SCC File No. 39340

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

LAW SOCIETY OF SASKATCHEWAN

Appellant
(Respondent)

- and –

PETER V. ABRAMETZ

Respondent
(Appellant)

FACTUM OF THE RESPONDENT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – INTRODUCTION AND STATEMENT OF FACTS

a. Introduction

1. Timely justice should be one of the hallmarks of a free and democratic society. The public and the courts are rightly focused on the serious access to justice issues currently characterizing the Canadian justice system, which includes the administrative justice system.

2. The Respondent, Peter V. Abrametz (the "Member") was denied timely justice by the Appellant Law Society of Saskatchewan ("LSS"). The Court of Appeal for Saskatchewan ("Court of Appeal"), viewing the matter holistically and applying well-established legal principles to the factual matrix presented to it, ordered a stay of proceedings on the basis of inordinate delay.

3. The 73 month global delay from the date the Member self-reported to the date of the Member's disbarment, and in particular the 53 months from the date of the self-report to the start of the hearing, was inordinate and undue. That delay was compounded by the fact the Member was under interim sanctions throughout, and further compounded by both the early discovery of the conduct at issue and relative simplicity of the allegations against the Member.

4. Rather than recognizing some form of "supercharged", new *Blencoe*[1] test as asserted by the LSS, the Court of Appeal simply determined that, as a self-proclaimed sophisticated and well-resourced regulator, the LSS should "be a model for others".[2] The Court of Appeal applied *Blencoe* in a manner that recognized an evolving understanding of both delay and prejudice, consistent with this Court's recent comments on delay in the Canadian justice system.

b. The relevant facts

5. The Member is 72 years old, and has practiced for 49 years in Prince Albert, a small city in Saskatchewan, in a firm of three lawyers (at the time). The majority of the Member's practice involves contingency claims for personal injury arising out of motor vehicle accidents under Saskatchewan's no-fault legislation. The Member had no discipline record prior to these

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[1] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*].
[2] *Abrametz v. Law Society*, 2020 SKCA 81 at para. 5 [Court of Appeal Decision], at Appellant's Record [AR], Vol I, Tab 5, p 70.

proceedings.[3] There is no complainant. The LSS initiated the investigation of the Member.[4] At the time of sanction, the events giving rise to the allegations were at least nine years old.

6. There were seven charges laid against the Member in October 2015.[5] As will be shown below, the conduct at issue in six of the charges was known to the LSS by 2012. The Member was acquitted of the seventh charge.[6] Despite early knowledge of the misconduct at issue, the LSS's investigation and these proceedings endured from December 2012, when the investigation was initiated, through May 2017 when the discipline hearing commenced, and until January 2019 when sanction was rendered.

7. Of the 73 months (December 2012 – January 2019) that the Member was under the sword of the LSS, the Member was also subject to two Notices of Intention to Interim Suspend. The first was served by the Conduct Investigation Committee ("CIC") only two months after the investigation commenced, on February 5, 2013.[7] All of the charges except the seventh (of which he was acquitted) were identified in this Notice of Intention to Interim Suspend. By decision made in March 2013, the Member was allowed to continue to practice. However, he was placed under onerous and restrictive conditions, including supervision by another member of the LSS, and requirements that all trust transactions and agreements entered into with clients (including retainer agreements) be first approved and then monitored by the supervisor, for the co-signing of trust cheques, and for monthly reporting to both the supervisor and the LSS.[8]

8. A second Notice of Intention to Interim Suspend was served by the CIC on November 20, 2014, and it included questioning of the Member on February 5, 2015. The Member was again allowed to continue to practice under substantially the same conditions, which he did without incident until the proceedings were stayed by the Court of Appeal on July 3, 2020.[9]

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[3] Decision of the Hearing Committee dated January 10, 2018 [HC Decision] at para 384, at AR, Vol 1, Tab 1, p 45.
[4] Hearing Transcript, at AR, Vol II, Tab 21, pp 114-115, and Tab 22, p 368.
[5] Formal Complaint dated October 13, 2015, at AR, Vol I, Tab 7, pp 136-138.
[6] HC Decision at para 253, at AR, Vol 1, Tab 1, p 27.
[7] Affidavit of Peter V. Abrametz sworn July 13, 2019 [Abrametz Affidavit], paras 27 and 28, and Exhibit F, at AR, Vol I, Tab 17, pp 370-371.
[8] Abrametz Affidavit, paras 27 and 28, and Exhibit G, at AR, Vol I, Tab 17, pp 374-379.
[9] *Ibid*.

9. As noted, these proceedings were initiated by an LSS audit of the Member in December 2012. The LSS auditor, Mr. Allen, scheduled a three-day site visit to start December 5, 2012.[10] On the eve of Mr. Allen's visit, on December 4, 2012, the Member self-reported eight transactions involving his trust account in which he took a total of $37,578.45 in fees outside of his general account between 2008 and 2010, contrary to LSS rules.[11] No client funds were misappropriated and the funds were returned to the Member's general account on December 18, 2012.[12] Those eight transactions comprised four of the seven charges against the Member.

10. The remaining two charges for which the Member was found guilty involved advances made to 11 clients against settlement funds on contingency files, in exchange for a 30% attendance fee. The hearing committee found that the fees charged for those advances were excessive and a breach of the Member's fiduciary duties to those clients and the LSS rules.[13]

11. Importantly, the Member's practice of making advances and charging the attendance fee was already known to the LSS in 2010.[14] Further, Mr. Allen personally knew of the Member's practice of making advances as early as 2011, when the LSS changed its annual reporting documents to require the reporting of advances. In 2011, the Member disclosed that he made advances on his 2010 practice declaration form and then corresponded with Mr. Allen in that regard. The Member again disclosed advances on his 2011 practice declaration form, and additional correspondence with Mr. Allen followed. This led to the Member confirming in May 2012 that he would no longer make advances to clients, and no further advances were made.[15]

12. Not only was all of the misconduct at issue known to the LSS by 2012 by virtue of the Member's own disclosure, the Member fully cooperated with Mr. Allen's investigation. He responded to Mr. Allen's additional inquiries and provided documents.[16] The CIC knew enough

[10] Hearing Transcript, at AR, Vol II, Tab 21, pp 115-116.
[11] HC Decision, at AR, Vol I, Tab I, para 12, p 4; and Hearing Transcript, at AR, Vol II, Tab 21, pp 118-121, and Exhibit CIC-1, at AR, Vol V, Tab 29, pp 38-39.
[12] Hearing Transcript, at AR, Vol II, Tab 21, pp 121-124, and Exhibit CIC-1, at AR, Vol V, Tab 29, p 41 and p 50.
[13] HC Decision, at AR, Vol 1, Tab 1, p 26.
[14] Hearing Transcript, at AR, Vol IV, Tab 25, pp 185-186.
[15] Exhibit CIC-1, at AR, Vol VI, Tab 29, pp 14-35, Hearing Transcript, AR, Vol II, pp 388-394.
[16] Abrametz Affidavit, paras 31 and 32, at AR, Vol I, Tab 17, p 351.

about the misconduct at issue to seek to interim suspend the Member only two months into the investigation.

13. Yet it took almost 23 months for Mr. Allen to complete a trust report, rendered on October 30, 2014,[17] it took the CIC 34 months to lay the charges, and it took 53 months to go to hearing.

14. One aspect of the investigation into the eight transactions comprising the self-report that Mr. Allen, and then the CIC, chose to pursue was for alleged tax evasion. It was the Member's position that tax matters between him and the Canada Revenue Agency were not relevant, and he objected to requests to produce personal and corporate income tax returns. This ultimately led the LSS, on September 9, 2015,[18] to apply for an order from the Court of Queen's Bench of Saskatchewan to compel the tax records under s. 63 of *The Legal Profession Act, 1990*.[19] The application was opposed by the Member and on October 13, 2015 he sought leave to cross-examine the LSS deponent who filed an affidavit in support.[20]

15. The LSS served a subpoena on the Member's accountants two days later on October 15, 2015, without notice to the Member.[21] After learning of the subpoena the Member sought to quash it on October 28, 2015.[22] The LSS responded by serving a subpoena on the Member.[23]

16. On April 21, 2016, the Court of Queen's Bench quashed the subpoenas as an abuse of process. The Court found that "the LSS improperly sought to discover documents through the use of a *subpoena duces tecum,*" and improperly attempted to use the subpoenas to avoid the judicial oversight that applied to the s. 63 application.[24]

17. During the same time period that it was pursuing its tax evasion investigation, and 31 months and two notices of intention to interim suspend later, the CIC prepared its report dated

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[17] Decision of the Hearing Committee dated November 9, 2018, para 3(f), at AR, Vol 1, p 222.
[18] Affidavit of Stacy Zummack Diewold sworn March 28, 2016 [Diewold Affidavit], Exhibit A, at AR, Vol I, Tab 16, p 269-273.
[19] *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1.
[20] Diewold Affidavit, Exhibit D, at AR, Vol I, Tab 16, p 295-299.
[21] Diewold Affidavit, Exhibit J, at AR, Vol I, Tab 16, p 321.
[22] Diewold Affidavit, Exhibit K, at AR, Vol I, Tab 16, pp 323-328.
[23] Diewold Affidavit, Exhibit M, at AR, Vol I, Tab 16, p 338-339.
[24] *Law Society of Saskatchewan v Abrametz*, 2016 SKQB 134, at paras 56-58.

