

Policy 12.1: Application of Administrative Monetary Penalties

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Responsible Program: EFCA

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Scope

This policy applies where the *Election Act* requires the Chief Electoral Officer to apply a monetary penalty of a discretionary amount, if the Chief Electoral Officer makes a determination of non-compliance.¹

If the Chief Electoral Officer makes a determination of non-compliance that requires the application of a monetary penalty under both the *Election Act* and the *Local Elections Campaign Financing Act*, Policy 36.3, Administration of Monetary Penalties under the *Local Elections Campaign Financing Act*, applies, with any necessary changes as may be applicable, instead of this policy.

Policy

This policy is intended to ensure the fair and reasonable determination and enforcement of Administrative Monetary Penalties under the *Election Act*. The policy outlines a process for the conduct of investigations and, if warranted

¹ *Election Act*, R.S.B.C. 1996, c.106, ss. 220.01(1), 220.02(1), 220.03(1), 220.04(1), 220.05(1), 220.06(1), 220.07(1), 220.08(1), 231.02(1), 250.01(1), 250.02(1), 250.03(1), 250.04(1), 250.05(1), 250.06(1), and 250.07(1) require the Chief Electoral Officer to apply a monetary penalty of a discretionary amount, if the Chief Electoral Officer makes a determination of non-compliance.

following an investigation, the process for the imposition of Administrative Monetary Penalties. These processes are designed to offer the Subject of an investigation a reasonable opportunity to be heard prior to the imposition of an Administrative Monetary Penalty.

Any investigation or imposition of an Administrative Monetary Penalty described in this Policy will be carried out using authority delegated under section 12 (2) (e) of the *Election Act*. This means that the Chief Electoral Officer will delegate in writing to the Director of Investigations, and the Enforcement Adjudicator referred to below, the authority to carry out investigations and impose monetary penalties under the *Election Act*.

Part 1 - Investigation

1. If the Director of Investigations identifies a possible instance of non-compliance with the *Election Act* (the “Act”), where the non-compliance would result in an Administrative Monetary Penalty if proven, the Director of Investigations will proceed with the matter under this policy.²
2. Investigations under this part can be generated:
 - a. Internally through compliance reviews;
 - b. Externally, through complaints from other candidates, parties or the public; or,
 - c. Referred to Elections BC from other law enforcement, investigative or government agencies.
3. Investigations will be completed by the Director of Investigations without unreasonable delay.
4. The Director of Investigations is authorized to use all investigative powers granted to the Chief Electoral Officer in the Act, including to collect evidence.
 - a. For clarity, this includes the authority described in Section 276(2) and (3) of the Act³ to enter a premise, other than a dwelling house, to inspect and make copies of records of:
 - i. A registered political party or a political party that was registered at any time during the past 5 years;
 - ii. A registered constituency association or a constituency association that was registered at any time during the past 5 years;
 - iii. An individual who is or was a candidate or leadership contestant at any time during the past 5 years; or,
 - iv. An individual or organization that was required to file an election advertising disclosure report at any time during the past 5 years.
5. The Director of Investigations may use anonymous or confidential sources to initiate or further an investigation.
 - a. The Director will attempt to independently verify or corroborate information obtained from anonymous or confidential sources.

² *Election Act*, R.S.B.C. 1996, c.106, ss. 181, 185.01, 185.02, 186, 186.01, 187, 188, 189, 231, 231.01, 231.02, 235.04, 235.05, 235.051, 235.06, 235.061, 235.07 and 239 all carry Administrative Monetary Penalties if non-compliance is determined.

³ *Election Act*, R.S.B.C. 1996, c. 106

- b. Any information provided by anonymous or confidential sources that cannot be independently verified or corroborated will be given appropriate weight by the Director of Investigations when evaluating whether to proceed with an Enforcement Notice in section 7.
 - i. Information from an anonymous or confidential source, which cannot be verified or corroborated, will not normally be sufficient in itself to cause the Director of Investigations to form the belief described in section 7(a) to proceed to an Enforcement Notice under part 2.
- 6. The investigation may involve the collection of personal information, as authorized by section 26(b) of the *Freedom of Information and Protection of Privacy Act*⁴. The personal information may be collected directly from the individual, or indirectly (as authorized by section 27(1)(c)(iv) of that Act).⁵
- 7. After the completion of the investigation, the Director of Investigations will complete an investigation report.
 - a. If the Director of Investigations believes that it is likely that non-compliance has occurred based on the evidence collected through the investigation, the Director will issue an Enforcement Notice under part 2, below.
 - b. If the Director of Investigations does not believe that it is likely that non-compliance has occurred based on the evidence collected through the investigation, the Director will conclude the investigation, and notify the parties in writing.

