SCC Court 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
ALBERTA SECURITIES COMMISSION and
BRITISH COLUMBIA SECURITIES COMMISSION
(JOINT INTERVENERS)
(Rule 42 of the *Rules of the Supreme Court of Canada*)

Co-Counsel for the Joint Intervener, Alberta Securities Commission and British Columbia Securities Commission

Alberta Securities Commission
Lorenz Berner/Tracy Knight
600-250 5th Street SW
Calgary AB T2P 0R4
Tel: 403-297-6454
Fax: 403-297-6156
Email: lorenz.berner@asc.ca
tracy.knight@asc.ca

British Columbia Securities Commission
Jennifer L. Whately
1200-701 West Georgia Street
Vancouver BC V7Y 1L2
Tel: 604-899-6800
Fax: 604-899-6506
Email: jwhately@bcsc.bc.ca

Ottawa Agent for the Joint Intervener, Alberta Securities Commission and British Columbia Securities Commission

Caza Saikaley s.r.l./LLP
James Plotkin
350-220 Laurier Avenue West
Ottawa ON K1P 5Z9
Tel: 613-565-2292
Fax: 613-565-2087
Email: jplotkin@plaideurs.ca

ORIGINAL TO:

Supreme Court of Canada
Office of the Registrar
301 Wellington Street
Ottawa ON K1A 0J1
Tel: 613-996-9277
Fax: 613-996-3063

AND TO:

Counsel for the Appellant,
Law Society of Saskatchewan

Caza Saikaley s.r.l./LLP
Alyssa Tomkins/Charles R. Daoust
350-220 Laurier Avenue West
Ottawa ON K10 5Z9
Tel: 613-565-2292
Fax: 613-565-2087
Email: atomkins@plaideurs.ca
cdaoust@plaideurs.ca
paul.daly@uottawa.ca

Counsel for the Respondent,
Peter V. Abrametz

McDougall Gauley LLP
Gordon J. Kuski, QC/Amanda M. Quayle, QC
1500-1881 Scarth Street
Regina SK S4P 4K9
Tel: 306-757-1641
Fax: 306-359-0785
Email: gkuski@mcdougallgauley.com
aquayle@mcdougallgauley.com

Agent for the Respondent,
Peter V. Abrametz

Goldblatt Partners LLP
Colleen Bauman
500-30 Metcalfe Street
Ottawa ON K1P 5L4
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Counsel for the Intervener,
Attorney General of British Columbia

Ministry of Attorney General (of British Columbia)
Meera Bennett/Robert Danay
Legal Services Branch
1301-865 Hornby Street
Vancouver BC V6Z 2G3
Tel: 604-660-3805
Fax: 604-660-3567
Email: meera.bennett@gov.bc.ca
robert.danay@gov.bc.ca

Agent for the Intervener,
Attorney General of British Columbia

Gib van Ert Law
Dahlia Shuhaibar
66 Lisgar Street
Ottawa ON K2P 0C1
Tel: 613-501-5350
Fax: 613-651-0304
Email: dahlia@givbanertlaw.com

Counsel for the Intervener,
Attorney General of Ontario

Ministry of Attorney General (of Ontario)
Alexandra Clark/Matthew Chung
Crown Law Office - Civil
8th Floor, 720 Bay Street
Toronto ON M7A 2S9
Tel: 416-574-4421
Fax: 416-326-4181
Email: alexandra.clark@ontario.ca
matthew.chung@ontario.ca

Agent for the Intervener,
Attorney General of Ontario

Borden Ladner Gervais LLP
Nadia Effendi
1300-100 Queen Street
Ottawa ON K1P 1J9
Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Counsel for the Intervener,
Attorney General of Saskatchewan

Ministry of Justice
Government of Saskatchewan
Laura Mazenc/Johnna Van Parys
Legal Services Division
900-1874 Scarth Street
Regina SK S4P 4B3
Tel: 306-787-6272
Fax: 306-787-0581
Email: laura.mazenc@gove.sk.ca
johnna.vanparys@gov.sk.ca

Agent for the Intervener,
Attorney General of Saskatchewan

Gowling WLG (Canada) LLP
D. Lynne Watt
2600-160 Elgin Street
Ottawa ON K1P 1C3
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener,
Barreau du Québec

Barreau du Québec
Sylvie Champagne/André-Philippe Mallette
445, boul. Saint-Laurent
Montréal QC H2Y 3T8
Tel: 514-954-3400, postes 5103/5100
Fax: 514-954-3407
Email: schampagne@barreau.qc.ca
apmallette@barreau.qc.ca