July 27, 2015.[25] The CIC recommended charges be laid against the Member and indicated that it reserved its right to recommend additional charges should better and additional disclosure be forthcoming. Having decided to pursue the tax evasion investigation, the CIC further delayed laying the charges until October 13, 2015, now 12-months after the trust report was issued, and only after the Member sought leave to cross-examine on the s. 63 application.

18. As a result of the CIC splitting its investigation and prosecution, the Member applied to the hearing committee to adjourn the proceeding until the ongoing investigation was concluded. The application was dismissed on August 20, 2016.[26]

19. The hearing committee heard the charges on May 17-19, August 9-10 and September 29, 2017. The only witness for the CIC was Mr. Allen. No clients of the Member were interviewed by either Mr. Allen or the CIC,[27] and none were called to testify.

20. The conduct decision was made January 10, 2018. The Member was found guilty of four of the seven charges. The four convictions were for the matters involved in the self-report and the advances to clients on settlement funds,[28] which were all known to the LSS in 2012.

21. The Member applied for a stay of proceedings on July 13, 2018.[29] The application was heard with penalty submissions on September 18, 2018. The stay application was dismissed on November 9, 2018 and the penalty decision was made on January 20, 2019.[30]

22. In addition to being the subject of proceedings for 73 months and practising under conditions since March 2013, the charges, the notices to interim suspend and the practice conditions were posted on the LSS website throughout, and the Member was subject to adverse publicity.[31] The prolonged proceedings significantly affected the Member, including his health, as well as that of his family and staff.[32]

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[25] Diewold Affidavit, Exhibit F, at AR, Vol I, Tab 16, pp 304-308.
[26] Decision of the Hearing Committee dated August 20, 2016, at AR, Vol I, Tab 11, p 158.
[27] Hearing Transcript, at AR, Vol II, Tab 22, p 368-369.
[28] HC Decision, at AR, Vol I, Tab 1, p 1.
[29] Notice of Application dated July 13, 2018, at AR, Vol I, Tab 9, p 142.
[30] HC Decision, at AR, Vol 1, Tab 1, p 1.
[31] Abrametz Affidavit, paras 24-26, and Exhibits C, D and E, at AR, Vol I, Tab 17, p 350 and pp 359-369.
[32] Abrametz Affidavit, at AR, Vol I, Tab 17, paras 35-36, p 352.

23. The Member cooperated with the LSS. He did not cause delay in the investigation or prosecution of the charges. Nevertheless, even with the Member's self-report and cooperation from the outset, it took 34 months to lay the complaint and 53 months for the hearing to proceed. As noted, the total time from investigation to sanction was 73 months.

PART II – STATEMENT OF ISSUES ON APPEAL

24. What is at issue in this appeal are two questions: 1) what is the appropriate standard of review; and 2) was the more than 6-year delay in this case inordinate such that the proceedings were rightly stayed. In answering those two questions, this Court is invited to determine the extent to which the existing *Blencoe* framework adequately addresses increasing concern throughout the justice system of the harm caused by delay, and the role that personal prejudice plays in that assessment. This Court is also asked by the LSS to revisit the framework for reviewing issues of procedural fairness in administrative law, including issues of delay.

25. The LSS incorrectly asserts that the Court of Appeal imposed limitation periods for administrative decision-making, and imported criminal law principles or s. 11(b) *Charter*[33] protections into the administrative law sphere. This appeal is not about any of these issues, nor are they the bases upon which the Court of Appeal erred. Nor is there any support for the repeated assertion of the LSS that the Court of Appeal created some form of "supercharged" new test for assessing administrative delay.

26. Also contrary to the LSS's suggestion, the Member has not argued, and does not argue, that this Court's decision in *Jordan*[34] should be adopted in administrative proceedings, that it replaced *Blencoe* or that s. 11(b) of the *Charter* extends beyond the criminal context. Nor does the Member argue that his s. 11(b) or s. 7 *Charter* rights have been infringed.

27. The Court of Appeal decision represents an application of the general principles set out in *Blencoe* to a factual scenario fundamentally different from the facts of *Blencoe* itself. It "is consistent with *Blencoe*".[35] If the Court of Appeal decision "does represent a step forward from

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[33] *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [*Charter*].
[34] *R v Jordan*, 2016 SCC 27 [*Jordan*].
[35] Court of Appeal Decision, at para. 29, at AR, Vol I, Tab 5, p 77.

Blencoe", it was but "an incremental step that is necessary to enable *Blencoe* to better serve its remedial purpose for the benefit of both those caught up in the machinery of the administrative state and, ultimately, administrative decision-makers themselves".[36] If anything, the Court of Appeal decision recognizes a role for personal prejudice in making that determination which is consistent with recent jurisprudence of this Court on the importance of timely decision-making throughout the justice system, in which administrative actors play a crucial role.

PART III – ARGUMENT

a. The standard of review question

28. The LSS asks this Court to depart from its long-standing position that "the breach of a duty of procedural fairness is an error of law" reviewed for correctness.[37]

29. Reasons of principle and fairness dictate that reviewing courts have the final word on whether administrative decision-making is the product of a fair process and, specifically, whether inordinate delay justifies a stay of proceedings.

i. The existing jurisprudence

30. Notwithstanding this Court's consistent view that procedural fairness and abuse of process issues are reviewed on a correctness standard, there are three approaches currently reflected in the jurisprudence out of the federal and provincial appellate courts on this question. The first stream follows this Court's long-standing guidance and applies correctness review. Under this line of cases, the notion that the decision-maker's choice of procedure – the fifth factor set out in *Baker*[38] discussed more fully below – incorporates deference into the duty of fairness review process has been rejected.[39] A second line of cases questions the appropriateness

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[36] *Blencoe* at para. 10.
[37] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 22, per Abella J.; see also *Khela v Mission Institution*, 2014 SCC 24 at para. 79 [*Khela*]; *Khosa v Canada*, 2009 SCC 12 at para. 43.
[38] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].
[39] For example, in *Mercredi v Saskatoon Provincial Correctional Centre*,2019 SKCA 86, at para 29, Justice Barrington-Foote determined that the "ultimate issue is always whether the process accords with the underlying values reflected by the duty of fairness".

of "correctness review" as the label for the function of reviewing courts when dealing with matters of procedural fairness, noting that the role of the court is simply to determine whether the underlying administrative process was "fair".[40]

31. Finally, there is a third line of cases that would introduce reasonableness review to questions of procedural fairness.[41]

32. With respect to the standard of review of inordinate delay specifically, the Federal Court of Appeal held in *Air Transat*[42] that, although the question of whether delay is unreasonable is a question of mixed fact and law, matters of fairness must be reviewed for correctness:

> In my opinion, the Judge erred in selecting the standard of reasonableness given that the issue related to the unreasonableness of the amount of time that passed falls under the category of matters of procedural fairness and the principles of natural justice, matters that always involve questions of mixed fact and law but that must be determined according to the standard of correctness.

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[40] For example, in *Demitor v Westcoast Energy Inc (Spectra Energy Transmission)*, 2019 FCA 114, at para 26, the Federal Court of Appeal noted the problems with addressing procedural fairness questions through the standard of review lens: "Procedural fairness was the only issue before the Judge. In *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2018] F.C.J. No. 382, the Federal Court of Appeal noted that "[a] court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances" and that "[a]ttempting to shoehorn the question of procedural fairness into a standard of review analysis is…an unprofitable exercise" (at paras. 54-55). Although historically referred to as a review on a correctness standard, questions of procedural fairness are not decided according to any particular standard of review. Rather, it is a legal question to be answered by the court. In assessing procedural fairness, the Court has to be satisfied that procedural fairness has been met."

[41] For example see *Maritime Broadcasting System Ltd. v Canadian Media Guild*, 2014 FCA 59, at paras. 50, 51, 53, 56 and 57. In *Saskatoon (City) v Amalgamated Transit Union, Local 615*,2017 SKCA 96, Chief Justice Richards described this "alternate view" as one adopting "at least in relation to certain kinds of procedural fairness questions…a measure of deference shown to statutory decision-makers."

[42] *Canada v Air Transat*, 2019 FCA 286 [*Air Transat*], at para. 54.

33. The Member agrees that the language of "standard of review" is sometimes conceptually awkward for what reviewing courts do when presented with an allegation that administrative proceedings have not been fair. However, the solution is not, as the LSS argues, to mould all questions of procedure into the framework for substantive review ─ indeed, this Court has rejected that proposition,[43] ─ nor is it to import greater deference to the decision-maker on some misplaced understanding of the role of the decision-maker's "choice of procedure".

34. For the reasons set out below, when a reviewing court considers an explicit decision on a question that engages procedural fairness, abuse of process, or natural justice, questions of mixed fact and law in the context of those decisions should be reviewed for correctness.

ii. "Reviewing" questions of procedural fairness

35. There are two types of circumstances in which an allegation of breach of procedural fairness or abuse of process make their way to a court for review. In the first case, the allegation is that the entirety of the underlying process was unfair, and the question of procedural fairness comes to the reviewing court as a matter of first instance. An example is *South East Cornerstone School Division No. 209 v Oberg*:[44] Subsequent to his demotion by a school board, a high school principal learned of information that led him to believe that the entirety of the demotion process was unfair. Allegations of breach of natural justice were made to the reviewing court as a matter of first instance. The Court reviewed the nature of the decision and the statutory scheme, determined the extent of the duty of fairness owed and whether that duty had been met in the circumstances. There was nothing to "review", as the school board had not made an express decision on a question of fairness. The court was concerned with whether the entirety of the administrative process met the requirements of natural justice.

