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)

- and –

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, LAW SOCIETY OF ALBERTA, LAW SOCIETY OF MANITOBA, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, COLLEGE OF NURSES OF ONTARIO, ONTARIO COLLEGE OF PHARMACISTS AND ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO, FEDERATION OF LAW SOCIETIES OF CANADA, ALBERTA SECURITIES COMMISSION AND BRITISH COLUMBIA SECURITIES COMMISSION, BARREAU DU QUÉBEC, CANADIAN ASSOCIATION OF REFUGEE LAWYERS

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Part I-OVERVIEW

1. This Court has established the foundational principles with respect to the regulation of professions that should guide the determination of the issues in this appeal:

- "It is difficult to overstate the importance in our society of our learned professions."[1]
- "[T]he self-governing status of the professions, and of the legal profession in particular, was created in the public interest."[2]
- "The privilege of professional self‑regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of the powers by the state comes with the responsibility for providing adequate protection for the public."[3]
- "In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar."[4]

2. The central issue in this appeal is when a stay of proceedings due to delay in discipline proceedings should be granted. An effective and fair system of professional discipline is a cornerstone of self-regulation and protection of the public. A stay of proceedings dramatically affects the ability of law societies and other regulators to protect the public by preventing completion or implementation of the findings in the professional discipline process. Accordingly, the Law Society of Alberta (the "LSA") submits that the unambiguously high standard in *Blencoe*[5] to obtain a stay should continue to be applied and decisions of hearing committees concerning delay should be entitled to deference. In many cases issues of undue delay can be most appropriately addressed through more nuanced and narrowly tailored remedies than a stay of proceedings.

Part II-QUESTIONS IN ISSUE

3. The LSA focuses on 4 key issues arising from this appeal:

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[1] *Rocket v. Royal College of Dental Surgeons*, 1990 CanLII 121 (SCC) at p. 249.
[2] *Pearlman v. Manitoba Law Society Judicial Committee*, 1991 CanLII 26 (SCC) at p. 887 (hereafter "*Pearlman*").
[3] *Pharmascience Inc. v. Binet,* 2006 SCC 48 at para. 36.
[4] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 38.
[5] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (hereafter "*Blencoe*").

1. The standard of review to be applied with respect to a hearing committee's decision concerning an abuse of process. The LSA submits that the standard of review should be palpable and overriding error.
2. The contextual and flexible conceptual framework in *Blencoe* should be preserved. The key principles in *Blencoe* should be applied in a way that recognizes and protects the public interest in completing professional discipline investigations and hearings.
3. The doctrine of waiver should be considered an integral part of the conceptual framework for assessing delay in administrative proceedings. Where an investigated person does not object to undue delay as it occurs and instead waits until the conclusion of the hearing to challenge the merits of the decision based on delay, the investigated person should be taken to have waived the delay.
4. The presumptive remedy for undue delay that is attributable to the regulator should be an application to the regulator asking it to expedite the proceedings. There are significant public policy advantages to this remedy and this process does not incur the very serious damage to the public interest that arises from stays of proceedings.

Part III-STATEMENT OF ARGUMENT

A. Standard of Review

4. The LSA submits that the standard of review by the Courts in statutory appeals of hearing committee decisions concerning administrative delay should be palpable and overriding error, a highly deferential standard. "Palpable" means an error that is obvious and "overriding" means an error that goes to the very core of the outcome of the case.[6] A "palpable and overriding error" is not in the nature "of a needle in a haystack" but rather of a "beam in the eye" which highlights the obvious nature of the error. In the absence of palpable and overriding error an appellate court must refrain from interfering with findings of fact and findings of mixed fact and law.[7]

5. The selection of "palpable and overriding error" as the standard of review is supported by: (1) the legislative intent to accord deference to decisions of law societies in carrying out their public interest mandate and (2) the nature of the issues to be addressed by a hearing committee in considering cases of administrative delay.

6. Legislative intent is the "polar star of judicial review."[8] Historically, this Court has recognized the legislative intent to provide a degree of deference to hearing committee decisions

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[6] *Benhaim v. St-Germain*, 2016 SCC 48 at paras. 38 and 39.
[7] *Hydro-Québec v. Matta*, 2020 SCC 37 at paras. 33 and 34.
[8] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 33 (hereafter "*Vavilov")*.

and decisions of law societies concerning the interpretation of their public interest mandate.[9] The application of the *Vavilovian* framework in this case should recognize this legislative intent.