Counsel for the Intervener,
Canadian Association of Refugee Lawyers

University of Toronto
Audrey Macklin
Chair Centre for Criminology and Sociolegal Studies and Professor and Chair in Human Rights, Faculty of Law
78 Queen's Park
Toronto ON M5S 2C5
Tel: 416-978-7124 x 246
Fax: 416-978-4195
Email: audrey.macklin@utoronto.ca

Downtown Legal Services
Prasanna Balasundaram
655 Spadina Avenue
Toronto ON M5S 2H9
Tel: 416-934-4535
Fax: 416-934-4536
Email: p.balasundaram@utoronto.ca

Counsel for the Interveners,
College of Physicians and Surgeons of Ontario, College of Nurses of Ontario, Ontario College of Pharmacists, and Royal College of Dental Surgeons of Ontario

College of Physicians and Surgeons of Ontario
Lisa Brownstone/Amy Block
80 College Street
Toronto ON M5G 2E2
Tel: 416-967-2600
Fax: 416-967-2647
Email: lbrownstone@cpso.on.ca
ablock@cpso.on.ca

Paliare Roland Rosenberg Rothstein LLP
Linda Rothstein/Alysha Shore
35th Floor, 155 Wellington Street W
Toronto ON M5V 3H1
Tel: 416-646-4324
Fax: 416-646-4301
Email: linda.rothstein@paliareroland.com
alysha.shore@paliareroland.com

Agent for the Intervener,
College of Physicians and Surgeons of Ontario, College of Nurses of Ontario, Ontario College of Pharmacists, and Royal College of Dental Surgeons of Ontario

Caza Saikaley s.r.l./LLP
James Plotkin
350-220 Laurier Avenue West
Ottawa ON K1P 5Z9
Tel: 613-565-2292
Fax: 613-565-2087
Email: jplotkin@plaideurs.ca

Counsel for the Intervener,
Federation of Law Societies of Canada

Borden Ladner Gervais LLP
Nadia Effendi / Ewa Krajewska / Teagan Markin / Mannu Chowdhury
22 Adelaide Street West
Toronto ON M5H 4E3
Tel: 416-367-6728
Fax: 416-367-6749
Email: neffendi@blg.com
ekrajewska@blg.com
tmarkin@blg.com
mchowdhury@blg.com

Agent for the Intervener,
Federation of Law Societies of Canada

Borden Ladner Gervais LLP
Nadia Effendi
1300-100 Queen Street
Ottawa ON K1P 1J9
Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Counsel for the Intervener,
Law Society of Alberta

Field LLP
James T. Casey, QC/Katrina Haymond
2500-10175 101 Street NW
Edmonton AB T5J 0H3
Tel: 780-423-7615
Fax: 780-428-9329
Email: jcasey@fieldlaw.com
khaymond@fieldlaw.com

Agent for the Intervener,
Law Society of Alberta

Supreme Advocacy LLP
Marie-France Major
100-340 Gilmour Street
Ottawa ON K2P 0R3
Tel: 613-695-8855 ext 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Intervener,
Law Society of Manitoba

Law Society of Manitoba
Rocky Kravetsky/Ayli Klein
200-260 St. Mary Avenue
Winnipeg MB R3C 0M6
Tel: 204-926-2018/2058
Fax: 204-956-0624
Email: rkravetsky@lawsociety.mb.ca
aklein@lawsociety.mb.ca

Agent for the Intervener,
Law Society of Manitoba

Gowling WLG (Canada) LLP
Jeffrey W. Beedell
2600-160 Elgin Street
Ottawa ON K1P 1C3
Tel: 613-786-0171
Fax: 613-788-3509
Email: jeff.beedell@gowlingwlg.com

Counsel for the Intervener,
Procureur général du Québec

Ministère de la Justice du Québec
Stéphane Rochette/Abdou Thiaw
8e étage-1200 Route de l'Église
Québec QC G1V 4M1
Tel: 418-643-6552
Fax: 418-643-9749
Email: stephane.rochette@justice.gouv.qc.ca

Agent for the Intervener,
Procureur géneral du Québec

Noël & Associés
Sylvie Labbé
111 rue Champlain
Gatineau QC J8X 3R1
Tel: 819-771-7393
Fax: 819-771-5397
Email: s.labbe@noelassocies.com

