WeirFoulds LLP

A Caution from the Supreme Court of Canada on Institutional Delay: Lessons from *Abrametz*

July 13, 2022

By Alyssa Armstrong

In a much anticipated decision, the Supreme Court of Canada released its reasons in *Law Society of Saskatchewan v. Abrametz* last week – confirming that obtaining a stay for inordinate delay in administrative proceedings is a very high bar to meet.[1]

Justice Rowe, writing for a majority of the Supreme Court, confirmed that the *Blencoe* test[2] remains the legal framework for establishing an abuse of process arising from delay that would justify a remedy of a stay – which is essentially an order made by the tribunal bringing the proceedings to an end without adjudicating the merits. As was discussed in a previous blog post,[3] prior to this decision there had been some rumblings in the legal community and elsewhere that, due to institutional delays, the Supreme Court of Canada should adopt a more stringent timetable for the completion of administrative proceedings – as was done in criminal matters following the Court's decision in *R. v. Jordan*.[4]

But with this decision in *Abrametz*, the Supreme Court has confirmed that such an approach in administrative proceedings would be inappropriate and that the principles that underlie *Jordan* (such as the *Charter* right to be tried within a reasonable time) do not apply to administrative proceedings – including complaints, investigations, discipline, and/or fitness to practise processes.[5] Instead, the Court focused on the need for flexibility and reaffirmed its earlier decision in *Blencoe v. British Columbia (Human Rights Commission)*, while providing further direction on the approach to be taken by administrative tribunals when dealing with issues of institutional delay.

In particular, while the Supreme Court did not depart from the *Blencoe* test, the Court had some strong words about the negative impact of institutional delay, noting that inordinate delay in administrative proceedings is contrary to the interests of society. Decisions by administrative decision-makers need to be rendered promptly and efficiently. Administrative delay undermines a key purpose for which such decision-making authority was delegated by the province – expeditious and efficient decision-making. In other words, this decision stands as a caution to administrative decision-makers on institutional delay. This blog post first sets out the key take-aways in the *Abrametz* decision to guide regulators. It then raises further issues for consideration arising from this decision with respect to (i) regulator resources and the need for expeditious and efficient decision-making and (ii) how the courts may treat pandemic-related delay in the regulatory context.

The *Blencoe* Test

In order to understand the effect of the *Abrametz* decision, it is necessary to appreciate the approach to administrative delay and abuse of process previously articulated by the Supreme Court in the *Blencoe* case. In that case, the Supreme Court recognized that delay may constitute an abuse of process in two ways:

1. The fairness of a hearing can be compromised where delay impairs a party's ability to answer the complaint against them,[6] or,

2. Even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay.[7]

Regarding the second category of delay (i.e., delay that does not impact hearing fairness), *Blencoe* established a three-part test for whether such delay amounts to an abuse of process. First, the delay must be inordinate based on an analysis of the overall context. Second, the delay must have directly caused "significant prejudice." Finally, if these two criteria are met, it must be determined whether the delay amounts to an abuse of process. If the delay is "manifestly unfair to a party or in some other way brings the administration of justice into disrepute," then abuse of process is established.[8]

The Facts in *Abrametz*

Mr. Abrametz was the subject of disciplinary proceedings before a Hearing Committee of the Law Society of Saskatchewan ("**LSS**") with respect to fraudulent transactions and tax evasion relating to his law practice. There were numerous delays throughout these proceedings, 32 ½ months of which was attributable to the LSS.[9]

At the discipline hearing Mr. Abrametz brought an application to stay the proceedings against him based on three grounds: *Charter* breach, lack of jurisdiction, and undue delay constituting a breach of natural justice and procedural unfairness resulting in abuse of process.[10] The stay application was ultimately unsuccessful on all three grounds. The Hearing Committee relied on the *Blencoe* framework and found that Mr. Abrametz had been unable to demonstrate that the delay had impacted his ability to answer the charges against him and that there was therefore no prejudice to hearing fairness. In addition, the Hearing Committee also found that Mr. Abrametz had suffered no personal prejudice due to delay in the proceedings.[11]

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 argument that the Hearing Committee had erred by dismissing the application to stay the proceedings for delay.[12]

Justice Barrington-Foote explained that the Supreme Court of Canada's decisions in *Hryniak v. Mauldin*[13] and *R. v. Jordan*[14] pointed to the importance of timely justice in civil and criminal cases, respectively.[15] 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.[16] 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*.[17]

Key Take-Aways from the Supreme Court Decision

In rejecting the Court of Appeal's analysis with respect to delay, the Supreme Court confirmed the *Blencoe* test for inordinate delay amounting to an abuse of process. There are several key take-aways for regulators flowing from the *Abrametz* decision:

1. Court-imposed limitation periods are not appropriate in the regulatory context. The Supreme Court's decision to not "*Jordanize*" institutional delay in the regulatory context is consistent with case law that recognizes the unique circumstances of regulatory proceedings and that the criminal standards with respect to delay do not apply to regulatory proceedings. In regulatory proceedings, the goal is to regulate professional conduct, which the Supreme Court frames as occurring "within a

limited private sphere of activity." In contrast, the purpose of criminal proceedings is "to maintain public order and welfare for the broad public."[18] Standards developed in the criminal context should not be adopted into an arena governed by different policy considerations.

