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Staying Administrative Proceedings Due to Delay: Is the Law Changing?

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The Supreme Court of Canada recently granted leave to appeal from the decision of *Law Society of Saskatchewan v. Abrametz*,[1] a decision of the Court of Appeal for Saskatchewan that has made waves in Canadian administrative law because it lowered the threshold for a stay as a remedy for undue delay. Before *Abrametz* the leading case addressing administrative delay was *Blencoe v. British Columbia (Human Rights Commission)*,[2] which set a high threshold for obtaining a stay due to administrative delay that amounts to an abuse of process.

Under the *Blencoe* framework, inordinate delay could only give rise to a stay of proceedings if the administrative delay was prejudicial, such that the party's ability to answer the case was somehow impaired, or if the delay caused significant personal or psychological prejudice or attached a stigma to a person's reputation, such that the proceedings would be brought into disrepute and constitute an abuse of process.[3] Even then, a stay was not the automatic remedy – the damage done to the public interest with respect to the fairness of the administrative process would have to exceed the harm to the public interest in the enforcement of the legislation if a stay was ordered.

For regulators, a new "*Abrametz* standard" for evaluating delay and determining the appropriate remedy for inordinate delay could significantly augment the *Blencoe* standard that currently applies to administrative hearings.

The Facts in *Abrametz*

Mr. Abrametz was the subject of disciplinary proceedings before a Hearings Committee of the Law Society of Saskatchewan ("**LSS**") with respect to a number of fraudulent transactions and tax evasion relating to his law practice. There were numerous delays throughout these proceedings, 32 ½ months of which amounted to delay that was attributable to the LSS.[4]

At the discipline hearing Mr. Abrametz brought an application to stay the proceedings against him based on three grounds:

1. delay amounting to a breach of section 7 and/or section 11(b) of the *Charter*; [5]
2. loss of jurisdiction by operation of section 53(1) of *The Legal Profession Act*, 1990, SS 1990–91, c L□10.1 for failing to render its decision as soon as possible; and
3. delay constituting a breach of natural justice and procedural fairness resulting in an abuse of process.[6]

The stay application was ultimately unsuccessful, with the Hearing Committee finding that there had been no *Charter* breach, that the Hearing Committee retained jurisdiction over the matter, and that there had been no delay constituting a breach of natural justice and no procedural unfairness resulting in an abuse of process. The Hearing Committee relied on the *Blencoe* framework and found that Mr. Abrametz had been unable to demonstrate that any delay of the proceedings had impacted his ability to answer the charges against him and therefore there was no prejudice on the basis of fairness of the hearing. In addition, the Hearing Committee also

found that Mr. Abrametz had suffered no personal prejudice.[7]

Court of Appeal Decision

Mr. Abrametz appealed the Hearing Committee's misconduct, penalty, and stay decisions to the Court of Appeal for Saskatchewan. The Court of Appeal rejected the appeals of the misconduct and penalty findings, but accepted Mr. Abrametz's position that the Hearing Committee had erred by dismissing the application to stay the proceedings for delay.[8] Justice Barrington-Foote, writing for the Court of Appeal, summarized the factors to be considered in determining whether there has been inordinate delay caused by an administrative body and prejudice attributable to that delay, as follows:

> The period of delay must be so inordinate as to be clearly unacceptable (at paras 115 and 121). Whether a delay is inordinate turns on contextual factors, including "the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay, and other circumstances of the case" (at para 122).
> The party [seeking a stay based on] abuse of process must show that the inordinate delay "directly caused [them] a significant prejudice" that is related to the delay itself (at para 115, emphasis added). In order for there to be abuse of process, "the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (at para 133).
> The analysis requires a weighing of competing interests. "In order to find an abuse of process, the court must be satisfied that 'the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted'" (at para 120).
> A stay is not the only remedy available in administrative law proceedings. However, where a respondent asks for a stay, they will bear a heavy burden (at para 117). A finding of abuse of process is available only in the "clearest of cases" (at para 120).[9]

Justice Barrington-Foote explained that the Supreme Court of Canada's decisions in *Hryniak v. Mauldin*[10] and *R. v. Jordan*[11] pointed to the importance of timely justice in civil cases and criminal cases, respectively.[12] The Court of Appeal then effectively applied the same principles of timeliness that have become the legal standard in civil and criminal proceedings to the issue of delay in administrative proceedings. In doing so, the Court of Appeal found that a 32½-month delay that was attributable to the regulator was unjustified in a situation where the member suffered from stress and had his practice restricted for a significant period of time. In the Court of Appeal's view, this delay warranted a stay of proceedings as the harm to Mr. Abrametz outweighed the harm to the public.[13] Further, according to the Court of Appeal decision, this finding was consistent with the principles of procedural fairness established in *Blencoe*, and in the alternative, represented an incremental change in the law that was consistent with *stare decisis*.[14]

Issues Raised by the Appellant Law Society

This appeal brought by the LSS has been tentatively scheduled to be heard by the Supreme Court in November 2021. As of now, one application to intervene has been filed by the Law Society of Alberta. In light of the diversity of administrative proceedings and the potential broad reach of the Supreme Court's decision, one can expect that further interventions are forthcoming.