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. Unreasonable delay can undermine administrative justice, but the determination of what is unreasonable must be made within a particular framework of statutory objectives and legal and factual circumstances. *Blencoe*[1] provides that administrative delay will be sufficiently unreasonable or "inordinate" as to warrant a stay of proceedings only in very exceptional circumstances – namely, when the fairness of the hearing process has been compromised, or when the delay amounts to an abuse of process that would bring the particular administrative system in question into disrepute or renders proceedings "unfair to the point that they are contrary to the interests of justice".[2]

2. The Alberta Securities Commission and British Columbia Securities Commission (jointly, the **Securities Regulators**) submit that both the high standard of *Blencoe* and its emphasis on context are necessary to ensure that administrative bodies such as securities commissions are able to carry out their public interest mandates. The test ensures that a stay is available to protect respondents when hearing fairness is compromised by delay, and otherwise only when, with full consideration of contextual factors, "the community's sense of fairness would be offended by the delay".[3]

3. The bar for a stay should not be lowered simply because a systemic attitude of complacency in the criminal law context warranted drastic steps in *Jordan*,[4] or because serious access-to-justice barriers were highlighted in the civil context in *Hryniak*.[5] The administrative law regime is unique and distinct from criminal and civil law. It is enormously varied and inherently shaped by policy-makers to address specific societal goals for the public interest. Context is critical.

4. If refinement to *Blencoe* is needed, the Court should reiterate that the bar for a stay must be high and that context is central, while illuminating relevant factors that will aid in gauging when administrative delay may offend the community's sense of fairness or justice.

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[1] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [***Blencoe***].
[2] *Blencoe* at paras 115 and 120. The Securities Regulators limit their submissions here to administrative law principles and do not address when a stay may be available under the *Charter*.
[3] *Blencoe* at para 122.
[4] *R. v Jordan*, 2016 SCC 27 [***Jordan***].
[5] *Hryniak v Mauldin*, 2014 SCC 7 [***Hryniak***].

PART II - QUESTION IN ISSUE

5. The Securities Regulators limit their submissions to the following question in issue:

> What test should govern "unreasonable delay" claims in administrative proceedings, including securities commission proceedings? In particular, when will unreasonable delay warrant a stay of proceedings?

6. The Securities Regulators submit that the *Blencoe* test remains appropriate for evaluating unreasonable delay claims in administrative or regulatory processes. Any clarifications or modifications should be limited to guidance on what contextual factors may render delay offensive to the community's sense of fairness or justice. A factors-based outline will ensure the test is appropriately flexible and can fairly be applied across the panoply of different administrative contexts – including securities commission proceedings.

PART III - ARGUMENT

A. *Blencoe* Remains Appropriate

7. *Blencoe* provides a well-crafted, adaptable test for assessing undue delay in administrative contexts, and it should be reaffirmed as the governing test. In setting a high threshold for a stay, the test acknowledges the extraordinary nature of this relief. In focusing on context, the *Blencoe* test ensures that individual recourse is available when appropriate, while simultaneously protecting the administrative body's legislated mandate.

(i) *Blencoe* Is Not Broken

8. Neither the Appellants nor the Respondents in this matter argue that the *Blencoe* test is deficient or that it must be replaced. Nor does the evidentiary record in this matter disclose a systemic pattern of delay or attitude of indifference across administrative bodies. Even the judgment of the Saskatchewan Court of Appeal did not suggest that a gauge other than the *Blencoe* test was needed for administrative proceedings. Instead, the court purported to apply *Blencoe*, with an ambiguous qualification:

> [i]f it does represent a step forward from *Blencoe*, I would characterize it as 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.[6]

9. No deficiencies in the *Blencoe* test were identified, nor was it explained how its "remedial purpose" could better be served by unspecified "incremental" amendments. Concern or criticism over how the test has been applied in certain circumstances does not mean the test itself is defective. In the absence of a clear foundation for overturning this Court's precedent, it should stand.[7]

(ii) *Blencoe's* Contextual Approach Balances Relevant Interests

10. The Court in *Blencoe* was clear that there is a high threshold for demonstrating unreasonable delay without evidence of specific procedural unfairness to a respondent. It was equally clear that the test could be made out in appropriate cases. A stay of proceedings should not be awarded simply because a process takes longer than what may be considered desirable. This would elevate a respondent's interests disproportionately above the underlying public interest that the process is designed to protect, and be "tantamount to imposing a judicially-created limitation period".[8]

11. The *Blencoe* majority understood that if delay did not cause identifiable substantive prejudice to a respondent – particularly in terms of "hearing fairness" – then the only logical basis for a stay of proceedings is when the public offensiveness of the delay outweighs the public interest in completing the proceeding in issue:

> … the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9.68).[9]

12. While this results in the *Blencoe* test being rigorous as a general rule, it offers appropriate flexibility because of its required focus on specific context:

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[6] *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at para 10.
[7] *Teva Canada Ltd. v TD Canada Trust*, 2017 SCC 51 at paras 65-66.
[8] *Blencoe* at para 101.
[9] *Blencoe* at para 120.