7. For the purpose of the standard of review analysis in *Vavilov* for statutory appeals it is necessary to classify the nature of the question in issue. Where questions of fact arise in the scope of a statutory appeal the standard of review is palpable and overriding error. The same standard applies to questions of mixed fact and law where the legal principle is not readily extricable. Questions of law are assessed on a standard of review of correctness. [10] Historically Courts have either not applied the standard of review analysis to questions of procedural fairness or if they have applied a standard of review analysis the Courts have said that "correctness" applies. Whatever approach is used, the role of the Court is to determine if the individual was provided the level of procedural fairness required by law.

8. A finding by a trier of fact that involves applying a legal standard to a set of facts is a question of mixed fact and law.[11] In other words, an issue of mixed fact and law is one where the tribunal or Court must determine "whether the facts satisfy the legal tests."[12]

9. The approach taken by the Courts to standard of review in delay cases has not been consistent. Some Courts have classified the issue as a matter of procedural fairness, such that no deference has been afforded to the findings of the tribunal.[13] Other Courts recognize the broad balancing of interests required and have held that a deferential standard should be applied.[14] Although an application for a stay based on delay requires a consideration of fairness for the

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[9] See for example *Pearlman*, *supra*, at p. 890; *Green v. Law Society of Manitoba*, 2017 SCC 20 at paras. 28-31; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 40; *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 at paras. 13-27; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 34.

[10] *Vavilov*, *supra*, at para. 37

[11] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36

[12] *St-Jean v. Mercier*, 2002 SCC 15 at para. 48 (hereafter "*St. Jean*")

[13] See for example *Stinchcombe v. Law Society of Alberta*, 2002 ABCA 106 at para. 33 (hereafter "*Stinchcombe*").

[14] See for example *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at para. 237 (finding of hearing committee that no abuse of process due to delay entitled to "considerable deference) (hereafter "*Sazant*") *Nova Scotia Construction Safety Assn. v. Nova Scotia Human Rights Commission*, 2006 NSCA 63 at paras. 57 (reasonableness used to assess application for abuse of process due to delay).

lawyer, the issues are much broader. Whether or not a stay should be granted is at its core a question of balancing the competing public interests and requires an assessment of "whether the facts satisfy the legal tests"[15] for abuse of process. This issue should be considered a question of mixed fact and law.

10. A detailed review of the analytical framework for assessing whether delay amounts to an abuse of process demonstrates that whether or not a stay should be ordered in specific circumstances is a matter of mixed fact and law.

11. The first step in the analytical framework in *Blencoe* for abuse of process is to calculate the period of delay.[16] A starting and end point for calculating the period of delay must be selected.[17] Then the hearing committee must determine the inherent time required for a case of this type taking into account the case's factual and legal complexity.[18] This issue should be considered a question of fact. Subtracting the inherent time required from the period of passage of time establishes the period of delay. Calculating the period of delay on an overall basis should be considered a question of fact.

12. The hearing committee must determine whether the delay is attributable to the Law Society or the lawyer. [19] Only delay attributable to the Law Society can be considered. The issue of determining who is responsible for the delay should be considered a question of fact.

13. The hearing committee then proceeds to determine if this period of delay is unreasonable or inordinate.[20] This should be considered a question of mixed fact and law

14. With respect to the amount of delay attributable to the Law Society, the hearing committee determines whether the delay caused serious direct personal prejudice to the lawyer. This question requires a consideration of a sub-issue: Is there a direct causal connection between

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[15] *St-Jean*, *supra*, at para. 48.

[16] The conceptual framework for a stay of proceedings where delay is alleged to have caused hearing unfairness differs in part. Examples of hearing unfairness due to delay are destroyed evidence, lost memories, and unavailable witnesses. In cases of hearing unfairness, an applicant must establish a period of delay that is attributable to the regulator that has directly caused prejudice of sufficient magnitude to impact the fairness of the hearing.

[17] *Blencoe*, *supra* at paras. 124, 125, and 132.

[18] *Blencoe*, *supra,* at para. 122; see also the Minority analysis at para. 160.

[19] *Blencoe*, *supra*, at para. 125.

[20] *Blencoe*, *supra*, at para. 121.

the delay attributable to the Law Society and the personal prejudice suffered by the investigated person? Or is the personal prejudice a by-product of the nature of the proceedings rather than from the delay itself? If the latter, then the required causal connection between the delay and the prejudice is not established.[21] All these issues should be considered questions of fact.

