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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: ANDREA GONSALVES & JUSTIN SAFAYENI ISSUE 9 • FEBRUARY 2017

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Certainty in immunity clauses and uncertainty in *Charter* damages: *Ernst v Alberta Energy Regulator*, 2017 SCC 1

FACTS: E was a frequent and vocal critic of the Alberta Energy Regulator (the "Board") – an independent, quasi-judicial statutory body. E brought a civil claim against the Board, arguing that it breached her right to freedom of expression under s 2(b) of the *Charter* by preventing her from speaking to key offices within the Board for a period of 16 months. As a remedy for this alleged breach, E sought damages of $50,000 under s 24(1) of the *Charter*.

The Board brought a motion to strike E's claim for *Charter* damages, on the basis that the statutory immunity clause in s 43 of the *Energy Resources Conservation Act*[1] (the "*Act*") bars E's claim for *Charter* damages. That provision reads: "No action or proceeding may be brought against the Board… in respect of any act or thing done purportedly in pursuance of this Act… or a decision, order or direction of the Board."

The Alberta Court of Queen's Bench struck E's claim for *Charter* damages on the basis that it was barred by s 43 of the *Act*, and her appeal to the Court of Appeal was unanimously dismissed.

DECISION: Appeal dismissed. (McLachlin CJ, Moldaver, Côté and Brown JJ, dissenting).

A majority of the Court concluded that the immunity clause applies to, and bars, E's allegations of a *Charter* breach. Justice Cromwell (writing for himself, Karakatsanis, Wagner and Gascon JJ) found that it was "plain and obvious" that the immunity provision bars E's claim. He noted that this was "common ground between the parties."[2] Writing separately, Justice Abella reached the same conclusion.

For the dissent, it was not plain and obvious that the immunity provision barred E's claim, because it was not plain and obvious that the Board's conduct (allegedly intended to punish E) was "done purportedly in pursuance" of the *Act*.

The Court also split on the issue of whether *Charter* damages could ever be granted in a case like this.

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[1] RSA 2000, c. E-10

[2] E argued that although the immunity clause did bar her claim, it should not be applied. The Court unanimously rejected this position, finding that the law had to be applied if it was constitutional, and the record did not disclose an adequate factual basis to find the immunity provision was unconstitutional.

Justice Cromwell concluded that *Charter* damages would "never be an appropriate remedy" against the Board, for three reasons. First, the alternative remedy of judicial review (which E did not pursue) substantially addresses the issue of *Charter* breaches. Second, imposing a remedy of *Charter* damages would give rise to good governance concerns – namely, distracting the Board from its statutory duties, potentially having a chilling effect on its decision making, compromising its impartiality and opening it up to new and undesirable modes of collateral attack. Finally, evaluating claims for *Charter* damages on a case-by-case basis – or allowing such claims to proceed merely because one has plead allegations of bad faith or punitive conduct – would undermine the purpose of the immunity. Because *Charter* damages would never be available against the Board, s 43 of the *Act* did not prevent anyone from bringing such claims and thus s 43 is not unconstitutional.

Justice Abella observed that Cromwell J's analysis on the unavailability of *Charter* damages was "likely" the right conclusion. However, she declined to address the matter definitively because, in her view, it was unnecessary to do so: the immunity provision was constitutional and thus *Charter* damages were not a live issue.

The dissenting judges again took a very different view. For them, it was not plain and obvious that *Charter* damages would necessarily fail against the Board. They did not consider it plain and obvious that judicial review was an adequate alternative remedy, noting that damages would not be available in such a proceeding in Alberta. The dissent also rejected the notion that good governance concerns required absolute (as opposed to qualified) immunity from *Charter* damages – particularly where the Board may not have been acting in an adjudicative capacity, or where punitive conduct was alleged, as in this case.

COMMENTARY: Although by only a narrow margin, the Court's holding that the immunity provision bars E's claim for *Charter* damages should offer significant comfort to regulators and tribunals operating under similar immunity provisions. In effect, a majority of the Court rejected the idea that allegations of bad faith, an abuse of power or punitive conduct could circumvent a broadly worded immunity clause. They also reject the adjudicative/non-adjudicative distinction relied on by the dissenting judges. Immunity for tribunals from civil suit under such clauses now appears to be effectively absolute.