> The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. …the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.[10]

13. The focus on context is critical. Unless the test for unreasonable delay accounts for vastly differing mandates, expectations, and factual circumstances, it will be impossible to apply it fairly across the spectrum of administrative decision-making processes. The *Blencoe* test meets this criterion. It protects individual respondents by inquiring first about actual prejudice to the fairness of the process in question. This permits an effective remedy where circumstances demand it, even if the delay is not particularly long. It also protects the broader public interest, by allowing for a remedy when – in context – the public's sense of fairness would be more offended by the delay than by staying the proceedings.

B. An Opportunity to Clarify *Blencoe*?

14. The Court of Appeal and Respondent appear to view this case as being an "opportunity" to modernize or clarify *Blencoe*. The Securities Regulators assert again that no basis has been provided for this court to depart from *Blencoe* as precedent, and submit that the *lis* here revolves primarily around facts.

15. At the same time, illumination and clarification of the *Blencoe* test may be helpful to administrative decision-makers and courts. The core challenge they face is in knowing what factors render a delay so significant that the public's sense of fairness would be offended. The Securities Regulators therefore offer the following considerations, whether as submissions on how *Blencoe* should be understood and applied or, if necessary, as key considerations for any modified unreasonable delay test in the administrative context.

(i) No Single Timeline Fits for All Administrative Bodies

16. A single, fixed-timeline test for investigation through sanction is inappropriate for the wide

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[10] *Blencoe* at para 122.

range of administrative contexts, and in many cases could undermine the ability to carry out legislated mandates. Even within the ambit of the Securities Regulators alone, investigative staff and hearing panels must address a wide range of issues and proceedings. A sophisticated multinational securities manipulation scheme can be expected to take substantially longer to investigate and adjudicate than a case involving a single respondent dealing in securities without being registered.

17. Any overly rigorous push for faster administrative proceedings could distort how administrative bodies make process or sanction choices. Ranking "speed" above other considerations in the administrative realm (expressly or implicitly) will inevitably result in unintended consequences. Administrative choices may be based less on mandate or factual circumstances than on whether a particular task or outcome can be achieved quickly. This could manifest as a preference for criminal or quasi-criminal prosecutions (where pre-charge delay is not factored in any delay calculation) rather than administrative proceedings;[11] avoidance of complex and lengthy investigations altogether (instead proceeding only with matters that can be completed quickly); or reduced interest and effort in pursuing alternative and creative resolutions that may take additional time (for example settlement proposals that include informal victim restitution elements).

18. In short, what amounts to unreasonable delay must be assessed on a scale that varies according to relevant circumstances. The *Blencoe* test allows for different "unreasonable delay" timelines to apply to different administrative bodies and to different cases before the same administrative body. Any clarification of *Blencoe* should reaffirm this requirement.

(ii) The Underlying Objective is Fairness to All Stakeholders

19. *Hryniak* was not a decision attacking delay or suggesting that faster proceedings are inherently better. Rather, it lamented the lack of access to justice in the civil context, and encouraged broader use of flexible, alternative procedures as a means to provide better fairness to those affected. The "culture shift" endorsed in *Hryniak* was not inherently about expediting civil trials; it endorsed a fairness concept that moved beyond the mindset that full adversarial legal

[11] In the securities regulatory context, there is a choice: for example, *Securities Act*, 1996 RSBC, c 418, ss 155-155.1, 161-162; *Securities Act*, RSA 2000, c S-4, ss 194, 198-199.

process was the only or best means to justice. This took the form of interpreting new summary judgment rules broadly and remedially to ensure that practical justice or fairness was available to litigants.

