's new evidence is admissible on the appeal if it meets the test in ***Palmer v The Queen***, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 at para 22:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases…
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
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> (***Anglin***, at para 12 of 2020 ABQB 131)

[31] The Applicant's evidence satisfies the ***Palmer*** criteria. Further (as mentioned earlier), it is admissible to explain the evidence the Applicant could have provided if her procedural rights were fulfilled.

[32] Fees for nomination contests are not contributions and therefore not the subject of a contribution limit. Section 13(3) of the *Act* provides:

> (3) A fee or deposit required to be paid by a person to enter a nomination contest or a leadership contest is not a contribution for the purposes of this Act but must be recorded as to amount and source by the registered party or registered constituency association that receives the funds.

[33] The Applicant had a meritorious answer to the complaint, that the two payments of $500 were nomination fees. The certified record filed on the appeal/judicial review application does not indicate that Alberta Elections answered the Election Commissioner's request for additional explanation or that the Election Commissioner considered this issue.

[34] Consequently, the decision should be set aside for breach of procedural fairness.

[35] The Applicant's counsel further asserted, in its appeal notice, that the Election Commissioner acted unfairly because it did not properly investigate the complaint. The Notice of Appeal/Judicial Review Application form states that after the Election Commissioner released its decision, it acknowledged that it had been made aware of concerns that Elections Alberta may

have mistakenly claimed that nomination fees were contributions and requested additional information from Elections Alberta that had not been received. Further, the Election Commissioner did not properly investigate and lacked the information to resolve the concerns.

[36] There is case law supporting that a clearly deficient investigation might amount to procedural unfairness (***Al-Ghamdi v Peace Country Health Region***, 2015 ABQB 155 at para 66; ***Chartrand v Alberta (Human Rights and Citizenship Commission)***, 2008 ABQB 207 at para 14). However, this additional ground was not addressed in argument. I do not find it necessary to address this point, in view of my conclusions with respect to the fundamental issues of lack of notice and opportunity to respond.

Merits of appeal

[37] The Applicant submits that the Election Commissioner committed an error of law in finding the nomination fees were political contributions, citing s 13(3) of the *Act*.

[38] The Election Commissioner's decision was a question of mixed fact and law, not a question of law alone. The alleged legal error cannot be extricated from the factual issue. The real problem was not that the commissioner failed to understand the difference between fees and contributions, but rather erred in characterizing the payments as contributions rather than fees. Therefore, the Applicant must establish not merely that the decision was incorrect, but rather that the decision contains a palpable and overriding error.

[39] As explained earlier, the new evidence tends to show that the two $500 payments were fees, not contributions, and cannot be counted in the $4000 limit (*Act*, s 13(3)). The Election Commissioner's decision was based on seriously deficient information, constituting an obvious error going to the core of the issue; in other words, a palpable and over-riding error.

Judicial review

[40] It is not necessary to consider the alternative request for judicial review, because the appeal resolves the issues.

Remedies

[41] As to the Court's jurisdiction to grant remedies on the appeal, the *Act* provides:

> 51.03(5) On hearing the appeal, the Court of Queen's Bench may confirm, rescind or vary the amount of the administrative penalty.

[42] The Court may rescind the administrative penalty under this provision. Case law in this Court also holds that the Court does not have jurisdiction to remit the matter for reconsideration (***Anglin*** at paras 26, 27 and 41 of 2021 ABQB 353) and that the Court may direct that the successful applicant's name be removed from the publication on the Commissioner's website under s 5.2(3) of the *Act* (***Rumpel*** at paras 72, 74).

[43] I agree with the conclusions in ***Rumpel*** and ***Anglin*** that the Court cannot remit the matter to the Election Commissioner for redetermination. If I had discretion to remit the matter, I would refuse to do so. More than three years have passed since the issue of the fees was raised and Elections Alberta was asked to provide additional information and explanation. The Applicant's

new evidence suggests the payments were nomination fees, not political contributions. There would be no basis to further delay the resolution of the matter.

Costs

[44] The Applicant seeks costs of these proceedings.