On the issue of *Charter* damages, the Court is evenly split on whether such a remedy would ever be appropriate against an administrative tribunal like the Board, without a statutory immunity provision. (Justice Abella's reasons suggest that she would side with Cromwell J, but they stop short of a firm commitment.) More specifically, the Court is evenly split on how to apply the third stage of the *Ward* framework.[3] whether there are countervailing considerations that would make *Charter* damages not appropriate and just.

Until there is further clarity on that issue, the possibility of claims against tribunals like the Board for *Charter* damages remains alive, if on life support – at least in situations where the claim is rooted in allegations of bad faith, an abuse of power and/or the performance of non-adjudicative functions by the tribunal.

In light of the broad construction given by the majority of judges to the immunity provision and the uncertainty surrounding the availability of *Charter* damages, most litigants would now be well-advised to pursue redress against a tribunal by way of judicial review, rather than a civil action. (Although, as the dissent points out, this may result in being unable to pursue a remedy for damages, as one could do in a civil action.)

The big question left unanswered by *Ernst* is whether s 43 would pass constitutional muster on a proper record (assuming a claim for *Charter* damages exists, and it bars that claim). But the answer to that question – and further clarity on the availability of a claim for *Charter* damages against a tribunal– will have to wait another day.

[3] *Vancouver (City) v Ward*, [2010] 2 SCR 28

Generous approach to sufficient notice and implicit reasons: *Phillips v Ontario Securities Commission*, 2016 ONSC 7901 (Div Ct)

FACTS: P and W were in the business of selling investment products to the public. Commission staff filed a statement of allegations – and, later, an amended statement of allegations – that included this allegation of misrepresentation:

> P and W each made statements a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship, which statements were untrue or omitted information necessary to prevent the statements from being false or misleading in the circumstances in which they were made, contrary to subsection 44(2) of the *Securities Act*.

No further particulars were provided. After a 12 day hearing the Commission found that P and W had breached s 44(2), including by way of a PowerPoint slide presentation, statements on a website and a group email to investors.

The Commission also found that P and W had engaged in fraud, contrary to s 126.1 of the *Securities Act*,[4] by selling securities without disclosing material information contained in a viability report. The Commission's reasons for decision do not explicitly address whether a reasonable person would consider the Appellants' non-disclosure to be a dishonest act (which is the analysis required by law when fraud occurs by "other fraudulent means" such as non-disclosure).

P and W appealed to the Divisional Court, arguing that the failure to give proper notice of the misrepresentation allegations amounted to a breach of the rules of natural justice and procedural fairness, and that the finding on fraud was unreasonable.

DECISION: Appeal dismissed

There was no breach of natural justice or procedural fairness in this case. The statement of allegations in a prosecution under the *Act* is not to be treated the same way as a formal information or indictment. The Commission has public interest jurisdiction and, in that context, fairness requires sufficient particularization of the allegations to define the issues, prevent surprise and to enable the parties to prepare for the hearing.

That standard was met here. P and W knew misrepresentation was alleged. The evidence the Commission relied upon to make its finding was evidence generated by, and in the possession of, the corporate entity controlled by P and W. P and W did not seek particulars of the misrepresentation allegation, raised no objection when evidence was called on that allegation and had many opportunities to call their own evidence addressing that allegation. At no point during closing submissions or during the sanctions phase did P or W object to Commission staff relying on evidence called in support of the misrepresentation allegation. If P and W had a procedural objection, the time to raise it was during the hearing, not on appeal after they have lost.

The Commission's finding that P and W committed fraud is reasonable. When a reasonable basis for the decision under review is apparent to the reviewing court, it is generally unnecessary to set that decision aside and remit it to the tribunal. Reviewing courts are entitled to look beyond the reasons to the record in assessing whether a decision is reasonable. Although the Commission's reasons do not explicitly include a 'reasonable person/dishonest act' analysis, the Commission's implicit conclusion is that P and W's non-disclosure of the viability report while continuing to sell securities would be regarded by a reasonable person as dishonest.

COMMENTARY: The Court's discussion on insufficient notice is a helpful reminder of just how difficult it is to successfully raise such an argument for the first time on appeal or judicial review. Courts generally take a generous and functional approach to notice in administrative law (in the absence of strict statutory requirements). This decision exemplifies such an approach, and

[4] RSO 1990, c s5

highlights several contextual considerations that work against an insufficient notice argument.