20. In the present appeal, this Court should not be persuaded that there is a need for an administrative law "culture shift" to defeat systemic personal unfairness caused by delay. Unlike in *Jordan*, no "culture of complacency" has been identified across the administrative law realm. Unlike in *Hryniak*, there is no evidence in the record of fundamental access-to-justice gaps. The appropriate culture for administrative law is characterized first and foremost by a drive for fairness in the relevant context and circumstances. Fairness is not uni-dimensional and cannot be distilled solely into meaning "expedient", particularly for administrative bodies that must navigate between private interests and multi-faceted public interests. An analysis of administrative delay must take place within that framework of contextual fairness.[12]

21. In complex regulatory investigations, a substantial passage of time could result from having to uncover and reconstruct deliberately concealed money-trails, or the need to wait for documents from third party witnesses or foreign agencies. Many investigations never translate into allegations. To move from a confidential investigation phase to a public allegation phase, regulatory staff are expected to meet a sufficient evidentiary threshold. Count thoroughness as "delay", and inevitably some cases will be moved more hastily – unfairly – from the investigation to the allegation phase. Alternatively, complex and difficult investigations may be abandoned due to the spectre of "delay" being characterized as incompetence or indifference – with the result being un-remedied risk, harm, and unfairness to the public. Both respondents and the broader public may be negatively impacted by a singular view of delay as harmful.

22. While delay clearly can undermine fairness when it becomes unreasonable or inordinate, in the administrative realm, more than any other, fairness must be understood in the broader context of the public interest. Fast does not equate with fair, nor does slow inherently mean unfair. Undue pressure to expedite yields unfairness if it means appropriate due process is lost or exploration of alternatives is abandoned. Undue pressure to expedite yields unfairness if a

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[12] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [***Vavilov***].

respondent's interests are disproportionately elevated above the interests of other members of the public.

23. This Court has long recognized that administrative fairness can only be determined in context.[13] To the extent that *Blencoe* may benefit from illumination, the Court should reiterate the importance of a broad view of fairness and clarify what factors may render delay unreasonable in context.

(iii) Factors to Evaluate Whether Delay is "Unreasonable" in Context

24. The Securities Regulators submit that except where delay can be shown to directly interfere with a respondent's ability to have a fair hearing, the remedy of a stay of proceedings should only be available if the delay offends the public's sense of fairness in the applicable administrative context. This fairness question must be evaluated on a contextual, case-by-case basis, recognizing that a stay will always be an extraordinary and exceptional remedy, and with the following circumstances being considered.

(a) The Administrative Body's Mandate

25. What does an administrative body's governing framework and history say about its purpose and focus? While the central objective of some bodies may be efficient and expedient decision-making, others may have been established to bring together deep expertise, thoroughness, attention to broad public policy, and international cooperation in order to foster or protect societal interests. Whether "delay" is unreasonable in the public interest sense must be measured differently for such different contexts.

26. Securities regulators are tasked with protecting the investing public by discovering, disrupting, and deterring market misconduct ultimately to maintain the health of Canada's capital markets:

> The goal of protecting our economy is a goal of paramount importance [...] This protective role, common to all securities commissions, gives a special character to

[13] *Vavilov* at para 77.

> such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.[14]

27. Uncovering deliberate efforts to hide and deceive, inter-provincial and international coordination, attention to policy implications, and a protective focus on the broad public interest are key to this mandate. The broad policy-shaping, supervising, and law-enforcing mandate requires careful strategic planning and resource allocation across divisions, meaning that externally (court) imposed demands on one division can have unforeseen consequences across others. Participating in the capital markets has been characterized as a privilege, not a "right".[15] This means that investigations regarding such participants should not be viewed as a state intrusion, but rather principally as an aspect of protecting critical public interests.

28. In any given case, consideration of the mandate of the administrative body in issue is necessary to identify when delay may offend the community's sense of fairness or justice.

(b) Structure and Processes

29. The established structure and operation of an administrative body must factor significantly in determining whether a delay is unreasonable in the sense of offending the community conscience. Some examples of considerations include the following:

- Do prescribed timelines or limitation periods already exist? While provable individual prejudice or inexplicably long actions may still justify a stay of proceedings, legislated prescription periods help indicate what legislators consider to be no longer timely.

- Are investigative and hearing processes distinct?[16] Distinct stages should generally be evaluated separately, as different parties and different considerations likely govern such stages.

- To what extent is the administrative process dependent on third parties for information gathering? Where complex regulatory investigations are multinational in scope, require

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[14] *British Columbia Securities Commission v Branch*, 1995 CanLII 142 (SCC), [1995] 2 SCR 3 at para 34.

