Revisiting the test for abuse of process in administrative law

July 13, 2022

Introduction

On July 8, 2022, the Supreme Court of Canada (SCC) released its decision in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, (*Abrametz*), clarifying the standard of review applicable to questions of procedural fairness in the context of statutory appeals, while reconsidering the test for abuse of process in the administrative law context. BLG acted as counsel[1] for the intervener *Federation of Law Societies of Canada* (the *Federation*), the national coordinating body for Canada's 14 provincial and territorial law societies.

This is the first time the SCC has considered the test for a stay of proceedings in administrative law in over two decades, since releasing its landmark decision in *Blencoe v. British Columbia (Human Rights* Commission), 2000 SCC 44 (*Blencoe*).

Overview: Abuse of process and the key impact of *Blencoe*

The doctrine of abuse of process is broad and applied differently depending on the interests at stake. This common law doctrine allows the courts to stop proceedings that become unfair or oppressive (*e.g.,* in situations where a party re-litigates essentially the same dispute, when earlier attempts at relief have failed). In the administrative law context, abuse of process can arise from unacceptable **delay** in administrative proceedings. Therefore, in cases where the duration of a proceeding before reaching a decision is significant enough to "shock" the community's sense of fairness and decency, a range of remedies are available.

Blencoe established the test for whether a delay in administrative proceedings was inordinate, so as to constitute a denial of natural justice or abuse of process, justifying a remedy under administrative law. Under *Blencoe,* such a finding could be made even in cases where the delay did not compromise the substantive fairness of the proceedings, but rather caused personal prejudice to the individual involved. In these latter types of cases, falling under what is often referred to as the "second branch" of the *Blencoe* test,

the following questions – germane to delay, prejudice, and public interest – are asked, in determining whether a stay of proceedings or other administrative remedy is warranted:

1. Was the **delay** unreasonably long, and not attributable to the party undergoing administrative proceedings?
2. Was the delay (rather than the allegations themselves) the direct or primary cause of **significant personal prejudice** , in the form of reputational or psychological harm?
3. As a result of this prejudice, would the **administration of justice be brought into disrepute** should the proceedings be allowed to continue? In other words, does this outweigh the public interest in enforcing the law or hearing the proceedings on its merits?

The *Blencoe* test intended to establish a very high threshold, not to be met on the basis of lengthy delay alone, but rather in the clearest and rarest of cases. To establish such a case, the individual would have to "demonstrate that the delay was unacceptable to the point of being so oppressive [and prejudicial] as to taint the proceedings". *Blencoe* expressly recognized that the administrative complaint processes "take a great deal more time" than their criminal counterparts, and that the law ought to maintain the distinction between these unique contexts.

The SCC's 8:1 majority decision in *Abrametz*, authored by Justice Malcom Rowe, affirmed Blencoe while providing additional guidance on the applicability of the *Blencoe* test.

The importance of *Abrametz* lies in the SCC's rejection of the more rigid approach to delay taken in criminal proceedings and, in keeping with the Federation's submissions, confirming that the application of the *Blencoe* test is context-specific, requiring a fact-specific analysis, that can vary on a case-by-case basis (*e.g.,* depending on the source of the delay, its impact on the parties involved, etc.).

Background behind *Abrametz*

The case resulted from member of the Law Society of Saskatchewan (the LSS) – Peter Abrametz – being found guilty of conduct that was "unbecoming" of a lawyer. He was disbarred without a right to apply for readmission for nearly two years.

The issue at the centre of the appeal was whether the amount of time between the LSS launching an investigation into Mr. Abrametz's conduct in 2012 – until issuing a finding of guilt and penalty in 2019 – amounted to an abuse of process.

As a result of this seven-year period, Mr. Abrametz applied for a stay of proceedings on the basis that the delay amounted to an abuse of process. The LSS Hearing Committee dismissed the application, stating that the delay did not amount to an abuse of process (see: 2018 SKLSS 8). On appeal, the LSS's decision was overturned and the Saskatchewan Court of Appeal entered a stay of proceedings (see: 2020 SKCA 81).

Before the SCC, **Mr. Abrametz argued that the *Blencoe* test must be *revised* to more closely mirror the treatment in other areas of the law** , such as in *R v. Jordan,* 2016 SCC 27 (*Jordan*). In *Jordan,* the SCC addressed institutional delays in the criminal law

context. *Jordan* identified strict timelines that such proceedings must abide by, with anything outside of these prescribed time periods amounting to an abuse of process.