Ultimately, counsel for parties in administrative proceedings would be well-advised to use the tools at their disposal during the hearing process – *e.g.* requests for particulars, objections, adjournments, etc. – to attempt to cure any potential unfairness, rather than remain silent and hope for a remedy on appeal or judicial review. At the same time, to avoid potential disputes, enforcement/prosecution counsel for regulators should consider disclosing significant particulars in advance of the hearing (whether by way of amendment to the notice or otherwise).

The Court's conclusion that the Commission made an "implicit" finding on the 'dishonest act' component of the fraud allegation raises the vexing question of just how far reviewing courts should rely on the record in assessing the reasonableness of a decision that is silent on a certain point. In other words, how far should courts go in looking to supplement what a tribunal said (or did not say) with what they *could* have said, based on the record?

On the facts of this case, the Commission's views on the 'dishonest act' issue may have been fairly obvious from its overall findings of fact, how it dealt with P and W's arguments on the non-disclosure issue, and the record. But it is nevertheless troubling that the reasons fail to explicitly address a central plank in a very serious finding of misconduct.

Reviewing courts continue to navigate murky waters when it comes to the line between (permissibly) upholding decisions based on reasons that could have been offered by a tribunal,[5] and (impermissibly) acting as if one has "free rein to dive into the record before the administrative decision-maker to save the decision."[6] As discussed in a previous issue of this Case Review, there is also the more fundamental problem of whether deferring to "implicit" reasons is even consistent with the rationales for deference in administrative law.[7] Courts have invited the Supreme Court to offer some clarity on these issues,[8] but it remains to be seen whether that invitation will be accepted.

Decision set aside for lack of justification: *Taman v Attorney General of Canada*, 2017 FCA 1

FACTS: T was a federal prosecutor with the Public Prosecution Service of Canada. She submitted a request to the Public Service Commission for a leave of absence without pay to seek the nomination of a political party and, if successful, to run as that party's candidate in the October 2015 federal election.

T's supervisor supported her request. However, the Director of Public Prosecutions disagreed that a perception of impartiality would not arise if T was unsuccessful in seeking nomination or being elected. In his view, seeking a political party's nomination shows a significant allegiance to the party and its platform, which could be perceived as interfering with T's ability to independently do her job as prosecutor.

The Commission was not satisfied under s 114 of the *Public Service Employment Act*[9] that T could return to her position without being impaired or being perceived to be impaired in her ability to perform her duties impartially, and it rejected T's request. T sought judicial review but was unsuccessful in the Federal Court. T appealed.

DECISION: Appeal allowed. Commission's decision set aside.

[5] See, for example, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 and *McLean v British Columbia (Securities Commission)*, 2013 SCC 67

[6] *JMSL v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114 at para 29

[7] See Issue No. 8 (December 2016) at p. 3

[8] *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 at para 45 (leave granted, appeal heard Jan 13, 2017, and decision reserved)

[9] SC 2003, c 22

Pelletier JA, writing for a unanimous panel, held that the standard of review of the Commission's decision is reasonableness. After reviewing the relevant sections of the Act, he observed that Parliament's concern was not necessarily political impartiality, but rather the impairment or perception of impairment of a public official's ability to perform her duties in a politically impartial manner. Thus, in order to give or refuse a public official permission to seek elected office, the Commission should have a clear idea of what would impair, or give the appearance of impairing, a public official's ability to perform her employment duties in a politically impartial way.

The Commission is required to base its decision on a future state of affairs – whether seeking elected office will impair a public official's ability to perform her duties impartially in the future and whether the public will so perceive. Consequently, the Commission must have some idea what facts or characteristics ascertainable prior to an election campaign are or may be predictors of the public official's conduct or the perception of that conduct after the campaign.

The Act provides a list of factors that the Commission may consider in deciding whether to grant a public official permission to run for elected office: the nature of the election, the nature of the employee's duties, and the level and visibility of the employee's position. The question arises as to what value these factors have in helping the Commission decide the two necessary inquiries. The Commission appears to have been uncritical of the Director's argument that a prosecutor's candidacy – and the significant allegiance to a political party and its platform that goes along with such candidacy – undermines the independence of the prosecutor's office.