2. Appellate courts owe significant deference to findings of fact made by administrative bodies. In particular, findings of whether delay was inordinate, or caused prejudice, are owed significant deference by an appellate court. In finding that the Court of Appeal for Saskatchewan had overstepped its role, erred in reweighing the evidence and making its own findings of fact on those issues, the Supreme Court of Canada upheld the longstanding principle that absent palpable and overriding error, appellate courts cannot interfere with the adjudicator's findings of fact.[19]
3. The absence of a complainant is a neutral factor in determining whether a stay of proceedings is warranted because of the regulator's role in protecting the public interest.[20] In other words, the fact that an investigation arose internally (not by way of a complaint) does not mean that there is less interest in ensuring alleged professional misconduct is adjudicated on the merits – the public interest and the interest of the profession are also significant.
4. There are various possible remedies that can be ordered when delay gives rise to an abuse of process in a discipline proceeding, including: a stay (which the court characterized as the "ultimate" remedy), reduction in sanction, and/or variation of a costs award. The Supreme Court also discussed two preliminary matters: as soon as delay becomes a concern, parties should avail themselves of the tribunal's internal procedures to address the delay. In addition, mandamus (a discretionary remedy granted by a court to compel an administrative decision-maker to carry out their duty) can potentially be sought to prevent further delay and avoid an abuse of process.[21]

Lack of Regulator Resources does not Excuse Delay

In addition to reaffirming *Blencoe*, *Abrametz* makes notable comments on the relationship between delay and resources. Justice Rowe explained that inadequate resources is not an excuse for inordinate delay:

Finally, 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: *Blencoe*, at para. 135. Administrative tribunals have a duty to devote adequate resources to ensure the integrity of the process.[22] [emphasis added]

Regulators should take note of Justice Rowe's warning that their complaints, investigations, discipline, and fitness to practise processes must be adequately resourced to ensure timely justice. This conclusion is consistent with previous Supreme Court of Canada decisions such as *Blencoe* and *Singh v. Minister of Employment and Immigration*.[23] While *Singh* was not referred to in the Supreme Court's decision in *Abrametz*, it is a well-known case in which the Supreme Court found that, among other things, the Immigration Appeal Board's failure to hold a hearing violated the claimants' *Charter* rights and the failure to have an adequate process could not be excused by inadequate resourcing.[24]

How will the Courts treat Pandemic-Related Delay?

At the outset of the COVID-19 pandemic, many jurisdictions passed legislation that suspended limitation periods and other regulations, rules or statutory provisions that imposed deadlines within court or tribunal proceedings.[25] Other legislation granted tribunals, including regulatory bodies, even broader authority to vary their hearings processes (for instance, by making it possible to hold electronic hearings and allowing regulatory bodies broad discretion as to how they implemented hearings).[26]

While the *Abrametz* decision indicates that there is a high bar to establishing inordinate delay resulting in abuse of process, it is not clear what will constitute a reasonable excuse for delay in all circumstances. For example, would a global pandemic be treated as a valid excuse for delay in investigating, referring or prosecuting misconduct allegations, and if so, for how long, and to what extent? Although a global pandemic is likely a valid excuse for delay, for how long and to what extent remains an open question.

Despite these legislative and procedural changes most, if not all, regulatory bodies experienced challenges and at least temporary delays during the COVID-19 pandemic in operating their complaints, investigations, discipline, and fitness processes. Similar challenges affected the courts and other administrative tribunals. It will be important for regulators to have *Abrametz* top of mind as pandemic measures cease to apply, and to limit the risk of potential challenges based on delay.

While the courts have clearly and repeatedly held that discipline proceedings are not criminal, and the Supreme Court in *Abrametz* refused to apply the *Jordan* analysis to delays in discipline proceedings, it is still instructive to look to the treatment of pandemic-related delays in recent criminal cases. Even in criminal matters, where the stricter *Jordan* approach to delay applies, courts have recognized the pandemic as an exceptional circumstance that may justify an otherwise unacceptable delay in prosecuting a case. However, the courts have also emphasized that the Crown prosecutor still "cannot sit idly on their hands when rescheduling the backlog created by COVID-19 – at minimum, thoughtful triage of trials is expected," requiring the prosecutor to be proactive and take steps to reasonably mitigate the delay. [27] A similarly proactive approach by regulators in dealing with any post-pandemic backlogs and associated delays in "gearing up" complaint, investigation, discipline, and fitness processes will reduce the risk of challenges based on delay.

