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No Jordan Rules for Administrative Tribunals

The Supreme Court of Canada's decision today in *Law Society of Saskatchewan v Abrametz* is a significant one for all lawyers practicing before administrative tribunals. In brief, the decision confirms that the three-part *Blencoe* test for delay and abuse of process in administrative proceedings continues in force. To establish that a delay rises to the level of abuse of process, a party must establish...

- inordinate delay;
- causing significant prejudice; and
- amounting to an abuse of process in that it is manifestly unfair or brings the administration of justice into disrepute.

The remedies for abuse of process are wide-ranging. But a stay will only be available in the clearest of cases, and only rarely where the offence is serious.

Factual and Procedural Background

In 2012, the Law Society of Saskatchewan commenced disciplinary proceedings against one of its members, Peter Abrametz. Six years later, the Law Society found Mr. Abrametz guilty of conduct unbecoming of a lawyer and later ordered that he be disbarred, without a right to apply for readmission for two years. In July 2018, Mr. Abrametz brought an application before the Law Society's Hearing Committee for a permanent stay of proceedings on the basis that there was an abuse of process caused by inordinate delay.

The Committee

The Committee found that the delay was neither inordinate nor unacceptable. There were complex issues to be investigated and voluminous documentation to be reviewed. Further, the Committee noted that Mr. Abrametz had himself contributed to the delay by being unavailable and bringing an application for a temporary stay of proceedings in April 2016.

On the question of prejudice, the Committee concluded that any prejudice to Mr. Abrametz was as a result of the disciplinary proceedings being brought against him, not as a result of the delay. In the Committee's view, the "delay was not so significant that continuation of the process would be so unfair to him that the public's sense of fairness would be

harmed, having regard to the Law Society's mandate to protect the public."

The Court of Appeal

The Court of Appeal allowed Mr. Abrametz's appeal and granted a permanent stay of the proceedings.

The Court held that there was an abuse of process because the 32.5 months of unexplained delay was inordinate and caused Mr. Abrametz significant prejudice, which would affect the public's sense of decency and bring the Law Society's disciplinary process into disrepute.

The Supreme Court of Canada

The Supreme Court of Canada allowed the appeal from the Law Society and held that there was no abuse of process in this case and a stay was not warranted.

Standard of Review

The majority, in a decision authored by Justice Rowe, confirmed that appellate standards of review apply to statutory appeals from administrative decision-makers: correctness for questions of law, and palpable and overriding errors for questions of fact or mixed fact and law.

In this case, the issue of whether the delay amounted to an abuse of process was a question of law to be considered on a correctness standard. But the underlying facts—whether the delay was inordinate and whether the appellant was prejudiced—were issues of mixed fact and law deserving of deference from the reviewing court.

No Jordan Rules for Administrative Tribunals

In *R v Jordan*, the Supreme Court applied a strict presumptive time limit for criminal proceedings: 18 months for provincial court cases and 30 months for more serious offences tried in the superior court. A key question for the Court in *Abrametz* was whether a presumptive rule should also apply to proceedings before administrative tribunals.

The majority answered with a resounding "no". Instead of adapting the *Jordan* principles to administrative law, the majority confirmed the three-part test in *Blencoe v British Columbia (Human Rights Commission)* for determining whether administrative delay amounts to abuse of process.

The Applicable Legal Test

The Court confirmed the three-part test to determine whether there is an abuse of process, as articulated in *Blencoe*:

- *Is there inordinate delay?*

Relevant considerations for whether there is inordinate delay include the nature and purpose of the proceedings, the length and cause of the delay, and the complexity of the facts and issues in the case.

- *Has the delay directly caused significant prejudice?*

Significant prejudice is a question of fact and can 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.

If the two questions above are answered in the affirmative, the court or tribunal must then proceed with a final assessment as to whether the delay is "manifestly unfair to a party or in some other way brings the administration of justice into disrepute.

Remedies

Where abuse of process is established, a stay of proceedings should only be granted in the "clearest of cases", where the public interest in procedural fairness outweighs the public interest in having the complaint decided on its merits. A stay may be more difficult to obtain where the conduct in question is more serious.

Other appropriate remedies where abuse of process is made out can include:

- Reductions in sentence – these can be applied to shorten suspension periods or lower administrative penalties. However, where the presumptive penalty in a disciplinary context is licence revocation, then a sentence reduction "will generally be as difficult to receive as a stay."

- Costs – an award of costs may be more widely available as a remedy for delay, even when it doesn't rise to the level of abuse of process. Courts may impose costs against the administrative agency, or set-aside costs ordered against a party.

Application to Mr. Abrametz

On the question of inordinate delay, the Supreme Court overturned the Court of Appeal's decision and reinstated the Committee's findings that the delay was not inordinate. The majority held that the Court of Appeal ought to have showed

more deference to the Committee, and not substituted its own views of the evidence for the facts as found at first instance.

Given that the Supreme Court found that there was no inordinate delay and that the delay did not directly cause Mr. Abrametz significant prejudice, there was no need to turn to the third and final assessment of abuse of process or consider the appropriate remedy in this case.

Dissent

Justice Côté dissented and found that the delay in Mr. Abrametz's disciplinary proceedings amounted to an abuse of process and that the appeal ought to be denied.

Justice Côté held that the test for abuse of process as articulated by the Majority is "unduly elevated", particularly given the range of remedies that can be granted by the court. In her view, evidence of inordinate delay should on its own be sufficient for a finding of a breach of the duty of fairness—and, as outlined in *Blencoe*, prejudice may be relevant to such a finding and the appropriate remedy. But one should conflate the doctrine of an abuse of process with the test for a stay of proceedings.

Key Takeaways

The bar for establishing abuse of process as a result of delay in administrative proceedings remains high. Individuals facing professional discipline or other types of administrative decisions who have experienced delay must be prepared to establish—with compelling evidence—that the delay was inordinate and there was direct significant prejudice as a result. Our key takeaways for consideration are:

1. Paper the record. Parties also have an obligation to address delay leading up to the hearing. Concerns should be put on the record, and any internal procedures for addressing delay pursued. It may even be appropriate for a party to bring a *mandamus* application to compel an expedited process rather than “wait in the weeds” in the hopes of obtaining a stay at some future point.

2. Consider whether remedies short of a stay may be appropriate. For lesser offences, a reduction in sentence might be available. A costs remedy is available even where delay does not rise to the level of abuse of process, and may be the only practical alternative where the offence is serious and the presumptive penalty is revocation.

Practically speaking, *Abrametz* sets a high bar for seeking remedies for an abuse of process in an administrative context.