The Commission referred to the autonomy and discretion T had while working as a federal prosecutor, and the increased publicity, visibility and recognition that would be associated with seeking nomination and being a candidate in a federal election. The suggestion was that as publicity, visibility and recognition increase, the ability to perform one's duties impartially (or the perception thereof) decreases. However, this is not self-evident and the conclusion was not justified in the Commission's reasons. The Commission identified autonomy, discretion and visibility as factors in its consideration of impairment, without indicating how those factors led it to its ultimate conclusion.

COMMENTARY: This case stands as a counterpoint to *Phillips v Ontario Securities Commission*. As in *Phillips*, the issue before the Court here was fundamentally whether the Commission's reasons adequately – if implicitly – justify the conclusions reached. And, as in *Phillips*, the most troubling aspect was the silence of the Commission's reasons on a central bridge along the reasoning pathway. Here, the unexplained conclusion was that the public official's autonomy, discretion and visibility would impair her ability to perform her duties impartially, or lead to a perception of impairment.

The Court in this case did not provide much insight as to why the Commission's conclusion could not be found "implicitly" in its decision or in the record or in its acceptance of the Director's position. Conspicuous by its absence is any reference to the leading cases from the Supreme Court on deferential review and implicit reasons,[10] or to decisions from the Federal Court of Appeal itself on the issue.

It is evident throughout the Court's decision that the Commission's reasons left several significant unanswered questions, including *how* autonomy and discretion in a public official's duties are indicative of the manner in which that official will behave, or be perceived to behave, following an unsuccessful attempt to be elected to office – particularly when the public official is under a duty of loyalty. The fact that the Commission referred to the factors identified in the Act was not sufficient and the Commission's conclusions could not be justified merely on the basis of being "self-evident".

It remains to be seen whether this case is an outlier or signals a pull back from the increasing

[10] Including *Dunsmuir v New Brunswick* and the cases cited in footnote 5 above.

tendency to defer to "implicit reasons". In either event, it would have been helpful for the Court to explain why the Commission's decision could not be upheld by deference to implicit reasons. Adequacy of reasons on reasonableness review remains an interesting hotspot in judicial review and we can expect further appellate guidance on this issue in the coming months.

Legislative action not subject to judicial review: *Canada (Governor General in Council) v Courtoreille*, 2016 FCA 311

FACTS: The Chief of the Mikisew Cree First Nation brought an application for judicial review claiming that the Governor General in Council and six federal government ministers breached their duty to consult the Mikisew Cree on the development and introduction in Parliament of two omnibus bills that reduced federal regulatory oversight of works and projects that might affect the Mikisew Cree's treaty rights.

The Federal Court judge held that the Crown had a duty to consult with the Mikisew Cree when the bills were introduced in Parliament. The Governor General in Council and ministers appealed. The primary issues on the appeal were whether the Federal Court judge erred in conducting judicial review of legislative action contrary to the *Federal Courts Act*,[11] or in failing to respect the doctrine of separation of powers or the principle of parliamentary sovereignty.

DECISION: Appeal allowed.

De Montigny JA (writing for himself and Webb JA) reviewed the history of the *Federal Courts Act* and the rationale for judicial review as reflected in the Act. Under the ss 18 and 18.1 of the Act there are two requirements for the Federal Court to be validly seized of an application for judicial review: there must be an identifiable decision or order; and the impugned decision or order must have been made by a "federal board, commission or other tribunal". Section 2 of the Act expressly excludes from the definition of "federal board, commission or other tribunal" the Senate, the House of Commons, and any committee or member of either House.

As to the first requirement, in this case, it is difficult to identify any discrete decision made by the Governor in Council or the various ministers that would be the subject of an application for judicial review. If the "decision" being challenged is the ministers' decision to move forward with a policy initiative with a view to bringing proposed legislation to Cabinet for approval and, eventually, to Parliament for adoption, it would not meet the requirement for a formal decision as it would be inchoate and not formally recorded. Even if the focus of the inquiry were broader – whether the decision-maker has done anything which may have triggered rights on the part of an aggrieved party to bring a judicial review application, even if it has not made a formal decision or order – the application would still have to establish that the Federal Court can act and provide a remedy. The remedies available on judicial review do not relate to legislative action. To the extent that the ministers and Governor in Council were acting in their legislative capacity in developing the two bills, judicial review would not be available.