Part 2 - Enforcement Notice

Timeframe: Without unreasonable delay following part 1

- 1. If the Director of Investigations has formed a belief under part 1 section 7(a), the Director will prepare an Enforcement Notice.
- 2. The Enforcement Notice will include the following information:
 - a. The alleged instance of non-compliance;
 - b. Copies of all relevant sections of the Act,⁶ any other relevant legislation or policy;
 - c. The identity of the person who will be making the Determination, whether the Chief Electoral Officer or an Enforcement Adjudicator;
 - d. Possible penalties and outcomes, including:
 - i. The range of monetary penalties that could be assessed, and the criteria for calculating the penalties;
 - ii. That if a Determination is made, the Determination will be published on an Elections BC-authorized internet site, including the relevant section of the Act, the identity of the parties, the Administrative Monetary Penalty assessed, and the Decision-maker's reasons for the Determination; and
 - iii. That if a Determination is made, the Determination will be published in the *British Columbia Gazette*, including the relevant section of the Act, the identity of the Subject and the Administrative Monetary Penalty.

⁴ *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165

⁵ *Ibid*

⁶ *Election Act*, R.S.B.C. 1996, c. 106

- e. Information about an Opportunity to be Heard under part 3, including:
 - i. What questions will be decided by the Determination Decision-maker;
 - ii. Any policy or criteria that will be considered by the Determination Decision-maker;
 - iii. The deadline for submissions;
 - iv. The option to waive the Opportunity to be Heard, and accept the penalty without further process; and,
 - v. The option to waive the Opportunity to be Heard on the Determination, but make submissions on the Administrative Monetary Penalty.
 - f. The Director of Investigation's investigation report, and copies of all evidence referred to in that report.
 - g. The Director of Investigation's proposed Administrative Monetary Penalty amount.
3. The Director of Investigations will provide the completed Enforcement Notice to the Enforcement Registrar, who will proceed with an Opportunity to be Heard under part 3.

Part 3 - Opportunity to be Heard

1. The Enforcement Registrar will send the Enforcement Notice to the Subject by registered mail as soon as practicable after the Director of Investigations provides the Enforcement Notice to the Enforcement Registrar.
2. The Subject will have 14 days⁷ to make written submissions to the Enforcement Registrar respecting the matters in the Enforcement Notice.
3. The 14-day Opportunity to be Heard period commences the first day following the day that the Subject was served with the Enforcement Notice.
4. The Enforcement Registrar may answer any procedural questions raised by the Subject during this process, in consultation with the Decision-maker.
5. After the 14-day Opportunity to be Heard Period has expired, the Enforcement Registrar will provide the Enforcement Notice, and any written submissions by the Subject, to the Decision-maker to make a Determination.
6. If the Subject waives the Opportunity to be Heard regarding the Determination and the Administrative Monetary Penalty, then the Enforcement Registrar will provide that waiver and the Enforcement Notice to the Decision-maker to make a Determination.
7. If the Subject waives the Opportunity to be Heard regarding the Determination, but makes written submissions regarding the Administrative Monetary Penalty, the Enforcement Registrar will provide that waiver, the Subject's submissions regarding the Administrative Monetary Penalty, and the Enforcement Notice to the Enforcement Registrar to make a Determination.

Part 4 - Determination

1. A Determination will be made by the Decision-maker as soon as practicable following the completion of the Opportunity to be Heard period.

⁷ Excluding holidays as defined in the *Interpretation Act*, R.S.B.C. 1996, c.238, other than Sundays.

2. The Decision-maker will decide, on a balance of probabilities, whether there has been non-compliance by the Subject with the provision of the Act set out in the Enforcement Notice.
3. The Determination is made applying the evidentiary standard of the balance of probabilities, which requires there to be evidence that something is more likely than not.
4. If the Enforcement Notice includes information obtained from confidential or anonymous sources, the Decision-maker may consider that information, but will decide what if any weight to give to it where it has not been corroborated or verified.
5. If the Decision-maker decides that there has been non-compliance by the Subject with the provision of the Act set out in the Enforcement Notice, this will be set out in the Determination.

