

## Regulators Breathe a Sigh of Relief

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The Supreme Court of Canada has just released its most significant decision for professional regulators since *Green v. Law Society of Manitoba*, 2017 SCC 20 (CanLII), [2017] 1 SCR 360, <https://canlii.ca/t/h2wx1>.

The issue of when inordinate delay constitutes an abuse of process in the professional disciplinary context has been uncertain since some very restrictive rules were imposed in criminal proceedings. There was concern that the Supreme Court would impose fixed deadlines (e.g., 30 months) rather than continuing to apply the “consider all of the circumstances” approach adopted more than two decades ago in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307, <https://canlii.ca/t/525t>.

However, in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 (CanLII), <https://canlii.ca/t/jqbs7>, the Supreme Court maintained the *Blencoe* approach with some minor modifications. In the *Abrametz* case the lawyer had been the subject of an extensive, and hotly contested, investigation into his trust accounts. While there had been no misappropriation of funds, the lawyer was found to have disregarded the rules in a dishonest way, possibly to conceal income from the tax authorities. He also was found to have made loans to clients without full disclosure and charged excessive fees for the loans.

The primary issue was whether there was inordinate delay on the part of the regulator. The Saskatchewan Court of Appeal thought so, calculating the delay as follows: “... of the 53-month period in issue, only 18 months were inherent to the process, and only 2 ½ months were attributable to Mr. Abrametz. The

remainder, totaling 32 ½ months, the Court of Appeal concluded, was undue delay.”

The majority of the Supreme Court disagreed with the Court of Appeal’s analysis. Abuse of process in discipline matters can occur in two ways: where the hearing becomes unfair (e.g., because a key witness is no longer available) or where the delay directly causes significant prejudice to one of the parties. On the second type of abuse of process, the majority held that the *Blencoe* test continued to apply:

*Blencoe* sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute ....

In evaluating whether a delay is inordinate, one has to look at all of the circumstances including the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case.

The majority of the Court explicitly chose not to apply the criminal law principles. They stated that administrative law proceedings (especially professional disciplinary proceedings) are designed to protect the public and raised different considerations. “The purposes of disciplinary bodies are to protect the public, to regulate the profession and to preserve public confidence in the profession.... Disciplinary proceedings are neither civil nor criminal, but rather [are in a category of their own].”

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# Grey Areas

## A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

In terms of significant prejudice, that had to result directly from the delay itself and not from the fact that the registrant was facing serious allegations. “Examples include 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....” The registrant has an obligation to raise the issue of delay within the process and seek an expedited process.

In terms of the final assessment of abuse of process, the majority of the Court said: “When these two requirements are met, the court or tribunal should conduct a final assessment as to whether abuse of process is established. This will be so when the delay is manifestly unfair to a party to the litigation or in some other way brings the administration of justice into disrepute.”

Perhaps the most significant development from *Blencoe* is the Court’s discussion of the remedy of a stay of proceedings for inordinate delay:

When faced with a proceeding that has resulted in abuse, the court or tribunal must ask itself: would going ahead with the proceeding result in more harm to the public interest than if the proceedings were permanently halted? If the answer is yes, then a stay of proceeding should be ordered. Otherwise, the application for a stay should be dismissed. In conducting this inquiry, the court or tribunal may have regard to whether other available remedies for abuse of process, short of a stay, would adequately protect the public’s interest in the proper administration of justice.

A stay will be more difficult to obtain where the charges are more serious.

The majority of the Court indicated that regulatory tribunals should actively consider remedies short of staying (or halting) the proceedings, such as a

reduced sanction (to compensate for the harm caused by the delay) or a reduction in costs payable by the registrant to the regulator.

In applying the above principles to the particular case, facts of the *Abrametz* case the majority of the Court found that the Court of Appeal had not shown sufficient deference to the tribunal’s findings of fact about the complexity of the investigation, in attributing portions of the delay to the registrant’s failure to cooperate with the investigation, in assessing the significance of the prejudice suffered by the registrant directly because of the delay itself, and in the impact of the restrictions on the registrant’s practice during the entire process.

The majority of the Court held that there was no abuse of process.

Regulators should not become complacent as a result of this decision. The Court said that: “... insufficient agency resources cannot excuse inordinate delay in any case .... Administrative tribunals have a duty to devote adequate resources to ensure the integrity of the process....”

There are a number of other noteworthy points in the decision that will keep regulatory lawyers busy for years. For example, the Court touched, in passing, on the argument that the absence of complaints by members of the public against the registrant was a mitigating factor for the registrant. The Court said:

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” ....

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Lawyers for regulators will also be analyzing the comments of the Court on the standard of review for procedural unfairness when there is a statutory ground of appeal. The Court seemed to suggest that the palpable and overriding error test should apply to the factual findings while the correctness test should be applied to the issue of whether those facts demonstrated an abuse of process.

In any event, even though the argument was unsuccessful in this case, regulators should prepare for more frequent instances where registrants place the regulator on notice that they are concerned about delay (in order to preserve their rights later in the process). In addition, delay arguments will likely be frequently raised in the sanction and costs portions of discipline hearings where findings are made against the registrant.