Regarding the second requirement, De Montigny JA held that while the ministers have executive powers in their responsibilities for their departments pursuant to various statues, those statutes do not refer to the ministers' roles as policy-makers or to the development of legislation for introduction in Parliament. Those roles flow from the Constitution itself and from Canada's system of parliamentary democracy. The exercise of such powers is not reviewable by way of judicial review. The legislative process is fluid and cannot be parsed into the minister's executive functions and legislative functions. The power that the ministers exercised in the entire course of the law-making process was legislative in nature and derived from their status as members of Parliament. The matter is not a proper subject for

[11] RSC 1985, c F-7

an application for judicial review under the *Federal Courts Act*.

De Montigny JA also allowed the appeal on constitutional grounds – namely, that court intervention before a bill is introduced into Parliament would offend the doctrine of separation of powers and be an undue interference with Parliament's process and sovereignty.

Pelletier JA concurred in the result but for different reasons. He noted that the relief sought was primarily declaratory, with ancillary orders in support of the declarations. The fact that a declaration is sought in an application against someone other than a federal board, commission or tribunal does not doom it to failure. Such a proceeding may not be an application for judicial review, but it may seek a remedy that the Federal Court has jurisdiction to grant under s 17 of the *Federal Courts Act*.

It may be that the judicial review remedies of *certiorari*, prohibition, *mandamus* and *quo warranto* are not available against anyone other than a federal board, commission or tribunal, but because a declaration is available against the Crown, the characterization of the respondent as a federal board, commission or tribunal is not critical to the success of a proceeding seeking a declaration.

The fact that the Mikisew Cree proceeding was not commenced as an application is not fatal. Under the *Federal Courts Rules*, such a procedural irregularity can be cured. Thus, the Mikisew Cree's application is not doomed to fail as a result of a procedural irregularity and their entitlement to declarations must be decided on the merits. On the merits, there is no duty to consult with respect to laws of general application such as these bills.

COMMENTARY: As noted by De Montigny JA, this case raises novel issues regarding the Crown's obligation to consult when contemplating changes to legislation that might adversely impact treaty rights. Our focus in this Case Review is the administrative law angle and particularly the aspects of the case that relate to the jurisdiction of the Federal Court on judicial review. In that regard, the reasons of the majority and the minority are each notable in their own right.

The majority reasons clarify the issue of what actions of government ministers constitute legislative action not subject to judicial review, and what actions constitute decisions, orders or "matters" of a federal board, commission or tribunal that may be subject to judicial review. De Montigny JA's reasons understand the legislative process as an indivisible continuum such that any ministerial action associated with the development, recommendation and introduction of a bill is legislative action over which the federal court has no judicial review jurisdiction. Ministers perform a variety of roles and wear many hats. Some of those roles are subject to judicial review, such as the exercise of decision-making powers conferred by legislation. However, the *Federal Courts Act* and the constitutional structure of the Canadian political system preclude the Federal Court from wading into the legislative process through judicial review. A party seeking to challenge such decisions will be left with challenging the enacted legislation itself on some constitutional ground.

Parties unsatisfied with that option and who are content with only declaratory relief may try to use Pelletier JA's concurring reasons in future duty to consult cases, as an alternative to traditional judicial review (which is seemingly unavailable based on the majority's reasons) or challenging the validity of enacted legislation. The majority did not comment on Pelletier JA's approach or s 17 of the *Federal Courts Act* as a viable procedural route to seeking a declaration as to the duty to consult in the course of ministerial action prior to the introduction of legislation. Pelletier JA's analysis of the availability of a declaration in such circumstances via s 17 of the *Federal Courts Act* seems sound. There may be a future case with stronger merits in which his analysis is endorsed by a majority of the court.

Penalty decision quashed as unfit and unreasonable: *College of Physicians and Surgeons of Ontario v Peirovy*, 2017 ONSC 136 (Div Ct)

FACTS: P is a medical doctor with a family practice in a walk-in clinic. In 2009 and 2010 six of his female patients complained of improper sexual touching. After a contested hearing, a panel of the College's Discipline Committee found that P had sexually abuse four patients and committed disgraceful, dishonourable or unprofessional conduct with a fifth. Two of the cases in which sexual abuse was found also led to criminal findings of guilt.