36. The second case occurs when an administrative body is asked to decide something that affects the conduct of the proceedings, such as an adjournment request, an application for recusal on the basis of bias, a request to have witnesses testify via video or, as in this case, an application for a stay based on delay. In this case, the decision-maker itself has been asked to opine on an aspect of the fairness of the proceedings at first instance, resulting in a more traditional

[43] See, e.g., *Khela* at para. 79.
[44] 2021 SKCA 28.

"decision" for the purposes of judicial review or statutory appeal.

37. In *Baker*, this Court set out the framework for determining the content of the duty of fairness owed and whether that duty has been breached in any given case. Because of the variety and breadth of administrative decision-making in Canada, and that any administrative decision that affects 'the rights, privileges or interests' of an individual is sufficient to trigger the application of the duty of fairness"[45], this Court recognized that" [all] circumstances must be considered in order to determine the content of the duty of procedural fairness".[46] This Court set out a non-exhaustive list of five factors that would govern the analysis: 1) the nature of the decision and the process followed in making it; 2) the nature of the statutory scheme; 3) the importance of the decision to the individual affected; 4) the legitimate expectations of the person challenging the decision; and 5) the decision-maker's choice of procedure (the "*Baker* framework").

38. The *Baker* framework is effective when the allegation on judicial review is that the underlying administrative procedure as a whole was unfair, and the allegations of breach of procedural fairness come to the reviewing court as a *de novo* matter. Because there is nothing to "review", the judicial review court uses the *Baker* framework to determine the extent of the duty owed in the circumstances, and if it has been breached. This is not a question to be viewed through the standard of review lens.

39. By contrast, in cases where the decision-maker has made a decision on a matter said to engage procedural fairness or abuse of process, the reviewing court conducts a "review" of that explicit decision. In these cases, involving a "right" invoked before an administrative body, that "right" or "issue" will generally have its own test associated with it, either under the tribunal's own statute or regulations, self-promulgated rules, or case law.

40. The question raised by this appeal is how courts should review these more "explicit" procedural decisions, to determine if they give rise to a breach of procedural fairness or an abuse of process. The Member submits the answer is that while the analysis may proceed on the facts found by the decision-maker absent palpable and overriding error, the application of those facts

[45] *Baker* at para. 20.
[46] *Baker* at para. 21.

to the legal test governing the decision – in this case inordinate delay – should be reviewed for correctness.

41. This is because the concept of "inordinate delay" is a legal standard. This Court has determined that "the application of a legal standard to the facts of the case is a question of law" reviewed for correctness.[47] The task is to determine whether the facts, as found, are sufficient, at law, to meet the legal standard.[48]

42. "Inordinate delay", like reasonable apprehension of bias and abuse of process, is a legal standard that should have consistent meaning across the justice system, including within the administrative justice system.

43. This same principle is reflected in *Virk*.[49] The British Columbia Court of Appeal held that "the allocation of periods of delay is reviewed on a standard of correctness. The ultimate decision of a judge to impose a judicial stay for unreasonable delay is a question of law and is likewise subject to a correctness standard".[50]

44. Finally, the characterization of questions of "inordinate delay" as being a legal standard to be determined correctly by the courts is consistent with the fact that an application for relief based on inordinate delay can be made at first instance either before the decision-maker itself (as

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[47] *R v Shepherd*, 2009 SCC 35, [2009] 2 SCR 527 at para. 20 [*Shepherd*].

[48] *Shepherd* at para. 20: "While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount at law to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law."

[49] *R v Virk*, 2021 BCCA 58 [*Virk*]. Ironically in light of the LSS's position on this appeal in relation to the application of criminal law and *Charter* principles in administrative law, *Virk* *is* relied on heavily by the LSS. In any event, *Virk* supports the Member's position on this appeal.

[50] *Virk* at para. 24.

occurred in this case), or as a stand-alone application for *certiorari* and *prohibition* in the superior courts (as occurred in both *Blencoe* and *Burke*,[51]). The determination of "inordinate delay", and whether a stay of proceedings is appropriate, should not differ based on which justice system actor decides the matter at first instance.

45. This is not to say that every instance of an application of the facts to a substantive legal principle by an administrative decision-maker should attract correctness review. Rather, the Member's submissions are limited to decisions that explicitly address issues of procedural fairness and natural justice – such as reasonable apprehension of bias, abuse of process, and inordinate delay. This means that the reviewing court can come to its own conclusions based on the findings made at first instance, where matters of fairness are engaged.

iii. Principle justifies a greater role for courts in ensuring fair proceedings

46. There are sound reasons of principle behind this Court's consistent view that courts must have the last word on questions of procedural fairness and abuse of process. The common law has long provided remedies to ensure fair government decision-making. In *Martineau v Matsqui Institution Disciplinary Board*,[52] Justice Dickson (as he then was) noted that the common law remedy for supervising government decision-making includes questions of fairness.[53]

47. The Saskatchewan Court of Appeal adopted these principles in *Misra*,[54] a case discussed at length in *Blencoe*: [55]

> [t]he above authorities have raised the following terms: 'natural justice', 'procedural fairness', 'abuse of discretion' and 'abuse of process'. There are two common denominators in each of the terms. The first is the impossibility of precise definition because of their breadth and the wide array of circumstances which may bring them

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[51] *Burke v Saskatchewan (Human Rights Commission)*, 2019 SKQB 339 [*Burke*].
[52] [1980] 1 SCR 602 [*Martineau*].
[53] *Martineau* at p. 628: "*Certiorari* is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers."
[54] *Misra v College of Physicians & Surgeons*, 1988 CanLII 211 [*Misra*].
[55] *Misra* at p. 20-21, emphasis added.

> into play. The other is the concept of 'fairness' or 'fair play'. They clearly overlap. Unreasonable delay is a possible basis upon which to raise any of them.
>
> The concept of natural justice or procedural fairness as outlined by Dickson J. in *Martineau* is broad enough to encompass principles which, in other contexts, have been termed abuse of discretion or abuse of process because of delay and related matters. A court, in exercising its supervisory function over an administrative tribunal is entitled to prohibit abuse of that tribunal's process in cases of unfairness or oppression caused or contributed to by delay resulting in a denial of natural justice.

48. As Justice LeBel observed in *Blencoe*, "[t]he notion that justice delayed is justice denied reaches back to the mists of time," [56] and that "[t]wo fundamental aspects of the common law's history are relevant to the rules in this area: (1) the common law system's abhorrence of delay; and (2) the common law's development as to the power of the courts to monitor the processes of administrative bodies". [57] He observed that "[f]or centuries, those working with our legal system have recognized that unnecessary delay strikes against its core values and have done everything within their powers to combat it, albeit not always with complete success".[58]

49. Ultimately, as this Court held in *Figliola* the doctrine of abuse of process "has as its goal the protection of the fairness and integrity of the administration of justice".[59]

50. These observations about the important role of the courts in guarding against unfair proceedings and abuse of process are at the root of this Court's jurisprudence on the standard of review for questions of procedural fairness. In *Mavi v Canada (Attorney General)*, this Court noted, in reference to *Baker*, that "the simple overarching requirement is fairness and this 'central' notion of the 'just exercise of power' should not be diluted or obscured by jurisprudential lists developed to be helpful but *not* exhaustive."[60] The outcome rejected in *Mavi* is precisely that which the LSS would have this Court adopt.

51. Perhaps this Court's strongest statement on the role of courts in ensuring that administrative proceedings are fair is in *Dunsmuir*: [61]

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[56] *Blencoe* at para. 146.
[57] *Blencoe* at para. 146.
[58] *Blencoe* at para. 146.
[59] *British Columbia (Workers' Compensation Board v Figliola*, 2011 SCC 52, at para 31 [*Figliola*].
[60] 2011 SCC 30, at para. 42 (italics in original), underlining added.
[61] *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], at para. 129.

> Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts will have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. Hansard is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated hauteur about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414 (Eng. C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law.

52. Therefore, "there is the strong pull of procedural fairness as one of the underlying principles of our whole legal system, including the administrative process".[62]

53. The argument of the LSS on this appeal in favour of deference should be a caution to this Court. It underscores why it has always been understood that courts have a greater role to play when a decision is challenged on the basis of natural justice or abuse of process.

54. If the LSS's position on the standard of review for procedural fairness – and on tolerance of delay and the deference that courts should give that issue in particular – is correct, then there is no incentive for administrative decision-makers to proceed in a timely manner. Nor is there any incentive for administrative bodies to remedy systemic delay.

55. Administrative decision-makers already enjoy significant deference on substantive matters falling within their mandates. As elaborated upon further below, when an individual finds themselves subject to the administrative state – either because their participation is compelled or because the legislature has ousted the jurisdiction of the courts over the matter in dispute – they are required to exhaust that system before resorting to the courts. In exchange, as this Court noted in *Vavilov*, administrative decision-makers are required to justify their decisions, in particular to those subject to them. The obligation to proceed fairly must be similarly policed rigorously by the courts to prevent unfair proceedings and abuse of process.