Part 5 - Administrative Monetary Penalty

1. If the Decision-maker has made a Determination of non-compliance under part 4, the Decision-maker must impose an Administrative Monetary Penalty.
2. In making a decision regarding the amount of Administrative Monetary Penalty to impose, the Decision-maker may consider any factors that the Decision-maker considers to be relevant in light of the nature and purpose of the Act, including:
 - a. The egregiousness of the behaviour:
 - i. Did the non-compliance result in the Subject receiving a large political contribution?
 - ii. Had the Subject been warned about the possible non-compliance?
 - iii. Had the Subject recently received a notice or reminder about the statutory requirement, the contravention of which caused the non-compliance?
 - iv. Was there evidence of a deliberate attempt to circumvent the legislation?
 - v. Did the Subject gain any material undue advantage (financial or otherwise) because of the non-compliance?
 - b. Previous behaviour:
 - i. Has the Subject committed a similar act of non-compliance with the Act previously?
 - ii. Is there a general pattern of the Subject being non-compliant with the Act?
 - c. Cooperation of the Subject:
 - i. Did the Subject cooperate with the investigation?
 - ii. Did the Subject report the non-compliance voluntarily?
 - iii. Did the Subject respond to requests in a timely and fulsome manner?
 - d. Preventative measures:
 - i. Did the Subject have a policy, procedure or administrative structure in place that would have normally prevented the non-compliance?
 - ii. Did the Subject take some form of reasonable care to avoid the non-compliance?

- iii. Was the non-compliance caused by human error despite the Subject having exercised due diligence?
- e. Previous Monetary Penalties issued under similar circumstances:
 - i. While the Decision-maker is not bound by previous decisions, the Decision-maker may consider previous monetary penalties that have been issued in similar circumstances, in an effort to ensure that the assessment of monetary penalties is reasonably consistent and predictable.

Part 6 - Adequate and appropriate reasons

The Decision-maker will provide the Subject with written reasons to explain how the Decision-maker made the Determination, within 7 days of making the determination.

1. The written reasons will:
 - a. Address the Subject's relevant submission;
 - b. Plainly state the rule the decision is based on, and provide an analysis of how the facts in the case were applied to the rule; and,
 - c. Contain information about the Post Determination Reconsideration process if it is available to the Subject, how to apply for relief from the Administrative Monetary Penalty under the Act, and inform the Subject that the Determination is subject to judicial review.

Part 7 - Apply the penalty, and publish the Determination

1. The Administrative Monetary Penalty will apply to the Subject 38 days after the date that the Subject was served with the Determination, unless the Subject seeks court relief under the Act.
2. Elections BC will publish the following on the date that the Administrative Monetary Penalty applies:⁸
 - a. The names of Subject on whom the Decision-maker has imposed an Administrative Monetary Penalty;
 - b. The section under which the Decision-maker has imposed the Administrative Monetary Penalty;
 - c. The amount of the Administrative Monetary Penalty; and,
 - d. The written reasons that were provided to the Subject.
3. The Determination, the section and the Administrative Monetary Penalty will be published in the *British Columbia Gazette*, after the Administrative Monetary penalty applies to the Subject under part 7 section 1.⁹
4. If the Subject seeks court relief from the penalty, the duty under part 7 section 1, and the publication of information under part 7 sections 2 and 3, is suspended until the completion of that process.
 - a. After the completion of the court relief process, the information in part 7 sections 2 and 3 will be published as outlined in those sections, and

⁸ *Election Act*, R.S.B.C. 1996, c.106, ss. 220.10(2) or 250.09(2), require the publication of items 1, 2 and 3 on an Elections BC authorized internet site.

⁹ *Election Act*, R.S.B.C. 1996, c.106, ss. 220.10(3) or 250.09(3), require the publication of items 1, 2 and 3 in the gazette.

will reflect any relief that the court granted from the Administrative Monetary Penalty.