In finding P guilty of misconduct, the Discipline Committee panel rejected P's argument that the complainants misunderstood his actions as sexual in nature. The panel found that P's touches (which involved touching of breasts under the pretense of a medical exam, but in fact without medical purpose) would be construed as sexual in nature by the objective observer, regardless of his motivation.

Several months later, the Committee reconvened for a penalty hearing. At the penalty hearing, an expert testified as to his findings that P was at low risk to re-offend and there was no evidence of personality pathology, personality disorder, psychopathy or sexual deviance. Another expert testified as to P's lack of awareness of his professional responsibilities in maintaining appropriate boundaries and his efforts to remediate his communication skills.

The panel was referred to a number of decisions of the Discipline Committee in which doctors were given suspension from three to six months in similar circumstances. In its reasons for penalty, the panel accepted that the maintenance of public confidence in the profession's ability to regulate itself is a "shifting standard". It held that protection of the public is the paramount principle. It noted the expert evidence to the effect that the pattern of behaviour was not the result of predatory intent or deviant urges, which lessens the risk of re-offence.

The panel suspended P's certificate of registration for six months and imposed restrictions on his practice for twelve months thereafter. The panel also ordered P to take training, pay therapy for the victims, and pay costs.

The College appealed the penalty order to the Divisional Court, arguing that P's certificate of registration should have been revoked.

DECISION: Application allowed. Penalty quashed and matter remitted to the Discipline Committee to impose a penalty.

The standard of review of the Discipline Committee's decision is reasonableness. A penalty decision of a specialized administrative tribunal of a self-regulating profession is at the heart of its discretion and is due great deference. To overturn a penalty, the decision-maker must have made an error of principle or the penalty must be clearly unfit.

Although the relevant legislation[12] authorizes the Discipline Committee to revoke P's certificate of registration for sexual abuse, it was not mandatory in these circusmtances. The purposes of penalty in discipline proceedings are protection of the public, maintenance of public confidence in the integrity of the profession and the principle of self-governance, deterrence and the potential for rehabilitation.

The Court was critical of the inconsistencies between the Committee's findings on misconduct and the reasons it gave for penalty. In its misconduct decision the panel found that P deliberately touched the complainants in a way that an objective observer would find sexual. There is no line of analysis that could lead the panel to conclude at the penalty stage that P's awkward manner was a factor in understanding his abusive behaviour. The Committee had already

[12] *Health Professions Procedural Code*, s 51(5), Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c 18

found that there was no legitimate medical purpose for P's touches. His motivation can have been nothing but sexual.

Regarding the fitness of the penalty, the Court held it was an error for the Committee to proceed on the basis that revocation is reserved for egregious conduct or members at a high risk to re-offend. In four months, P sexually abused four patients. A short suspension is inadequate to deter others and contribute meaningfully to the eradication of sexual abuse in the profession.

The main justification offered by the Committee is that the penalty imposed is in line with similar penalties that were imposed in similar cases. While consistency in the imposition of penalty is a proper consideration, a litany of clearly unfit penalties does not justify the imposition of yet another unfit penalty.

The Court emphasized that public confidence in the profession is not a "shifting standard". Rather, community tolerance for sexual abuse by doctors has lessened. Public confidence in the medical profession demands more from the disciplinary process than recent sexual abuse discipline cases suggest.

COMMENTARY: The Divisional Court's decision in this case is as notable for its tone as it is for its substance. The tone of the decision conveys a certain frustration by the court, on behalf of the public, with the perception of unduly lenient penalties in cases of sexual abuse by health professionals.

As for the substance, the decision sends two clear, important messages. First, even if a tribunal's liability decision and penalty decision are rendered months apart, they will be read together by a reviewing court and they must be consistent in material respects. A penalty decision must be supportable based on the liability findings even if new evidence is introduced at the penalty phase of the hearing. The challenge for the tribunal is to receive and apply relevant evidence called at the penalty phase in light of its earlier factual findings, without undermining those findings.

Second, this decision shows that, while consistency with prior cases is relevant and desirable, disciplinary penalties may need to progress alongside evolving social standards and tolerances. Penalties that follow prior penalties now shown to be unfit in the light of clear social change will be found to be unfit. ⚖

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