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[62] Mullan & Harrington, *The Charter and Administrative Decision-Making: The Dampening Effects of Blencoe*" (2002) 27 Queen's LJ 879 ("Mullan & Harrington"), at 912.

iv. The nature of the interests at stake

56. Fairness in administrative decision-making is contextual, a point reflected in the *Baker* framework. Given the prevalence of administrative decision-makers in Canada and their range of functions, the purpose and nature of the proceedings and the function of the decision-maker in question are important to determining the extent to which timely decision-making is essential.

57. This case deals with a professional disciplinary tribunal which revoked a person's licence to practice his chosen profession. Other than depriving a person of their liberty, this may be one of the most severe sanctions that any quasi-judicial body can impose. This Court has on numerous occasions stressed the importance of work to an individual's identity: [63]

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

58. Courts and tribunals across the country have, rightly, endorsed this view.[64]

59. In the professional discipline context, the individual is subject to the state's compulsive and coercive authority, and has his or her professional life on the line. Given the severity of the punishment – in this case disbarment – a professional disciplinary tribunal must take extra care to ensure its proceedings are fair and not abusive. The prosecuting party should have less leeway than might be given, for example, to a human rights commission where the dispute is driven by the parties, and not by state compulsion.

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[63] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para. 91, per Dickson CJ.

[64] For example, in *Forster v Saskatchewan Teachers' Federation*, 1992 CanLII 8305 at para 9, the Saskatchewan Court of Appeal noted that the "ability of a person to carry on his profession and to maintain his professional reputation untarnished is of primary importance". In *Law Society of Alberta v King*, 2010 ABLS 9 at para 79, it was said in relation to a reprimand that, for a "professional person, whose day-to-day sense of self-worth, accomplishment and belonging is inextricably linked to the profession, and the ethical tenets of the profession, it is a lasting reminder of failure".

v. The LSS's misplaced reliance on the fifth *Baker* factor

60. Central to the LSS's position on standard of review is that the fifth *Baker* factor – the decision-maker's choice of procedure – incorporates a level of deference into the court's role on judicial review of procedural fairness questions.

61. This is not the role that the fifth *Baker* factor traditionally plays in the analysis. The *Baker* framework is used when a reviewing court must determine the scope of the duty of fairness owed in the circumstances, and whether that duty was met, when an alleged breach of procedural fairness is raised as a matter of first instance. In these circumstances, the "choice of procedure" refers to decisions like whether to hold an oral hearing, or whether to offer a person subject to an investigation a chance to review the report before it is finalized. "Choice of procedure" does not assist in determining whether the procedure *actually chosen* gives rise to inordinate delay.

62. The LSS also relies on jurisprudence supporting the view that fact finding conducted by a decision-maker on questions of procedural fairness is to be afforded deference. The source of that legal principle is not *Baker*. It is in the traditional fact-finding role of a first instance decision-maker, be it administrative or judicial. In any event, it does nothing to alter the fact that the application of those facts to the legal standard of inordinate delay is a question of mixed fact and law that should be reviewed for correctness. It is possible to show deference to a tribunal's findings of fact, while still preserving the overarching role of the courts to supervise administrative discretion for fairness and abuse.

63. Finally, while the LSS emphasizes the fifth *Baker* factor and argues for deference to the decision-maker's choice of procedure, it conveniently ignores the third *Baker* factor, which is the importance of the decision to the individual. This Court has already determined on numerous occasions that "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake", because a "disciplinary suspension can have grave and permanent consequences upon a professional career".[65] The LSS cannot selectively elevate one of the five *Baker* factors to the exclusion of the others.

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[65] *Baker* at para. 25.

vi. Conclusion on the standard of review question

64. Applying these principles to this case, this Court's task is to determine, based on the hearing committee's findings, whether the delay in this case is inordinate and, if so, whether a stay of proceedings is appropriate.

b. The delay question

65. The Court of Appeal determined that the proceedings gave rise to inordinate delay, and ordered a stay of proceedings. To demonstrate why the Court of Appeal was correct in so doing, it is first important to review the decision in *Blencoe*, and the overarching principles relevant to the issues on this appeal.

i. The *Blencoe* framework

66. The LSS argues that the Court of Appeal's decision reflects a substantial departure from this Court's decision in *Blencoe*. The LSS also argues the Member is seeking to change the *Blencoe* framework. Both arguments are misplaced.

67. The Court of Appeal's decision is consistent with the principles in *Blencoe*. It is nothing more than an application of *Blencoe* to a fundamentally different factual scenario.

68. In *Blencoe*, two individuals brought sexual harassment complaints against Mr. Blencoe to the British Columbia Human Rights Commission. They were investigated and eventually referred for a hearing scheduled approximately 32 months after the complaints were filed. Four months prior to the start of the hearing, Mr. Blencoe applied for judicial review, claiming that the Human Rights Commission had lost jurisdiction due to unreasonable delay in processing the complaints. Mr. Blencoe's application for judicial review was dismissed, and on appeal he argued that his s. 7 *Charter* rights to liberty and security of person were violated, due to the length of the delay. The majority of the Court of Appeal allowed the appeal and directed a stay of proceedings.

69. Leave to appeal to this Court was granted. The majority held that the facts did not support a remedy either under the *Charter* or in administrative law, and in doing so set out the

Blencoe framework.[66]

70. The majority set a high threshold for establishing the kind of personal prejudice that could support the imposition of a stay of proceedings for inordinate delay:[67]

> Where inordinate delay has directly caused significant psychological harm to a person or attached a stigma to a person's reputation, such that a human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused significant prejudice to amount to an abuse of process. It must be delay that would, in the circumstances of the case, bring the human rights system into disrepute.

71. The majority concluded that the proceedings must be "unfair to the point that they are contrary to the interests of justice,"[68] and that the delay must be so "unacceptable to the point of being so oppressive as to taint the proceedings".[69]

72. In his reasons on behalf of a 4-judge minority, Justice LeBel stated that "the important and determinative issue should have been the role of judicial review and administrative law principles in the control of undue delay in administrative tribunal proceedings".[70] His view was that the appeal should be decided solely on administrative law grounds.

73. First, Justice LeBel tracked the history of the role of reviewing courts in the policing of procedural matters and abuse of process in the administrative justice system, noting that the development of common law judicial review included the power of the courts to monitor the processes of administrative tribunals for legality, and that delay was not excluded from that scope.[71] Indeed, he saw this review power as an indispensable aspect of judicial review:

> The common law system has always abhorred delay. In our system's development of the court's supervisory role over administrative processes through mandamus, we see a crystallizing potential to compel government officers to do their duty and, in so

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[66] *Blencoe* at paras. 101-102, 115, 121.
[67] *Blencoe*, at para. 115.
[68] *Blencoe* at para. 120.
[69] *Blencoe* at para. 121.
[70] *Blencoe* at para. 138.
[71] *Blencoe* at para. 147.

doing, to avoid delay in administrative processes…[72]

74. On the issue of prejudice, and in particular the need to establish personal prejudice, Justice LeBel was of the view that "[a]busive administrative delay is wrong and it does not matter if it only wrecks your life and not your hearing".[73] Further, "[u]nreasonable delay is not limited to situations that bring the…system into disrepute either by prejudicing the fairness of the hearing or by otherwise rising above the threshold of shocking abuse".[74] Therefore, Justice LeBel took a more nuanced approach to what it meant to be prejudiced by administrative delay:

> [177] It is true that administrative delay was not the only cause of the prejudice suffered by the respondent. Nevertheless, it contributed significantly to its aggravation. It must be added, though, that this delay also frustrated the complainants in their desire for a quick disposition of their complaints. Finally, the inefficient and delay-filled process at the Commission linked with the specific blunders made in the management of those particular complaints harmed all parties involved in this sorry process. Its flaws were such that it may rightly be termed to have been abusive in respect of the respondent. In this connection, I note that my colleague, Bastarache J., despite coming to the conclusion that the conduct of the Commission did not amount to an abuse of process, nevertheless found it necessary to award costs against the Commission in light of the "lack of diligence [it] displayed" (para. 136). In my view, this further demonstrates the tension in this appeal and the fact that the conduct of the Commission in dealing with this matter was less than acceptable.

75. In other words, the delay was inherently prejudicial.

76. Justice LeBel concluded that "[u]nreasonable delay in administrative proceedings is illegal under administrative law. It is a breach of the duty to conduct administrative proceedings fairly."[75] The "inefficiency in the Commission's handling of this matter has led to abuse of process".[76] However, while the delay was abusive, the interests of the complainants meant that a remedy short of a stay should be imposed.

77. In an article written shortly after *Blencoe*'s release, Mullan & Harrington observed "there was a distinct cleavage between the positions of the majority and minority on the factual

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[72] *Blencoe* at para. 150.
[73] *Blencoe* at para. 154.
[74] *Blencoe* at para. 155.
[75] *Blencoe* at para. 162.
[76] *Blencoe* at para. 162.

circumstances in administrative proceedings."[77] They describe the minority decision in *Blencoe* as follows:[78]

> In his first judgment as a member of the Court, LeBel J. was clearly much more concerned with Blencoe's plight than the majority was. In refreshingly blunt language uncharacteristic of traditional Supreme Court of Canada judgments, LeBel J. said: 'Abusive delay is wrong and it does not matter if it wrecks only your life and not your hearing'. He then criticized the nature, causes and impact of the delay in much harsher terms than the majority. In short, the majority and the minority were distinctly at odds in their evaluation of the facts.