15. The final step in determining abuse of process involves a weighing process. A hearing committee must consider all the contextual circumstances. The hearing committee assesses the damage to the public interest in the fairness of the administrative process should the proceedings go ahead in the face of the delay. Then a hearing committee must consider the harm to the public interest in the enforcement of the legislative process if the proceedings are halted. If the former outweighs the latter, then a hearing committee can declare an abuse of process.[22] It is an error to fail to balance the prejudice faced by an investigated person against the competing public interest of having the allegations investigated and adjudicated.[23] The issues in the weighing exercise should be considered to be questions of mixed fact and law.

16. Given the nature of the questions under consideration, for the purpose of the standard of review analysis the issue of abuse of process should not be classified as a discrete issue of procedural fairness. The factual findings by a hearing committee form the foundation for the assessment of whether there is an abuse of process. Other issues are questions of mixed fact and law. The final step requires the hearing committee to weigh the public interest, an issue on which the Courts have traditionally granted deference to Law Societies. Ultimately, a hearing committee must determine if the set of facts satisfies the legal test for abuse of process which makes this issue one of mixed fact and law. The LSA submits that the issue of whether an abuse of process has been established should be reviewed on an overall basis using the deferential standard of review of palpable and overriding error.

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[21] *Blencoe*, *supra*, at para. 115 and 133; in the context of the *Charter* analysis see also para. 59 and 60; *Sazant*, *supra*, at para. 234; see also *Peet v. Law Society of Saskatchewan*, 2014 SKCA 109 at para. 61 (hereafter "*Peet*").
[22] *Blencoe*, *supra*, at para. 120.
[23] *Diaz-Rodriguez v British Columbia (Police Complaint Commissioner),* 2020 BCCA 221 at para. 71 (hereafter "*Diaz-Rodriguez*").

B. The Application of the *Blencoe* Conceptual Framework

17. The conceptual framework in *Blencoe* should be preserved and applied in a way that continues to recognize these key principles from *Blencoe*: those seeking a stay of proceedings as a remedy have to bear "a very heavy burden";[24] the period of delay must be "clearly unacceptable";[25] to find an abuse of process requires it be "one of the clearest of cases";[26] findings of an abuse of process will be "extremely rare";[27] "few lengthy delays will meet this threshold";[28] considering whether delay rises to the level of an abuse of process involves a consideration of whether the administrative process "would be brought into disrepute" and whether the delay has caused "actual prejudice of such a magnitude that the public's sense of decency and fairness is affected".[29]

18. Maintaining the contextual approach and the high threshold established in *Blencoe* to justify a stay of proceedings will ensure that the public protection objective of professional discipline proceedings is not undermined.

19. Criminal law principles developed in the context of the *Charter* should not be imported into the analysis of administrative law doctrines assessing delay. As noted by the British Columbia Court of Appeal: "*In my view, it is neither necessary nor appropriate to import the principles in Jordan into the assessment of delay in administrative proceedings*." [30]

20. The following principles as articulated in *Blencoe* continue to be relevant in the professional regulatory context and should be affirmed in order to ensure the conceptual framework is applied in a way that adequately protects the public. Delay attributable to the lawyer is not taken into account in assessing the degree of undue delay.[31] Delay arising from a lawyer's failure to cooperate should not be taken into account in assessing the delay attributable to the regulator. Delay arising from unsuccessful procedural challenges made by the lawyer should not be attributed to the regulator.[32]

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[24] *Blencoe*, *supra*, at para. 117; this was also the view of the Minority (para. 180).
[25] *Blencoe*, *supra*, at para. 115.
[26] *Blencoe*, *supra*, at para. 120.
[27] *Blencoe*, *supra*, at para. 120.
[28] *Blencoe*,*supra*, at para. 115.
[29] *Blencoe, supra* at paras. 115 and 133.
[30] *Diaz-Rodriguez, supra*, at para. 70.
[31] *Blencoe*, *supra*, at para. 122.
[32] *Blencoe*, *supra*, at para. 125.

21. With respect to the selection of a start date for calculating delay, time associated with a trust audit prior to the issuance of formal Citations should not be included in the calculation of the delay. Trust audits can take a significant period of time especially where there have been financial irregularities and a lawyer or their staff may have taken steps to disguise their actions. Thorough and effective trust audits are a key component in protecting the public interest.