In *Abrametz*, the SCC refers to these efforts to expand the *Jordan* framework into administrative law as essentially attempting to "*Jordanize*" the *Blencoe* test.

The SCC rejects attempts to *Jordanize* administrative law

While *Abrametz* recognized that excessive delays in administrative proceedings are contrary to the public interest, the SCC's majority decision – consistent the Federation's submissions – rejected attempts to import *Jordan* into administrative law because *Jordan* was grounded in Section 11(b) of the *Charter,* which governs the right to a trial within a reasonable time in criminal proceedings. No such *Charter* right applies to administrative proceedings. As a result, *Blencoe,* in its current form, still applies.

Inordinate delay

In its discussion of whether a delay is inordinate, the SCC provided some important factors to consider:

- ***The nature and purpose of the proceedings***

  Inordinate delays can overshadow someone's professional reputation, career and personal life. Therefore, disciplinary bodies – like the LSS – have a duty to deal fairly with its members, since their livelihoods are at stake.

  However, a proceeding lasting a considerable duration is not in itself an inordinate delay. Rather, some delays are justified once the circumstances surrounding the case are considered.

- ***The length and causes of the delay***

  The requirements of procedural fairness will sometimes inherently slow the pace at which the proceedings progress. However, the SCC's decision emphasizes that whether such delays are justified will depend on the circumstances of each case.

  Where an individual seeking to invoke the delay caused it, the delay is not an abuse of process. For example, if a party asked for a suspension of proceedings or did not object to a suspension of proceedings, they will be considered to have unequivocally accepted such delay. In such cases, the party is said to have "waived" the delay, which can be done implicitly or explicitly.

  However, whether the administrative body used its resources efficiently should be considered in the analysis of inordinate delay. That said, insufficient agency resources cannot excuse inordinate delay in any case. For example, if an inefficient use of resources causes the suspension of proceedings, this should be an indicator of abuse of process.

Decision-makers should also consider that a delay by itself may be beneficial to the affected party. For example, if the affected party is facing the penalty of disbarment, a delay in the administrative process might be welcome by the affected party if it enables him to continue practicing.

- ***The complexity of the facts and issues in the case***

  The complexity of the facts and issues in a case will affect the time required to decide the matter. For example, sexual abuse allegations might entail difficult and time-consuming investigations.

  By contrast, large numbers of documents are not necessarily complex, especially if the tribunal has experience doing so.

  In dissent, Justice Côté disagreed with the majority's interpretation of *Blencoe* and would have found that inordinate delay is itself procedurally unfair and capable of resulting in an abuse of process. The question of whether the delay gives rise to significant prejudice is relevant not to whether there is an abuse of process, but instead to the appropriate remedy, such as whether to issue a stay of proceedings.

Significant prejudice

Abrametz confirmed that this element of abuse of process is only satisfied where the delay is *detrimental* toan individual. Whether prejudice has occurred is a question of fact. However, the SCC provided examples of situations where prejudice is likely to occur, such as an individual experiencing significant psychological harm, where there is stigma attached to the individual's reputation, a disruption to family life, a loss of work or business opportunities, as well as extended and intrusive media attention. The SCC further emphasized that although the mere fact of an investigation or proceeding may cause prejudice, only the prejudice attributable to inordinate delay is relevant in an abuse of process analysis.

The SCC's majority in *Abrametz* noted that an administrative body should consider the "speed at which information can travel today and how easy it is to access."

Remedies

On the final assessment and the consideration of the remedy, the SCC confirmed there is a spectrum of remedies available ranging from a stay of proceedings, a reduction in sanction, or variation of an award of costs.

A permanent stay will only be warranted when the high threshold is met, namely when an inordinate delay and resulting prejudice shocks the community's sense of fairness and decency. This will be a more difficult standard to meet when the charges are more serious. In the alternative, when this threshold is not met, other remedies exist, including reduction of sanctions and variation in any award of costs.

Importantly, for the legal profession, the Court noted that the threshold for a reduction in the sanction will be particularly high when the presumptive penalty is licence revocation. Given the gravity of the misconduct generally required for such a penalty to be imposed,

setting it aside might imperil public confidence in the administration of justice, rather than enhance it.