78. In Mullan & Harrington's view, the "test that the minority adopted for whether there had been an abuse of process was somewhat less stringent than any version of the test posited by the majority."[79] They describe *Blencoe* as "making it clear that delay amounting to abuse of process counts not only in the domain of criminal law but also in the administrative process", but that it "is equally obvious" that "it will take extreme circumstances for an applicant for relief to be able to rely on delay as an abuse of process", particularly in the case of private disputes.[80]

79. As will be demonstrated below, the minority reasons in *Blencoe* better reflects this Court's more recent, post-*Blencoe* jurisprudence on administrative law generally, and in relation to inordinate delay within the entirety of the justice system and the inherent prejudice that it causes. Should this Court be of the view that a refinement of the *Blencoe* framework is required, the Member submits that the minority reasons in *Blencoe* represent a principled starting point. They better recognize that inordinate delay is prejudicial in and of itself, and may bring the administrative law system into disrepute. They also reflect a more widely applicable test for establishing prejudice than does the more case-specific conclusions of the majority.

ii. The prevalence of administrative decision-making in Canadian society

80. There are a number of contextual issues and legal principles relevant to the issues on this appeal. The first is the scope of administrative decision-making in Canada. It is pervasive, making it likely that most Canadians' interactions with the justice system at first instance are by way of administrative bodies, not the courts. Passages like the following, from this Court's

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[77] Mullan & Harrington, at p. 906.
[78] Mullan & Harrington, at p. 907.
[79] Mullan & Harrington, at p. 908.
[80] Mullan & Harrington, at p. 911.

decision in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, are found throughout Canadian administrative law jurisprudence: [81]

> Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the function they fulfill are legion.

81. Justice Stratas, writing extra-judicially, made similar observations:[82]

> Another part of our justice system is the 'administrative justice system'. Tribunals, boards, commissions, regulatory officials, and other governmental officers dispense justice under that system. The system is massive, both in terms of the number of administrative decision-makers, and in terms of the number of cases involved. To the individuals involved in administrative proceedings, the matters are extremely important, sometimes life-changing. As far as the public is concerned, issues of great moment can arise, such as a labour board's determination of the legality of a work-stoppage that causes great inconvenience, a competition bureau's assessment of whether a massive corporate acquisition can proceed, or a parole board's decision of whether a convict, said by some to by [sic] dangerous, can be paroled. Yet, the attention and scrutiny paid to the 'administrative justice system' is far less than that paid to the court system.

82. This has been acknowledged by tribunals themselves. In *Toussaint v Ontario*, the Human Rights Tribunal observed that "many more citizens have their rights determined by administrative tribunals than by courts".[83]

83. One of the "compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker" includes a belief in their "ability

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[81] [1992] 1 SCR 623 at pp. 634-35.

[82] The Hon. David Stratas, "Decision-makers under new scrutiny: sufficiency of reasons and timely decision-making", delivered at the CIAJ Administrative Law Roundtable, Toronto, ON, May 3, 2010 ("Stratas"), at p. 1 (available online: https://ciaj-icaj.ca/wp-content/uploads/documents/import/RT/R22.pdf?id=600&1607729259)

[83] 2010 HRTO 2102 at para. 26.

to render decisions promptly, flexibly and efficiently, and the ability to provide simplified and streamlined proceedings intended to promote access to justice".[84] Because of this extraordinary power that administrative bodies exercise over individuals, as agents of the state, this Court in *Vavilov*[85] imposed a duty on decision-makers to deliver responsive reasons and to justify their decisions.

84. Given the prevalence of administrative decision-making in Canada, the Court of Appeal was right to ask "why should less be required of administrative decision-makers than courts".[86]

iii. The doctrine of exhaustion can compound delay

85. Once within the administrative justice system, a litigant is required to remain in it until the statutory system has been exhausted. Courts across Canada have enforced the principle of non-interference with ongoing administrative processes vigorously.[87]

86. The impact of the doctrine of exhaustion is compounded by the fact that, at least in the professional disciplinary context, the individual subject to the proceeding has no choice but to participate and often has no means of advancing it. The *Blencoe* majority noted that "one distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals".[88]

87. Not only are the vast majority of citizens' rights *required* to be determined via the administrative justice system and they are often compelled to participate in it by the actions of the state, but once in that system they must exhaust its remedies. Delay takes on an even more important dimension in these circumstances.

iv. The "culture of complacency" and proving prejudice

88. The Court of Appeal held that "there are insidious effects of delay in judicial and

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[84] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para. 29 [*Vavilov*].
[85] *Vavilov*, at para. 135.
[86] Court of Appeal Decision, at para. 9, at AR, Vol I, Tab 5, p 71.
[87] *Canada v CB Powell Limited*, 2010 FCA 61, at paras. 31, 33.
[88] *Blencoe* at para. 36.

administrative proceedings,"[89] that "timely justice has long been recognized as an essential element of the rule of law", and that, regrettably, this "assurance has too often been honoured in the breach rather than the observance".[90] In this regard, the Court of Appeal decision is consistent with the overall tenor of this Court's recent access to justice jurisprudence.

89. Front of mind in the submissions of the LSS is the assertion (notwithstanding what the Court of Appeal actually decided) that this Court's decision in *Jordan* has now been blindly incorporated into administrative law.[91] :

90. While the Member has never argued, and does not argue on this appeal, for the adoption of *Jordan* into administrative law, that does not mean that this Court's comments in *Jordan*, or in *Hryniak v. Mauldin*[92], about the impact of delay are not relevant. *Jordan* is but one of many cases recently decided by this Court, across all aspects of the justice system, emphasizing the common law's abhorrence of delay and the importance of timely decision-making. This Court has oft-noted, as did the Court of Appeal, that courts, government, and the public are all rightly concerned about a lack of timely access to justice in the Canadian judicial system. The Canadian justice system includes the administrative law system.

91. In *Jordan*, this Court noted not only that "[t]imely justice is one of the hallmarks of a free and democratic society",[93] but also that developments since the Court's last statement on delay in criminal proceedings demonstrated that "the system has lost its way".[94]

92. These comments are similar to those of Justice LeBel in *Blencoe*, which were cited approvingly by this Court in *Giguere v Chambre des notaires de Quebec*:[95]

> Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It is a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the

[89] Court of Appeal Decision at para. 6, at AR, Vol I, Tab 5, p 70.
[90] Court of Appeal Decision at para. 7, at AR, Vol I, Tab 5, p 70.
[91] The LSS presumably relies on para.8 of the Court of Appeal Decision, at AR, Vol I, Tab 5, p 70.
[92] *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*].
[93] *Jordan* at para. 1.
[94] *Jordan* at para. 29.
[95] 2004 SCC 1.

> confidence of Canadians. The tools for this task are not to be found only in the *Canadian Charter of Rights and Freedoms*, but also in the principles of a flexible and evolving administrative law system.

93. In *Jordan*, this Court also commented on the difficulties inherent in proving personal prejudice, and its lack of relevance to the question of whether delay is inordinate. This Court noted that "actual prejudice can be quite difficult to establish", and that "courts have also found that 'it may not always be easy' to distinguish between prejudice stemming from the delay versus the charge itself".[96] These recent observations are in contrast to the majority reasons in *Blencoe*, which held that an applicant for a stay had to establish that the delay, and not the allegations themselves, was the cause of the prejudice.

94. As this Court also noted in *Jordan*, even if sufficient evidence of prejudice is adduced, "the interpretation of that evidence is a highly subjective enterprise".[97] Further, the focus on whether there has been actual personal prejudice has no bearing on whether the period of delay is undue.[98]

95. In *Blencoe*, perhaps presciently, Justice LeBel questioned the majority's undue emphasis on hearing prejudice, in language similar to that of this Court in *Jordan*:

> Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system.

96. Justice LeBel expressed concern that, under the majority's approach "there would not be any remedy for an individual suffering from unreasonable delay unless this same individual were lucky enough to have suffered sufficiently to meet an additional, external test of disrepute".[99]

97. The difficulties in proving personal prejudice do not disappear simply because the matter is a regulatory one, as opposed to a criminal one. If anything, they become more difficult, given the high threshold for establishing personal prejudice set out by the majority in *Blencoe*. There

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[96] *Jordan* at para. 33.
[97] *Jordan* at para. 33.
[98] *Jordan* at para. 34.
[99] *Blencoe* at para. 155.

is no principled reason why the comments in *Jordan* about proving personal prejudice, and its lack of relevance to whether the delay in question is inordinate, should be confined to the criminal law context. The comments about prejudice and the importance of timely decision-making in *Jordan* merely echo those already made by four judges of this Court in *Blencoe*.

98. To side-step this issue, the LSS advances its arguments under a proposition that amounts to nothing more than: *Jordan* is a criminal law case, the criminal law has no role to play in administrative law, and therefore *Jordan* is in no way relevant to questions of delay in other areas of the law.[100]

99. The criminal law is not the only context in which this Court has discussed the law's abhorrence of delay and the importance of timely decision making. In *Hryniak*,[101] this Court spoke of the importance of ensuring access to justice in the civil context. This Court spoke of the "necessary culture shift", and the "values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice".[102] Adjudication must be fair and just, and "this cannot be compromised".[103] Given that administrative actors decide far more matters of importance to citizens than the civil courts, there is no principled reason that the "culture shift" advocated for in *Hryniak* should not also apply in administrative law.