[15] See for example, *Erikson v Ontario Securities Commission*, 2003 Carswell Ont 818 (ON SCJ) at paras 55-56 and *Planned Legacies Inc., Re*, 2011 ABASC 278 at para 42.

[16] See, for example, *Alberta (Securities Commission) v. Workum*, 2010 ABCA 405.

financial and communication records from banks and telecommunication providers, and involve formal interviews of dozens of witnesses or victims, substantial periods of time may consist of waiting for others.[17]

- How formal are the processes of the administrative body? Investigations and hearings that may result in very significant consequences typically trigger more formal, complex, and time-consuming procedures. This should not be seen as "delay", but rather as a legitimate cost of more fulsome procedural protections.

- Are the investigative processes confidential or are they known to the public, such that respondents risk being "tainted" in the public's eyes throughout the process? Criminal "cold case" investigations may take decades to complete, yet no one suggests such delay means personal prejudice or public unfairness. In the same way, confidential administrative investigations do not create the same public "shadow" over respondents that a public allegation does, and as such should not be judged with a similar scale.

30. Additionally, does the administrative body have unique processes that support overall fairness and access to justice goals, but which may slow down proceedings? Examples of these in the context of the Securities Regulators could include credit-for-cooperation policies, the use of "Wells notices" or invitations to explain or correct the regulators' interpretation of evidence before formal allegations are made, or whistleblower protections that require extra precautions and extra time to ensure complainants are protected.

31. The above examples underscore the importance of factoring structural context into an administrative delay analysis.

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[17] This Court, for example, has recognized "the indispensable nature of interjurisdictional co-operation among securities regulators today". See *Global Securities Corp. v British Columbia (Securities Commission)*, 2000 SCC 21 at para 27. This was seen as significant in interpreting statutory limitation periods in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 1, 51 and 77.

(c) Circumstances of the Case

32. An unreasonable delay assessment must also consider case-specific factual circumstances. For example, were there any significant periods of unexplained delay? Were interim remedies or restrictions engaged against respondents (for example, practice restrictions in the professional conduct context, or an interim cease-trade order in the securities context)? Did the exercise of due process steps, including interim applications, contribute to the delay? Were there unique challenges or complexity arising on the facts? Can a remedy short of a stay adequately address the delay?

33. Significant periods of unexplained delay will typically be more likely to offend the public's sense of fairness than delay that is attributable to particular factors or events. Importantly, though, this must not devolve into a microscopic critique of an investigation or hearing process, as such an approach will lead to a dramatic rise in delay applications and, ironically, increase systemic delay.

34. In summary, *Blencoe* may not have articulated exactly how to determine when delay reaches a level of offending the community's sense of fairness. However, it emphasized the importance of context and recognized that a high threshold was needed to fairly balance individual and public interests. The Securities Regulators submit that this remains true today, and that any fine-tuning of the *Blencoe* test should preserve these critical features.

PARTS IV AND V - COSTS AND RELIEF SOUGHT

35. The Securities Regulators seek no costs and ask that none be ordered against them, and take no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of September, 2021.

Lorenz Berner and Tracy Knight
Alberta Securities Commission; and

Jennifer Whately
British Columbia Securities Commission

PART VI - TABLE OF AUTHORITIES

NO.	DOCUMENT	PINPOINT PARAS
Legislation		
1.	*Securities Act* (Alberta), RSA 2000, c S-4	17
2.	*Securities Act* (British Columbia), RSBC 1996, c 418	17
Case Law		
3.	*Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81	8
4.	*Alberta (Securities Commission) v. Workum*, 2010 ABCA 405	29
5.	*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44	1-2, 4, 6-15, 18, 23, 34
6.	*British Columbia Securities Commission v Branch*, 1995 CanLII 142 (SCC), [1995] 2 SCR 3	26
7.	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65	20, 23
8.	*Erikson v Ontario Securities Commission*, 2003 Carswell Ont 818 (ON SCJ)	27
9.	*Global Securities Corp. v British Columbia (Securities Commission)*, 2000 SCC 21	29
10.	*Hryniak v Mauldin*, 2014 SCC 7	3, 19-20
11.	*McLean v British Columbia (Securities Commission)*, 2013 SCC 67	29
12.	*Planned Legacies Inc.*, Re, 2011 ABASC 278	27
13.	*R. v Jordan*, 2016 SCC 27	3, 20
14.	*Teva Canada Ltd. v TD Canada Trust*, 2017 SCC 51	9