22. Selecting an appropriate start and end date is a critically important part of the application of the *Blencoe* framework with Courts taking a variety of different approaches. Recognizing that particularly complex investigations can of necessity be lengthy, less weight should be placed on the passage of time during investigations. Where there is no complaint from the public the start date for calculating the passage of time for law societies should be the issuance of the citations. Where a law society attempts to unsuccessfully informally resolve a complaint and then refers the matter to investigation, the start date should be the referral to investigation. The end date for calculating the period of delay should generally be the date of referral to a hearing as the Court concluded in *Blencoe*.[33]

23. In assessing whether there is an abuse of process it should be immaterial whether a complaint was received by a member of the public or whether the investigation was initiated by the Law Society. There are many very serious cases where the public is at risk and where the investigation was initiated by the LSA, particularly after a Trust Account audit.

24. Many lawyers may face stress and some negative publicity arising from the investigation and allegations of conduct unbecoming regardless of whether the process proceeds within a reasonable time. However, to obtain an administrative law remedy there must be a direct causal connection between the undue delay and the prejudice suffered by the lawyer.[34]

25. Even if the stress and stigma is attributed to delay caused by the regulator, subjective vague testimony by the lawyer may be considered insufficient to establish "serious personal prejudice."[35] If the lawyer establishes some prejudice, this must still reach a high level to justify a stay.[36]

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[33] *Blencoe*, *supra*, at paras. 124 and 132.
[34] *Blencoe*, *supra*, at para. 115**.**
[35] See for example *VZ v. Licensed Practical Nurses Committee of Inquiry,* 2016 YKSC 22 at para. 81; *Peet*, *supra*, at para. 58.
[36] *Wachtler v. College of Physicians and Surgeons of Alberta,* 2009 ABCA 130 at para. 36 (hereafter "*Wachtler*").

26. The imposition of interim restrictions on practice should not be given any significant weight in assessing the degree of prejudice where the practice conditions have not hampered a lawyer's ability to maintain a busy practice.[37]

27. The time required to complete the screening process for complaints, comply with complex statutorily mandated procedural steps, ensure a fair process for lawyers and engage in informal attempts at resolution should not count in assessing whether the delay is undue.[38]

28. In considering the degree of damage to the public interest if the proceedings are halted by a stay, hearing committees will naturally assess the seriousness of the misconduct as part of the weighing exercise. Where the allegations are extremely serious this may tip the balance in favour of not granting a stay.[39] A hearing committee's assessment of the seriousness of the misconduct should be entitled to deference.

C. Waiver

29. The law is clear that delay may be waived by a member.[40] Therefore consideration of waiver should be an integral part of the conceptual framework for assessing delay. However, in the context of waiver of administrative delay the elements necessary to establish waiver are unclear. One line of authority provides that waiver requires an unequivocal statement or act reflecting the intent to waive the delay and the rights associated with it.[41] Another line of authority holds that a member who raises no protest about delay as it occurs may be taken to have waived or acquiesced to the delay.[42]

30. In the context of professional regulation where the fundamental obligations of a professional include cooperating with the investigation and being prepared to be held accountable for their conduct by their regulator, ongoing silence with no objection to any delay as it occurs should constitute waiver.

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[37] See the analysis in *Sazant*, *supra*, at para. 234.
[38] See generally *Blencoe*, *supra*, at paras. 126 and 127; see also *Diaz-Rodriguez*, *supra*, at para. 52.
[39] See for example *Sazant*, *supra*, at para. 248 and *Robertson v. British Columbia (Teachers Act Commissioner),* 2014 BCCA 331 (B.C.C.A.) at paras. 79 and 80.
[40] *Blencoe, supra*, at para. 122.
[41] See for example *Stinchcombe v. Law Society of Alberta*, 2002 ABCA 106 at para. 61.
[42] See for example *New Brunswick (Financial and Consumer Services Commission) v. Emond et. al,* 2017 NBCA 28 at para. 41.

31. As stated by the Federal Court: "In my view, just as any objection to bias must be raised on a timely basis, policy considerations favor requiring any complaint of delay to be raised and pursued before the final decision is rendered."[43] There are a number of public policy advantages to requiring lawyers to object to undue delay as it takes place or face a finding of waiver. First, regulators are placed on notice about the concerns of the investigated person and are given an opportunity to expedite matters if there has been undue delay. Second, the objection is made at a time when there can be a practical impact benefiting the lawyer. Third, this process avoids undermining protection of the public interest that occurs when a stay of proceedings is granted, thereby preventing the implementation of the legislative scheme.