100. Similarly, there has long been a recognized jurisdiction on the part of the courts in civil actions to dismiss all or part of a claim if the court is satisfied that there has been delay that is

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[100] Despite saying that the Court of Appeal wrongly incorporated principles of criminal law into administrative law, the LSS relies on numerous criminal law and *Charter* cases to support its arguments on this appeal. With due respect, the LSS cannot have it both ways. There are other instances where this Court has adopted general principles from cases decided in the criminal law context into administrative law. For example, in *Vavilov*, this Court endorsed the purpose of reasons articulated in *Sheppard* in the administrative law realm, despite the fact that *Sheppard* dealt with the sufficiency of reasons for imposing a criminal conviction.

[101] *Hryniak* at para. 1: "Ensuring access to justice is the greatest challenge to the rule of law in Canada today."

[102] *Hryniak* at para. 23.

[103] *Hryniak* at para. 23.

inordinate and inexcusable, and it is not in the interests of justice to permit an action characterized by inordinate delay to proceed further. Courts across Canada apply a similar three-part test for determining whether an action should be dismissed for delay: 1) is the delay inordinate; 2) what are the reasons for the delay, and is it excusable; and 3) is it in the interests of justice that the case proceed to trial notwithstanding the delay.[104]

101. Therefore, even in the context of entirely private disputes, the justice system has an interest in avoiding inordinate delay, and a plaintiff who fails to diligently advance their claim may see it dismissed. Applications to dismiss civil claims have been granted *despite* findings of no actual prejudice on the part of the defendant.[105]

102. There is no reason why these principles should apply only in the courts. As an equal player in the justice system, administrative decision-making is thought to result in a more efficient process with quicker results than those available in the courts. However, this "assurance has too often been honoured in the breach rather than the observance."[106]

103. Administrative actors should be held to a standard comparable to the civil and criminal law courts when it comes to the timeliness of decision-making. If administrative decision-makers are considered to be just as much a part of the legal system, and contribute equally to the development of the law and the interpretation of statutes, as do courts, there is no principled reason why they should be exempt from any comparable objective standard of timely decision-making.

104. Courts, governments and the public alike are rightly concerned about the lack of timely access to justice reflected throughout the Canadian justice system, including the administrative justice system. Administrative actors, as part of earned deference, have the same corollary obligation to those affected by their decisions: to maintain the confidence of the public in the

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[104] For example, *International Capital Corporation v Robinson Twigg & Ketilson*, 2010 SKCA 48; *Sickinger v Krek*, 2016 ONCA 459; *S (C.H.) v. Alberta (Director of Child Welfare)*, 2010 ABCA 15.
[105] *Rafuse v Rafuse*, 2011 SKQB 184, at paras 12, 39, and 40; *Big Sky Farms Inc. v Koenders Mfg. (1997) Ltd.*, 2011 SKQB 205 at paras 26 and 35; and *LNY Holdings Ltd. v Royal Bank*, 2012 SKQB 107, at paras 12(a) and 13.
[106] Court of Appeal Decision at para. 7, at AR, Vol I, Tab 5, p 70.

enforcement of their statutory mandates over which they have exclusive jurisdiction, and in the administration of justice as a whole. For professional regulatory bodies, rendering decisions in a timely manner supports their statutory mandate to protect the public interest. Individuals who are subject to administrative proceedings that have or will have a significant impact on their lives should have those matters decided in a timely manner. Given the breadth of administrative decision-making in Canada, society as a whole has an interest in the timely resolution of administrative proceedings, as much as they do court proceedings.

v. The difficulty in establishing the right to a stay under *Blencoe*

105. Despite the clear importance of ensuring administrative proceedings are resolved in a timely way, the jurisprudence applying *Blencoe* – both at the tribunal level and in the courts – shows how difficult it is for an applicant to demonstrate the level of personal prejudice required to obtain a stay of administrative proceedings when hearing prejudice is not an issue. For example, in *Wachtler v College of Physicians and Surgeons*,[107] the Alberta Court of Appeal concluded that although a 53-month delay caused prejudice, it was not enough to discharge the high burden justifying a stay of proceedings.

106. Perhaps the most glaring example of the impact of the high threshold for establishing serious personal prejudice is *Air Transat*, where there was a 10-year delay from the time an access to information request was submitted to the time the Commissioner's report was issued, a delay that could only be described as "unreasonable".[108] Air Transat had been treated "inordinately badly".[109] Though the delay did not prejudice Air Transat "in terms of their right to procedural fairness", the Federal Court of Appeal had "no doubt that the process strongly prejudiced Air Transat in a broader sense".[110] Furthermore, "these two administrative agencies had little consideration for Air Transat and for respecting their rights in relation to the process

[107] 2009 ABCA 130.
[108] *Air Transat* at para. 149.
[109] *Air Transat* at para. 159.
[110] *Air Transat* at para. 160.

underway",[111] and that they "acted in a cavalier fashion in the circumstances".[112] Moreover, there was no reasonable explanation for the delay. It was "indisputable" that the case should have been resolved sooner, and that the "Commissioner's lack of diligence resulted in bringing the access to information regime into disrepute".[113]

107. Despite these findings, the Federal Court of Appeal nevertheless found the evidence of prejudice to be "vague and unspecific",[114] and so the absence of serious personal prejudice meant that, following *Blencoe*, a stay was not available.

108. Academic commentary also highlights the difficulty of obtaining a stay of administrative proceedings when hearing fairness is not at issue. Stratas observed, in examining the cases applying *Blencoe*, "that the threshold for obtaining a stay of proceedings is extremely high, and so the remedy is seldom granted. As a result, parties are not getting any relief for severe delay that causes damage to them."[115]

109. Stratas also observed:[116]

> As the list, above, of cases where a stay was not granted shows, a vast majority of serious administrative delays that cause damage will not be redressed. Persons subject to long administrative delays will have no recourse… [and] little incentive for tribunals to address issues of delay, to the extent that those issues are within their power to control.

110. In his view, these were "delays that would never be countenanced in the court system and whose effects, both on the parties involved and the public interest, are often massive."[117] Without greater recourse to a stay, "tribunal members may have little incentive to act faster."[118]

111. Others have observed that it is "obvious that it will take extreme circumstances for an

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[111] *Air Transat* at para. 162.
[112] *Air Transat* at para. 164.
[113] *Air Transat* at para. 170.
[114] *Air Transat* at para. 151.
[115] Stratas, at p. 25.
[116] Stratas, at pp. 30-31.
[117] Stratas, at p. 2.
[118] Stratas, at p. 38.

applicant for relief to be able to rely on delay as an abuse of process".[119] As it stands, a stay of administrative proceedings for undue delay, absent hearing prejudice, "is seldom granted."[120]

112. *Blencoe* has clearly been interpreted by courts and tribunals as setting a high threshold for non-hearing, personal prejudice. However, a closer examination of the reasons behind this high threshold, and its application to the actual facts of, and issues raised in, *Blencoe*, demonstrate that the result in *Blencoe* may have been driven by its facts, and is therefore being confined too narrowly.

113. The majority's reasons in *Blencoe* on the issue of prejudice were clearly focused on the s. 7 *Charter* argument and whether the non-hearing prejudice suffered by Mr. Blencoe was so sufficiently high to amount to a serious deprivation of his security of the person interest:

> I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the *Charter* covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), *supra*, of an overlong and vexatious criminal trial or in *G (J)*, *supra*, where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceeding must be accepted. This will also be the case when dealing with the regulation of a business profession, or other activity. A civil suit involving fraud, defamation, or the tort of sexual battery will also be "stigmatizing". The Commission's investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no "stigmatizing" state pronouncement as to his "fitness" that would carry with it serious consequences such as those in *G(J)*. There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to "liberty" or "security of the person".

114. Then, the majority applied this same high *Charter*-based, deprivation threshold to its consideration of whether a stay was appropriate on administrative law grounds, without any explanation as to why the threshold for determining whether there has been a *Charter* breach was appropriate for determining whether an abuse of process in administrative law has occurred. The availability of an administrative law remedy was akin to an afterthought for the majority, which

[119] Mullan & Harrington, at 911.
[120] Stratas, at p. 29.

is what may have prompted the minority reasons.

115. The majority in *Blencoe* also found that because of the combined effect of Mr. Blencoe's status as a public figure, pre-existing media coverage of the allegations against him, and parallel civil proceedings dealing with the same issues, the delay caused by the human rights proceedings were not the cause of the prejudice – rooted in stigma – that Mr. Blencoe had advanced. The combination of these factors –pre-complaint media coverage, parallel civil proceedings, and prior notoriety – are unlikely to present in the average person's case.