In addition, the LSS has recently filed its appeal factum[15] and has raised a number of interesting and thorny issues for the Court to consider as to why, it says, the *Blencoe* framework is appropriate in addressing administrative delay, including:

1. The Level of Deference Owed to Regulatory Decisions On Findings of Fact

Abrametz raises important questions as to the level of deference owed to procedural choices in regulatory hearings when assessing a claim of undue delay. As the Appellant notes in its appeal factum, there is a significant body of jurisprudence that indicates that deference is owed to administrative decision-making bodies with respect to findings of fact.[16] Interestingly, the Appellant noted in its leave application that other jurisdictions have more onerous standards than Canada for proving undue delay,[17] but this argument does not appear in its appeal factum. While not dispositive of the question of the availability of stays, the contrast with other jurisdictions is potentially instructive. Perhaps this question is the least pressing one given the Supreme Court's recent guidance on the question of standard of review in *Vavilov*.[18

2. The Role of Waiver and Acquiescence

The question of waiver and acquiescence goes to the first set of *Blencoe* principles in determining whether the delay was inordinate and it is at issue in this case. The Appellant argues that Mr. Abrametz "actively sought further delay," for example, by seeking an adjournment of the proceedings while also refusing to disclose certain accounting records in his possession.[19] The Appellant also argues that Mr. Abrametz repeatedly failed to raise the issue of delay, and that this constitutes waiver. A determination by the Supreme Court could offer clarity on how a defendant's conduct throughout a regulatory proceeding might influence a finding of inordinate delay.

3. The Circumstances Under Which it is Appropriate to Stay a Matter that Originated from a Complainant

Although the Saskatchewan Court of Appeal is careful to state that the origin of a discipline matter and the presence or absence of a complainant must not be determinative, the reasons in *Abrametz* raise the question of how the presence or absence of a complainant or complainants should be interpreted. Justice Barrington-Foote stated:

I do not suggest that the presence, absence or views of complainants or others directly involved in an administrative proceeding is determinative…there are circumstances in which the interests of complainants must give way to "the safeguarding of the basic rights of the respondent engaged in a human rights proceeding and the preservation of the essential fairness of the process itself."[20]

This statement by the Court of Appeal suggests that in a situation where there is a client or patient complaint, it may be more appropriate to refuse to grant a stay because doing so would fail to provide justice to the complainant.[21] It may be useful to receive further direction from the Supreme Court on this question.

4. Is a Stay the Appropriate Remedy or Should Some Other Remedy be Ordered?

Abrametz also raises the question of whether a stay is the appropriate remedy in inordinate delay cases, or whether other remedies may be more appropriate. Such other remedies may include "a generous costs award, an order compelling speedy resolution, or a reduction of penalty."[22] It is well established that a stay remedy for abuse of process in administrative proceedings will be extremely rare, and this also holds true in the professional disciplinary context.[23]

5. The Possibility of Court Ordered Limitations Periods

It seems unlikely that the Supreme Court would impose mandatory timelines on regulators as limitation periods fall within the purview of the legislature, not the courts.[24] Nonetheless, regulators should stay tuned because if the Supreme Court upholds the Court of Appeal's decision in *Abrametz*, effectively "*Jordanizing* undue delay in administrative law,"[25] then it could become more crucial than ever for regulators to demonstrate that they are disposing of fitness and discipline matters in a timely manner.

Conclusion

There is much to watch for in the Supreme Court of Canada's hearing and eventual decision in the *Abrametz* case. The result will undoubtably clarify the law of delay as it applies to administrative hearings and regulators should stay tuned for further updates.

[1] *Law Society of Saskatchewan v. Abrametz*, 2020 SKCA 81 [*Abrametz* CA], leave to appeal granted 2021 CanLII 13273 (SCC).

[2] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*].

[3] *Blencoe* at paras. 102, 115.

[4] The LSS reasons with respect to misconduct, penalty, and the stay application were published as one decision by the Hearing Committee of the LSS*, Law Society of Saskatchewan v. Abrametz*, 2018 SKLSS 8 [*Abrametz* LSS].

[5] *Canadian Charter of Rights and Freedoms*, ss. 7, 11(b), Part I of *The Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

[6] *Abrametz* CA, para. 52; *Abrametz* LSS at paras. 258-364.

[7] *Abrametz*, LSS at paras. 344-353.

[8] *Abrametz* CA at paras. 69-70.

[9] *Abrametz* CA at para. 142.

[10] *Hryniak v. Mauldin*, 8 2014 SCC 7, [2014] 1 S.C.R. 87.

[11] *R v. Jordan*, 9 2016 SCC 27, [2016] 1 S.C.R. 631.

[12] *Abrametz*, CA, at para. 8.

[13] *Abrametz*, CA, at para. 197.

[14] *Abrametz* CA, at para. 10.

[15] Appellant's Factum, May 25, 2021, online: <https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=39340> [Appellant's Factum].

[16] Appellant's Factum at paras. 23-26.

[17] Memorandum of Argument of the Applicant, Law Society of Saskatchewan at para. 17, online: <https://www.scc-csc.ca/case-dossier/info/mal-mdaa-eng.aspx?cas=39340> [Memorandum of Argument of the Applicant].

[18] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[19] Appellant's Factum at paras. 69-70.

[20] *Abrametz* CA at para 211.

[21] This argument is addressed at para. 90 of the Appellant's Factum.

[22] Memorandum of Argument of the Applicant at para. 28.

[23] *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at para. 207; *Blencoe* at para. 120

[24] *Abrametz* CA at para 142, citing *Blencoe* at para. 101.

[25] Appellant's Factum at para. 111.

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