D. Remedies

32. It has been suggested that there has been insufficient attention to available remedies under *Blencoe* other than stays of proceedings.[44] It is well established that a stay of proceedings is not the only remedy available for undue delay.[45] When a stay is ordered in a regulatory context, it ignores the interests served by the legislated scheme and the interests of the complainant in having their complaint heard.[46] As a result, this Court has said that a party seeking a stay as a remedy has to bear a "very heavy burden."[47] Other available remedies include: awarding Court costs where there has been delay but the tests for a stay have not been met;[48] a reduction in sanction;[49] and orders for an expedited hearing.[50] In *Blencoe* the four Justices in the Minority would have ordered an expedited hearing rather than a stay.

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[43] *Marsh v. Zaccardeli* [2006] FCJ No 1854, 2006 FC 1466 (Fed. Ct.) at para. 41 (delay in context of adjudication of grievance).
[44] Gerald P. Heckman, "Remedies for Delay in Administrative Decision making: Where Are We After Blencoe?" (2011) 24 Can. J. Admin.L. & Practice 177 at p. 196, BOA of Appellant, Tab. 4.
[45] *Blencoe*, *supra*, at para. 117.
[46] *Blencoe*, *supra*, at para. 117.
[47] *Blencoe*, *supra*:this was the view of both the Majority (para. 117) and the Minority (para. 180).
[48] *Blencoe*, *supra*, at para. 136); *Wachtler*, *supra*, at para. 50; *Hennig v. Institute of Chartered Accountants of Alberta,* 2008 ABCA 241 at para. 34; *Crown Packaging Ltd v. British Columbia (Human Rights Commission),* 2002 BCCA 172 at para. 38; *Air Transat AT Inc v. Canada (Transports),* 2019 FCA 286 at para. 172 (Fed. C.A.).
[49] *Wachtler*, *supra*, at para. 50; *Law Society of Upper Canada v. Abbott,* 2017 ONCA 525 at para.90; *Law Society of Saskatchewan v. Peet,* 2013 SKLSS 5 at paras. 87-93; affirmed 2014 SKCA 109; *Christie v. Law Society of British Columbia*, 2010 BCCA 195 at para. 31.
[50] See the analysis of the minority in *Blencoe, supra*, at paras. 149-150 and 179-182; *Wachtler*, *supra*, at para. 44; *A.D.M. v. Canadian Institute of Actuaries*, 2008 ABQB 522 at para. 46.

33. The LSA submits that the presumptively appropriate procedure when a lawyer has established undue delay caused by the regulator is for the lawyer to apply to the regulator to expedite the investigation and hearing with set timelines. This type of remedy would only be available where the lawyer has established undue delay which is attributable to the regulator that has caused serious personal prejudice. Such a remedy has four important advantages from a public policy perspective as compared to stays of proceedings: first, orders for an expedited hearing provide a practical and effective means to remedy delay in the particular case; second, orders for expedited hearings advance the public interest in efficient administrative law proceedings; third, this more narrowly focused remedy does not completely undermine the public interest in ensuring completion of the statutory process; fourth, such orders do not serve to disentitle complainants to any remedy that may be available to them under the statutory scheme. It is noted that if a stay of proceedings had been granted in *Blencoe* the complainant would never have received the damages awarded by the adjudicator as a result of the complainant having been sexually harassed by Mr. Blencoe.[51]

34. The LSA submit that an application for an expedited hearing should be made to the regulator itself rather than to the Courts. Applications to the Courts prior to the completion of administrative processes bifurcate and delay completion of administrative proceedings and are generally considered to be undesirable.[52] Lawyers who choose not to object and make such an application to the regulator make a tactical choice to "wait in the weeds". If they wait to raise delay until the end of the discipline hearing they should be considered to have waived the delay.

PART IV-SUBMISSIONS CONCERNING COSTS

35. The LSA seeks no order as to costs and asks that no award of costs be made against it.

PART V-ORDER SOUGHT

36. The LSA makes no submissions in respect of the order on the merits of the appeal.

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[51] *Willis v Blencoe,* [2001] BCHRTD No, 12, 2001 BCHRT 12

[52] See generally *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission),* 2012 SCC 10 at para. 35-36

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of August, 2021.

James T. Casey, QC

Katrina Haymond

Counsel for the Law Society of Alberta

PART VI – TABLE OF AUTHORITIES

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