Consequently, while much of the decision in *Abrametz* is generally favourable to regulators, the message from the Supreme Court of Canada is clear: regulators should remain vigilant in ensuring that their complaints, investigations, discipline, and fitness matters proceed as promptly and efficiently as possible. This consideration is likely even more pressing as certain temporary measures enacted during the pandemic cease to apply.

[1] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [*Abrametz*].

[2] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 [*Blencoe*].

[3] A. Armstrong, "Staying Administrative Proceedings Due to Delay: Is the Law Changing?" (June 21, 2022).

[4] *R. v. Jordan*, 2016 SCC 27 [*Jordan*].

[5] Courts may well insist on more expeditious prosecutions where an interim order is imposed by a referring committee, and some statutes require more expeditious prosecutions where that is the case. See, for example, the *Health Professions Procedural Code*, Schedule 2 of the *Regulated Health Professions Act, 1991*, s. 25.4(3).

[6] *Blencoe* at paras. 100, 102, 104

[7] *Blencoe* at paras. 107, 115. Types of significant prejudice where the delay does not impact hearing fairness may include, for example, significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention.

[8] *Abrametz* at para. 72.

[9] 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].

[10] *Law Society of Saskatchewan v. Abrametz*, 2020 SKCA 81 [*Abrametz* CA] at para. 52; *Abrametz* LSS at paras. 258-364.

[11] *Abrametz* LSS at paras. 344-353.

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

[13] *Hryniak v. Mauldin*, 2014 SCC 7.

[14] *Jordan*.

[15] *Abrametz* CA at para. 8.

[16] *Abrametz* CA at para. 197.

[17] *Abrametz* CA at para. 10.

[18] *Abrametz* at para. 48.

[19] *Abrametz* CA at paras. 114-116.

[20] *Abrametz* at para. 88: "The absence of a complainant is a neutral factor. The public at large expects a professional who is guilty of misconduct to be effectively regulated and properly sanctioned. A professional misconduct hearing involves more than the interests of those affected; rather one needs to consider "the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies": *Adams v. Law Society of Alberta*, 2000 ABCA 240, 266 A.R. 157, at para. 6."

[21] *Abrametz* at paras. 78-82: Note that the Supreme Court appears to suggest that costs could be awarded against the regulatory body by reason of delay. However, the costs provisions in the legislation governing many professional regulatory bodies in Ontario provide for costs to be awarded against the regulator only where the commencement of the proceeding (i.e., the referral) was unwarranted and do not provide broader scope for costs awards to penalize a regulator for delay. Nonetheless, the *Abrametz* decision suggests that a costs award to the regulator and against the registrant could be reduced to compensate for inordinate delay that is attributable to the regulatory body. See, for example, the *Health Professions Procedural Code*, Schedule 2 of the *Regulated Health Professions Act, 1991*, s. 53; *Social Work and Social Service Work Act, 1998*, S.O. 1998, c. 31, s. 26(9); *Ontario College of Teachers Act, 1996*, S.O. 1996, c. 12, s. 30(9).

[22] *Abrametz* at para. 64.

[23] *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh*].

[24] *Singh* at paras. 72-74, pp. 219-221.

[25] See, for example, *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17, O. Reg. 73/20: Limitation Periods, s. 2:

2. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended, and the suspension shall be retroactive to Monday, March 16, 2020.

[26] In Ontario, this authority was granted to regulatory bodies pursuant to the *Hearings in Tribunal Proceedings (Temporary*

Measures) Act, 2020, S.O. 2020, c. 5, Sched. 3.

[27] *R. v. Simmons*, 2020 ONSC 7209 at para. 74; *R. v. Osei*, 2022 ONSC 1607 at para. 54. See also, *R. v. Mengistu*, 2022 ONSC 3624, where Justice Chalmers found that the COVID-19 pandemic was an exceptional event that excused delay where the delay could be attributed to the pandemic. But where a trial date was set before the onset of the pandemic – and that date fell several months after the resumption of jury trials in September 2020 – the pandemic was not an excuse to delay as it did not have a direct impact on the scheduling of the trial.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:

Alyssa Armstrong

Toronto
416.947.5022

Email:
aarmstrong@weirfoulds.com

Alyssa Armstrong is an Associate in the Municipal, Development and Land Use Planning Practice Group at WeirFoulds. She represents private and public sector clients in a wide array of public law matters, with a particular emphasis on expropriation, municipal and administrative law.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035