[45] The law respecting costs on the appeal from a decision of the Election Commissioner are set out by Jones J in ***Wenzel v Election Commissioner of Alberta***, 2021 ABQB 445:

> [20] The Election Commissioner reinforces the default position in a typical case as noted in ***Sihota*** [***v. Edmonton (City)***, 2013 ABCA 125] in citing ***Lor-Al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board***, 2001 ABCA 123 at paragraph 31. There the Court noted that:
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> > The established practice on review of, or appeal from, decisions of administrative tribunals is not to award costs either for or against a tribunal where the tribunal confines its participation to matters that are truly questions of its jurisdiction and makes no submissions on the merits.
>
> [21] The Appellants note the decision in ***Optimax Developments Ltd. v. Calgary (City)***, 2016 ABQB 70, paragraph 45. There, this Court referred to the decision of this Court in ***Court v Alberta (Environmental Appeal Board)*** (2003) Alta LR (2d) 74. That decision quoted from Brown and Evan, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback, 2003) at para. 5:2560
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> > However, costs have been awarded against an administrative tribunal where it cast itself in an adversarial role, acted capriciously in ignoring a clear legal duty, made a questionable exercise of state power, effectively split the case so as to generate unnecessary litigation, manifested a notable lack of diligence, or was the initiator of the litigation in question, or where bias among tribunal members had necessitated a new hearing.

[46] Jones J later noted, at paras 27-30, that procedural unfairness alone does justify a departure from the general costs rule. In this regard, he referred to ***M & M Resources Inc v Prince Edward Island (Workers Compensation Board)***, 2018 PECA 9 (approved in ***Borgel v Paintearth (Subdivision and Development Appeal Board)***, 2020 ABCA 321 at para 53):

> ...where a tribunal misconducts itself by neglecting to properly consider a serious issue of jurisdiction, conducts itself capriciously, or makes a clear breach of procedural fairness or similar egregious conduct, then costs could be awarded against the tribunal; but even then, a court would exercise caution before making such an award. In the result, an award of costs against a tribunal, including the Appeal Tribunal on a statutory appeal, would be a rare and unusual occurrence.

[47] I agree with Jones J's statement of the law. I note Ross J followed this statement of the law in ***Anglin v Alberta (Chief Electoral Officer)***, 2021 ABQB 623.

[48] The Applicant's counsel emphasized the procedural unfairness and the notable lack of diligence by the Election Commissioner in conducting the administrative penalty proceedings. Further, in the Notice of Appeal/ Judicial Review Application form, counsel noted that the Election Commissioner declined to withdraw the administrative penalty or consent to an order setting the penalty aside, thus refusing to acknowledge the "obvious and fatal errors of his predecessor and consent to a resolution".

[49] The Election Commissioner did not appear on this application to address the merits or assume an adversarial role. Respondent's counsel emphasized that the procedural unfairness in this case was not an exceptional case where a costs award was warranted.

[50] The procedural unfairness in conducting the penalty determination without adequate notice or opportunity to respond does not alone rise to the level of misconduct of the administrative penalty proceedings to warrant a departure from the general rule.

[51] Counsel did not address the power (if any) of the Election Commissioner to withdraw or reconsider administrative penalties. Assuming the Election Commissioner had power to reconsider its decision where it conducted the proceedings without basic procedural fairness (***Chandler v Alberta Association of Architects***, 1989 CanLII 41 (SCC), [1989] 2 SCR 848), its failure to recognize that possible option does not rise to the level of misconduct that takes the matter out of the general rule.

[52] The record before me does not provide a basis for finding the Election Commissioner engaged in misconduct in the litigation, or misconduct in its administrative penalty proceedings sufficient to warrant an award of costs. Consequently, I refuse the request for costs.

Conclusion

[53] The appeal is allowed. The finding that the Applicant breached s 17(1) of the *Act* is set aside and the administrative penalty imposed by the Respondent by letter to the Applicant dated 22 May 2019 is rescinded and not remitted for reconsideration. The Respondent is ordered to remove the Applicant's name and any reference to the administrative penalty imposed on her from the Elections Alberta website where the names of those penalized for over-contributions are posted. I decline to award costs against the Election Commissioner.

Heard on the 19th day of July, 2022.
Dated at the City of Calgary, Alberta this 27th day of July, 2022.

J.T. Eamon
J.C.Q.B.A.

Appearances:

K R Anderson QC
for the Appellant

K Elhatton-Lake
for the Respondent