Standard of review for procedural fairness in a statutory appeal

While the central substantive issue in *Abrametz* was the standard for abuse of process in administrative proceedings, the case also provided an opportunity for the SCC to examine the **standard of review** on issues of procedural fairness in a statutory appeal. Drawing on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) Justice Rowe held that it was "categorical" that where there is a statutory appeal mechanism, appellate standards of review apply.

Justice Rowe confirmed that, on a statutory appeal, abuse of process is a question of law and that the standard of correctness applied. Unfortunately, the majority decision failed to provide clarity on how abuse of process should be reviewed outside the context of a statutory appeal.

The dissent of Justice Côté, and the submissions of the parties, sought to have the court inject deference in the inquiry. However, later in the decision it the majority decision confirmed that whether significant prejudice was caused by administrative delay is a question of fact. It further recognized that deference was owed to the findings of fact and of mixed fact and law of the LSS Hearing Committee.

Application of *Blencoe* in *Abrametz*

Applying the *Blencoe* test on an appellate standard of review, the majority decision confirmed that it was the role of the administrative decision maker – in this case the LSS – to weigh and assess the evidence, and that appellate review should only interfere with the factual findings of the LSS if there was palpable and overriding error. As a result, the majority held that the Court of Appeal erred by substituting its own findings of fact for why the delay occurred instead of properly deferring to the LSS' findings. The majority decision therefore restored the LSS' determination that no stay was warranted because there had been no inordinate delay or significant prejudice:

- **No inordinate delay**

  The LSS had determined that the delay was largely caused by Mr. Abrametz's conduct. Therefore, the Court of Appeal should not have interfered with this conclusion, and concluded that the process had taken too long and amounted to an abuse of process, merely because it disagreed with the LSS' assessment of the evidence. The SCC emphasized how the Court of Appeal "departed from its proper role" when substituting its own findings of fact, notably on the scale and the complexity of the investigation. The Court of Appeal failed to show appropriate deference to the Hearting Committee's conclusion, which were grounded in the evidence before it. Rather than applying the palpable and overriding error standard, the Court of Appeal improperly reweighed this evidence and substituted its own findings, which warranted reversal by the SCC.

- **No significant prejudice**

  Mr. Abrametz claimed to have experienced four types of prejudice:

1. Media attention;
2. Practice conditions;
3. Impact on his health; and
4. Impact on his family and employees.

   The LSS concluded these did amount to significant prejudice, but the Court of Appeal again disagreed. The SCC found that, in the absence of proof the prejudice alleged amounted to significant prejudice, the Court of Appeal should not have interfered with the LSS' finding that no prejudice capable of grounding an abuse of process had been suffered.

Given the SCC's finding that the Court of Appeal had improperly interfered with the LSS' decision, the appeal was allowed, the judgement of the Court of Appeal was set aside and the matter remitted back to address the outstanding grounds of appeal.

Justice Côté, dissenting, concluded that the LSS was unable to justify 32 ½ months of delay making that delay inordinate, and that as a result of the delay Mr. Abrametz suffered prejudice in the form of stress to himself and his employees and stress from intrusive conditions imposed by the LSS on his legal practice. She agreed with the Court of Appeal that the delay amounted to an abuse of process and would have maintained the disposition of the Court of Appeal setting aside the penalty imposed on Mr. Abrametz but would not have issued a stay of proceedings.

Key takeaways

- Where there is a statutory appeal from the decision of an administrative actor, questions of procedural fairness are subject to appellate standards of review. However, this appears to be a narrow holding, and it remains unclear what standard of review applies where procedural fairness is at issue but there is no statutory appeal.
- A party experiencing delay in an administrative proceeding should raise the issue of delay as soon as it becomes a concern or risk waiving the possibility of obtaining a remedy for the delay under the abuse of process doctrine.
- The flexible and contextual test from *Blencoe* still applies to determine whether an abuse of process has occurred in the administrative law context.
- Given the broad scope of administrative law and types of administrative proceedings, blanket frameworks for determining abuse of process are not appropriate, unlike in contexts such as criminal law (*e.g.* the *Jordan* framework).

For more information on the test for abuse of process in administrative law, please contact any of the key contacts below.

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