Part 8 - If the Enforcement Registrar cannot serve notice on the Subject

1. If the Enforcement Registrar does not receive confirmation that the Subject has received the Enforcement Notice though registered mail under part 3 section 1, within 7 days of the Registrar sending the Notice, or if the Subject refused delivery of the Enforcement Notice, the Registrar will attempt to serve it on the Subject by personal service.
2. If the Enforcement Registrar is unable to serve the Enforcement Notice on the Subject under section 1 of this part the Registrar will:
 - a. Document the attempts to serve the Subject; and,
 - b. Provide the documentation, the Enforcement Notice and the Investigation Report to the Decision-maker.
3. The Decision-maker will proceed with parts 4, 5, 6, and 7 of this Policy without the participation of the Subject.
4. The notice published under part 7 will state that the Determination was made without the participation of the Subject, and that the Subject may apply to have an opportunity to be heard, through a Post-Determination Reconsideration under part 9 below.

Part 9 - Post-Determination Reconsideration

1. If the Determination proceeds without the Subject's participation under part 8 and the Decision-maker determines that the Subject was non-compliant with the Act, the Subject may apply to have an opportunity to be heard through a Post Determination Reconsideration.
2. A Post Determination Reconsideration will follow the process established in parts 3, 5 and 6 of this policy, with the 14-day Opportunity to be Heard Period commencing on the date that the Enforcement Registrar is able to serve the Subject with the original Enforcement Notice.
3. The matter before the Adjudicator at a post Determination reconsideration is the same as in part 4.
 - a. If the Decision-maker answers yes to questions 1 and 2 of part 4, then the Decision-maker confirms the Determination,
 - i. If the Decision-maker confirms the Determination after reconsideration, the Adjudicator may either confirm the Administrative Monetary Penalty, or vary the Administrative Monetary Penalty, based on the information provided in the Subject's submissions and the other factors set out in part 5.
 - ii. The Determination as originally published by Elections BC authorized internet site will remain, but will be supplemented by the Adjudicator's Post-Determination Reconsideration reasons.
 - iii. If the Adjudicator varies the Administrative Monetary Penalty, the Administrative Monetary Penalty as published on an Elections BC authorized internet site will be modified accordingly, and a variance will be printed in the *British Columbia Gazette*.
 - b. If the Decision-maker answers no to question 1 or 2, the Decision-maker sets aside the previous Determination.

- i. If the Determination is set aside, the Determination will be removed from the Elections BC authorized internet site, and a retraction will be printed in the *British Columbia Gazette*.

Part 10 - Collection of Administrative Monetary Penalties

1. The Subject of a Determination and Administrative Monetary Penalty has 30 days from the date that the Administrative Monetary Penalty applies to the Subject under part 7, to either pay the Administrative Monetary Penalty, or enter into a payment agreement with Elections BC to pay the Administrative Monetary Penalty over a period of up to one year.
2. If the Subject of an Administrative Monetary Penalty fails to pay the penalty, or enter into a payment agreement with Elections BC, within 30 days of the Administrative Monetary Penalty applying to them, the Chief Electoral Officer may issue a certificate specifying the name of the Subject, and the amount owed, and file that certificate with the Supreme Court as authorized by section 278(1) of the Act.¹⁰

Definitions

“Administrative Monetary Penalty” – Means a monetary penalty assessed by a Decision-maker, under this policy.

“Decision-maker” – Means the Chief Electoral Officer or an individual to whom the Chief Electoral Officer has delegated the powers, duties and functions of the Chief Electoral Officer to make Determinations and impose Administrative Monetary Penalties in accordance with the Act and this policy.

“Determination” – Means a formal decision made by the Decision-maker that a Subject’s actions or omissions resulted in them being either compliant or non-compliant with the *Election Act*.

“Enforcement Adjudicator” – Means the individual to whom the Chief Electoral Officer has delegated the authority to make Determinations of non-compliance, and to establish Administrative Monetary Penalty amounts.

“Enforcement Notice” – Means the formal notice to a Subject that Elections BC is considering making a Determination of non-compliance, and issuing an Administrative Monetary Penalty against the Subject.

“Enforcement Registrar” – Is responsible for managing the Opportunity to be Heard process, under the direction of the Decision-maker.

“Director of Investigations” – Is responsible for coordinating and conducting investigations into possible instances of non-compliance with the *Election Act*.

¹⁰ Ibid

“Opportunity to be Heard” – Means a formal written process, intended to allow the Subject of a potential Administrative Monetary Penalty to respond to the allegations made against them, and rebut or disprove them. It also allows the Subject to make submission on how the potential Administrative Monetary Penalty should be calculated and applied.

“Subject” – Is the person, political party, constituency association, or third party-sponsor who is alleged to be non-compliant with the *Election Act*.



Anton Boegman
Chief Electoral Officer
September 9, 2022