116. As noted, Justice LeBel took a more nuanced view of prejudice and was also of the view that significant administrative delay could be a wrong in and of itself. Such comments had been made in pre-*Blencoe* cases, discussed approvingly in *Blencoe*, where stays for delay were granted. For example, in *Ratzlaff*, the court noted that "where delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence".[121]

117. In *Misra*, Dr. Misra had been suspended on an interim basis from his practice for over 5 years pending discipline proceedings based on criminal charges. In granting a stay of the disciplinary proceedings, the Saskatchewan Court of Appeal observed as follows:[122]

> [T]he result is clearly oppressive and unfair to the [appellant]. It will be more difficult for him to defend because five years has elapsed since the events occurred. He has undergone, through that period, the usual stress, anxiety and expense involved in such matters. The charges do allege matters criminal in nature and his reputation in the community will have suffered. He has, for approximately six years, been deprived of the right to practice his profession although he has not yet been found guilty of any offence. His income from that source is forever lost and it may be assumed that whatever practice he had was severely damaged, if not destroyed. Yet he is being required to defend himself on charges arising from the same events which gave rise to his five year suspension.
>
> These are all matters which arose because of the procedure used by the respondent (although in good faith). The circumstances have made the procedure clearly unfair and prejudicial to the appellant to the extent that they are oppressive, and make it impossible to give him a fair hearing. The suspension can never be remedied if he is found not guilty of the charges. It is one thing to undergo a temporary suspension for

[121] *Ratzlaff v. British Columbia (Medical Services Commission)*, 1996 CanLII 616 (BCCA) at para. 19.
[122] *Misra* at p. 24-25.

> a few months or even a year or two while waiting to be heard – five years is quite another matter.

118. The majority in *Blencoe* distinguished both *Ratzlaff* and *Misra* on their facts, and did not question the stays imposed in those cases.

119. It is perhaps for all of these distinguishing features that exist in the Member's case that the Court of Appeal did not view its decision as a departure from *Blencoe*.

120. If the Court of Appeal decision is viewed as a departure from *Blencoe* (and the Member does not believe it is), it would be in relation to both the quantity and the quality of personal prejudice that an applicant must show before a stay will be granted. In that regard, the Court of Appeal stressed the inherent prejudice – both to the individual and to the regulatory system – flowing from inordinate delay: [123]

> Allegations of serious professional misconduct generally weigh heavily, raising as they do the prospect of damage to livelihood, reputation, and mental and physical health as a result of delay and regardless of outcome. Where charges are unfounded or are not made out, an unwarranted cloud of suspicion may have descended and never dissipate. A rush to judgment may occur. These dangers have become even more pressing at a time when notices of disciplinary measures are published on law society websites for all to see, and information is so often shared quickly, widely, and in small and misleading bites. Delay has taken on a new meaning in the online age.

121. As this Court rightly observed in *Jordan*, evidence of serious personal prejudice is in no way relevant to the question of whether delay is inordinate. If an element of personal prejudice is relevant to the question of remedy for inordinate delay, the threshold should not be so high that it would permit an outcome like that in *Air Transat*, where neither extraordinarily lengthy delay nor unreasonable conduct by the decision-makers was sufficient to warrant a stay. If anything, the Court of Appeal breathed life into the intention of *Blencoe*, recognizing the modern realities of stigma and other personal prejudice that exists (particularly in the digital age) without having to establish evidence of "traditional" personal prejudice, such as psychological injury. Moreover, the Court of Appeal decision recognizes that inordinate delay is prejudicial in and of itself, and can bring the administrative justice system into disrepute. These are important principles that should be endorsed by this Court.

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[123] Court of Appeal Decision at para. 213, at AR, Vol I, Tab 5, p 130.

vi. The role of deference

122. The LSS rests its arguments on this appeal almost entirely on the need for deference to administrative proceedings, and (an unfounded) concern that granting a stay for inordinate delay would unduly interfere with that deference. Put more simply, the LSS asks this Court to bless administrative complacency, and sacrifice fairness on the altar of deference.

123. In *Vavilov*, the majority of this Court sought to introduce a culture of justification to administrative decision-making. There is no reason why that culture of justification should be limited to matters of substantive review. If anything, a culture of justification is even more important to ensure the fairness of administrative decision-making.

124. The Court of Appeal was alive to concerns about deference in administrative law generally. It recognized, citing the minority opinion in *Vavilov* (which in turn cites *Hryniak*), that ensuring that an administrative process is fair and that administrative justice is delivered in a timely manner are not inconsistent with deference:[124]

> The judicial response to delay in administrative proceedings must, of course, take due account of the principled reasons for judicial deference that shaped *Blencoe* and were reaffirmed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*]. Beyond that, why should less be required of administrative decision-makers than courts? Administrative agencies decide many issues of great importance. As Abella and Karakatsanis JJ. commented in their minority opinion in *Vavilov*:
>
> > [242] Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Regimbauld, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:
> >
> > > … the aims of administrative law … generally gravitate towards

[124] Court of Appeal Decision at para. 9, at AR, Vol I, Tab 5, p 71.

> promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.
> (Yves-Marie Morisette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 236)

125. The LSS and its delegates should not be permitted to hide behind the high threshold of "deference" on substantive matters to shield itself from delay that, by virtue of its own self-proclaimed status as a sophisticated tribunal, it is well placed to remedy. Without the meaningful remedy of a stay of proceedings for inordinate delay, the LSS and other administrative bodies will lack accountability for delay, particularly when that delay is systemic in nature. As the Court of Appeal noted, the LSS is "a regulator that should, given its mandate, resources and composition, be a model for others".[125]

126. If the LSS is correct, and deference can insulate it or other disciplinary bodies against the accountability of a stay of proceedings, there is little incentive for any such body to address issues of delay.

c. Factors relevant to the exercise of discretion to grant a stay

127. In light of the above, and outside of the specific facts of this case, if anything, the *Blencoe* framework may simply require comment to account for the current jurisprudential landscape on delay and prejudice, and to recognize the impact of stigma in the online age. To that end, the Member submits the following factors (all present in the Member's case) are relevant to determining if delay requires a remedy that reviewing courts can and should consider.

i. The length, cause and effects of the delay

128. The length of the delay, assessed globally, is the starting point for whether that delay is inordinate. While the Member agrees that it is not appropriate to set ceilings in this regard, given the breadth of administrative decisions and decision-makers, there must be some recognition that extremely long, multi-year delays should give rise to a presumption that the delay is unreasonable and inordinate, and therefore inherently prejudicial.

129. Secondary issues are the cause of the delay and its effects on the individual. The

[125] Court of Appeal Decision at para. 5, at AR, Vol I, Tab 5, p 70.

Member submits that there are a number of factors relevant to a court or tribunal's determination of the cause and effects of the delay and, therefore, whether the delay is inordinate.

ii. Was the proceeding "complaint" based?

130. Central to both the majority and minority opinions in *Blencoe* was the concern that a stay in that case would give rise to harm against the interests of the complainants, who had not been responsible for any of the delay.

131. The human rights process engages the right of a complainant to have his or her discrimination allegations heard through a forum dictated by the legislature, to the exclusion of the courts. However, there may be other administrative regimes or bodies that oust the jurisdiction of the courts, but do not contemplate a "complainant" in the same sense. While there may be cases in the professional disciplinary context where the matter is driven by a complainant, as this case demonstrates that is not always the case.

132. In professional disciplinary cases where there is no complainant, the societal interest in proceeding will not as easily outweigh the considerations favouring a stay.

iii. Presence or absence of interim sanctions

133. An additional relevant factor is whether the individual compelled by the proceeding has been subjected to interim sanctions. In *Misra* – distinguished in *Blencoe* on its facts – an essential component of the prejudice was the lengthy interim suspension that the individual had been subject to during the period of delay.[126]

134. In this case, the Member was subject to stringent practice conditions for the entirety of the period of undue delay. If a decision-maker elects to proceed with interim sanctions, it has an obligation to move expeditiously with its investigation and, if necessary, hearing of the allegations.

iv. Complexity and the seriousness of the alleged misconduct

135. The complexity of a given investigation should not be conflated with the seriousness of the allegations. There are many cases that involve serious allegations – such as criminal conduct

[126] *Blencoe* at para. 112.

– where the proceeding before the regulatory body will be simple (e.g., reliance on a criminal conviction to impose sanctions for professional misconduct). There will be other cases where the allegations are not serious, but the investigation is factually and/or legally complex.

136. There is no reason why straightforward cases that are neither factually nor legally complex should not proceed expeditiously, regardless of the seriousness of the underlying allegations. If anything such cases should proceed expeditiously, in particular, if the interest of protecting the public is engaged.

137. The seriousness of the alleged misconduct cannot be determinative of whether a stay is appropriate. First, it would allow any professional regulator to excuse even atrocious inordinate delay. Second, what constitutes "egregious" misconduct is inherently subjective, and would require the reviewing court to make a qualitative determination, in a vacuum, as to how egregious the allegations are in any given case. All allegations of professional misconduct are serious, but that does not make them, by definition, egregious.

v. Relative "sophistication" of the tribunal in question

138. The LSS argues that its status as a self-proclaimed "sophisticated" tribunal means it should be given more deference, despite any delay that might ensue.

139. The Member submits the opposite should be true. There are few administrative tribunals in Canada that have the resources and experience of law societies, or that are capable of generating additional revenue through member levies. If law societies cannot be held to a higher standard, there is no basis for holding lesser funded, less sophisticated bodies to any standard when it comes to timely decision-making. Again, in the words of the Court of Appeal, "the facts of this case tell a troubling and disappointing story about a regulator that should, given its mandate, resources and composition, be a model for others".[127]

140. In any event, lack of resources does not excuse delay that is otherwise inordinate:[128]

> Nevertheless, I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of

[127] Court of Appeal Decision at para. 5, at AR, Vol I, Tab 5, p 70.
[128] *Blencoe*, at para. 135 (emphasis added).

> resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases. In *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 795, the Court stated that in the context of s.11 of the *Charter*, the government "has an institutional obligation to commit sufficient resources to prevent unreasonable delay". The demands of natural justice are apposite.

vi. Personal prejudice

141. As a matter of procedural fairness, inordinate delay that leads to hearing prejudice will justify a stay of proceedings. Where there is no hearing prejudice, stays have been far less common. Prejudice has no role to play in determining whether the delay itself is inordinate, for the reasons articulated in *Jordan*. It must be recognized that inordinate administrative delay is inherently prejudicial.

142. The standard of personal prejudice set by the *Blencoe* majority risks being unequal in its application, favouring those who are more susceptible to the effects of egregious delay, and rendering stays unavailable for those with more fortitude. This Court in *Jordan* recognized the failings of a test based on subjective susceptibility to prejudice.

143. The *Blencoe* majority's refusal to accept that the stigma against Mr. Blencoe met its threshold for justifying a stay must be understood in light of the specific facts of that case: there was notoriety regarding the allegations in the public and the media prior to the complaints to the human rights commission, and Mr. Blencoe was already a public figure. By contrast, the circumstances described by the Court of Appeal are likely to resonate far more with the circumstances of the professionals who find themselves before disciplinary bodies: [129]

> Allegations of serious professional misconduct generally weigh heavily, raising as they do the prospect of damage to livelihood, reputation, and mental and physical health as a result of delay and regardless of outcome. Where charges are unfounded or are not made out, an unwarranted cloud of suspicion may have descended and never dissipate. A rush to judgment may occur. These dangers have become even more pressing at a time when notices of disciplinary measures are published on law society websites for all to see, and information is so often shared quickly, widely, and in small and misleading bites. Delay has taken on a new meaning in the online age.

[129] Court of Appeal Decision at para. 213, at AR, Vol I, Tab 5, p 130.

144. The nature of the prejudice recognized by the Court of Appeal in this case should be included in the analysis.

vii. The public interest

145. The LSS implies that it is always in the public interest to see a regulatory process through to its conclusion, regardless of delay. Indeed, it seeks to justify the delay in this case almost exclusively on the nature of the Member's conduct. This is not the test. The question should be whether continuing with the proceedings would bring both the proceedings themselves, and the underlying regulatory system, into disrepute. The following passages from *Burke* demonstrate the nature of the balancing exercise:

> [58] The work of the SHRC is indeed important. However, this submission ignores the concern of bringing the administrative process into disrepute. As the 2011 article quoted earlier recognizes, there is inherent stress on both complainants and respondents in the SHRC process.
>
> [59] The public can also recognize when a system is not functioning properly and there is inordinate delay. There is an important interest in ensuring individuals are treated in accordance with the principles of natural justice, as the court recognized in *Watson*, at para. 40:
>
> > …In this case, there is a system failure causing inordinate delay due to the failure to respond to Watson's application to the Commission. This had denied Watson his individual rights and the duty to be treated in accordance with the principles of natural justice. In the circumstances of this case, I find that the individual right takes precedence over institutional and public interest rights.
>
> [60] I am also of the view that there is a public interest in ensuring investigations are conducted in a timely fashion.

146. The legal profession enjoys the privilege of self-regulation, manifested through the provincial law societies that are created and empowered by statute. With that privilege to regulate, comes responsibility. A professional disciplinary tribunal can revoke a person's license to practice their chosen profession, a matter for which the individual will have invested considerable time and expense, and in this case a lifetime of both. Recognizing the importance of a person's profession to them, and given the potential severity of the punishment that can follow a finding of professional misconduct – in this case disbarment – as well as the deference that the disciplinary body will receive in relation to its substantive decisions, a professional disciplinary tribunal must take extra care to ensure that its proceedings are fair and not an abuse.

147. While there is a public interest in ensuring that wayward lawyers are properly disciplined, there is *also* a public interest in ensuring that the disciplinary process for those lawyers, and where there are complainants the complaints against those lawyers, proceed in a fair and timely manner. This is implicit in the authority to self-regulate. The LSS will not enjoy public support for its mandate if its procedures relating to that mandate are not viewed as fair.

d. Application to the facts of this case

148. As the Court of Appeal correctly observed, while "[t]o err is human", the "facts in this case tell a troubling and disappointing story about a regulator that should, given its mandate, resources and composition, be a model for others".[130]

149. The Court of Appeal applied *Blencoe* to a more egregious fact scenario than Mr. Blencoe himself presented to this Court. The facts here are much closer to those found in the two cases that the *Blencoe* majority distinguished: *Misra* and *Ratzlaff*.

150. This case is also similar to *Burke*, where a human rights investigation was stayed for administrative complacency and *Blencoe* was distinguished. The delay was longer,[131] and there were significantly longer periods of inactivity.[132] The Commission's "astonishingly slow interview pace [was] only quickened once the SHRC receive[d] word of Mr. Burke's application for a stay".[133] This "flurry of activity, however, [did] not erase the lengthy periods of inactivity in the preceding years".[134] Furthermore, "any potential degree of complexity was only added when the SHRC elected to change the focus of the investigation to include exploration of a possible pattern or practice of discrimination".[135] Regarding the shift in the investigation, the Court found that "when the investigation is so protracted, and its focus changed some four years later, it begs the question of neutrality".[136] The publicity factor in *Blencoe* was also distinguished; in *Burke*, "the only reason the public is aware of the allegations is because of the

[130] Court of Appeal Decision at para. 5, at AR, Vol I, Tab 4, p 70.
[131] *Burke*, at p*ara*. 26.
[132] *Burke,* at para. 28.
[133] *Burke* at para. 32.
[134] *Burke* at para. 34.
[135] *Burke* at para. 35.
[136] *Burke* at para. 61.

ongoing investigation".[137]

151. Characterized by a record that is marked by a similar lack of direction, change in focus, and unnecessary delay, the LSS's approach in this case offends the public's sense of decency and fairness. The Member "languished under the cloud of uncertainty for too long".[138]

152. Absent the shield of deference and that the seriousness of the Member's misconduct in and of itself justifies what is otherwise abusive delay ─ being the pillars of the position of the LSS on this appeal ─ the Court of Appeal's decision to stay the proceedings was clearly correct.

153. At the time of his disbarment, the Member had been the subject of professional discipline proceedings for 73 months – over 6 years. He had been under investigation by the LSS since December 2012, with respect to conduct that occurred between 2008 and 2011, all of which had been self-reported or disclosed by the Member to the LSS by at least 2012. Since March 14, 2013, the Member had been under onerous and restrictive practice conditions. Despite the Member's self-disclosure and cooperation, it took almost three years for the charges to be laid, and more than four years for the hearing to be scheduled. There was no complainant, and the LSS was the sole opposing protagonist. There is no private interest to weigh against the considerations favouring delay.[139] The time taken by the LSS markedly exceeds the reasonable time it should have taken to investigate and prosecute the Member.

154. The LSS should not be unaccountable because the Member did not suffer discrete and sufficiently "serious" personal prejudice. Access to justice, accountability, and the administration of justice demand more. The delay in these proceedings breached the Member's fairness rights, and was abusive. The stay of proceedings should be upheld.

e. Issues of waiver and alternative remedies

155. Neither the issue of waiver nor the availability of alternative remedies was argued by the LSS in the Court of Appeal. Had they been, the Member would have had an opportunity to address them. While this Court may determine that alternative remedies and waiver are issues that are to be addressed by a court or tribunal adjudicating in future cases, it would be

[137] *Burke* at para. 55.
[138] *Burke* at para. 62.
[139] Mullan & Harrington, at p. 911.

fundamentally unfair to the Member to retroactively apply them to his case, given that the LSS raises these issues for the first time before this Court.

PART IV – COSTS

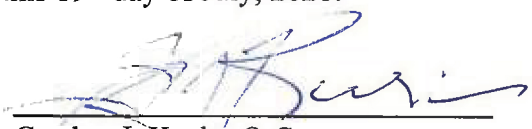
156. The Member asks that he be awarded costs in the event the appeal is dismissed.

157. In the alternative, if the LSS's appeal is allowed either in whole or in part, the Member submits that it is appropriate that he nevertheless be awarded his costs of this appeal.[140]

PART V – ORDER SOUGHT

158. The Member asks that the appeal be dismissed and the stay of proceedings ordered by the Court of Appeal confirmed. Having stayed the proceedings, the Court of Appeal did not consider all of the grounds of appeal before it, including the question of whether disbarment was an appropriate sanction in the circumstances. If the appeal is allowed, the matter should be remitted to the Court of Appeal to address the outstanding grounds of appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2021.



Gordon J. Kuski, Q.C.
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Lauren J. Wihak

[140] *Blencoe* at para. 135.

PART VII – TABLE OF AUTHORITIES

NO.	DOCUMENT	PARA CITIED
Legislation		
	Canadian Charter of Rights and Freedoms, Part I of *The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 *Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada* (R-U), 1982, c 11, Partie I, *Charte Canadienne des droits et libertés*	25, 26
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	British Columbia (Workers' Compensation Board v. Figliola, 2011 SCC 52	49
	Burke v. Saskatchewan (Human Rights Commission), 2019 SKQB 339	44, 150, 151
	Canada v. Air Transat, 2019 FCA 286	32, 106, 107
	Canada v. CB Powell Limited, 2010 FCA 61	85
	Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65	83, 124