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 THE INTERVENER, THE ATTORNEY GENERAL OF BRITISH COLUMBIA

(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

A. Overview

1. This appeal allows the Court to revisit the primary questions considered in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 ("*Blencoe*"): when is administrative delay unreasonable and what is the appropriate remedy? The Attorney General of British Columbia ("AGBC") says the Court ought to affirm the high threshold for a stay of proceedings established in *Blencoe*, and find that the principle of legislative intent guides a refined articulation of the applicable framework. Viewed from this perspective, the primary remedy for unreasonable administrative delay should be an order of *mandamus*.

B. Statement of Facts

2. The AGBC accepts and relies on the facts as stated by the parties.

PART II – QUESTIONS IN ISSUE

3. The appellant Law Society of Saskatchewan raises four issues in this appeal:

   a. The applicable standard of review;

   b. The principles applicable to administrative delay;

   c. Whether the Court of Appeal erred in its analysis of *Blencoe*; and

   d. Whether this Court should change the law respecting administrative delay in light of *Hryniak v. Mauldin,* 2014 SCC 7 and *R. v. Jordan,* 2016 SCC 27 *("Jordan*").

4. The AGBC takes no position respecting the first and third questions posed by the appellant. With regard to the second and fourth questions, the AGBC submits that the principles of *stare decisis* should preclude a wholesale reconsideration of the *Blencoe* test. Instead, the framework in *Blencoe* should be refined so that legislative intent is the guiding principle for assessing and remedying unreasonable administrative delay. Consistent with that approach, an order of *mandamus* (rather than a stay) should be the primary remedy for curing unreasonable delay in administrative proceedings.

PART III – ARGUMENT

5. A stay of proceedings in an administrative law context undermines legislative intent that a tribunal complete its delegated task. For that reason, a stay should only be granted in rare circumstances. Where a court finds unreasonable administrative delay, the primary remedy should be *mandamus*.

The Court should not abandon the *Blencoe* framework

6. There is no need for this Court to undertake a wholesale reconsideration of the *Blencoe* framework. As reconfirmed in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 ("*Vavilov*") at para. 20, adhering to established jurisprudence promotes fundamental values such as certainty and predictability. Departure from precedents is warranted where they are unsound in principle, unworkable or unnecessarily complex, or have attracted significant and valid judicial, academic and other criticism. None of these criteria apply to *Blencoe*.

7. There is equally no need for this Court to make fundamental changes to the *Blencoe* framework, such as adopting timelines within which administrative decision-makers must deliver a decision. A presumptive ceiling for delay, as set out in *Jordan*, would be unworkable in light of the wide variety of administrative decision-makers and processes employed to implement legislative regimes around this country.

8. This proceeding does, however, present an opportunity for this Court to refine its guidance and provide greater clarity on the applicable test and primary remedy for administrative delay. The AGBC's submissions are intended to assist the Court in this task.

The test for a stay should not be relaxed

9. *Blencoe* appropriately sets a high bar for applicants seeking a stay for two reasons. First, as demonstrated by the Court's jurisprudence over the last 20 years, respect for legislative intent remains one of the foundational principles of judicial review. Second, a relaxed test for a stay due to delay could pit decision-makers' obligations to provide the comprehensive reasons required by *Vavilov* against their desire to act quickly enough to avoid a stay.

10. Under *Blencoe*, delay on its own does not justify imposition of a stay. Rather, there must be proof of significant prejudice. A stay will only be granted where the continuation of the proceedings is contrary to the interests of justice.[1] The majority reasoned that a party seeking a stay "bear[s] a heavy burden" because a stay "accords very little importance" to the legislative intent behind implementing the *Human Rights Code*, RSBC 1996, c 210 and empowering the Human Rights Tribunal to address the complainant's interests.[2]

11. Since *Blencoe*, this Court has continued to emphasize the central role that respect for legislative intent plays in the judicial review of administrative action (or inaction). In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (at para. 30) and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 (at para. 96), the Court described legislative intent as the "touchstone" of judicial review. Similarly, in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 (at para. 149) and *Vavilov* (at para. 33), the Court explained that legislative intent is the "polar star" of judicial review.[3]

12. By its nature, a stay of an administrative proceeding frustrates the legislature's intent that the administrative decision-maker complete its assigned task. The high bar for a stay set in *Blencoe* remains consistent with the Court's prevailing approach to judicial review.

13. Secondly, this Court in *Vavilov* underscored the importance of a "culture of justification" which requires decision-makers to communicate not just the outcome, but the reasoning behind their decisions. To ensure that administrative decision-makers have the time necessary to fulfill this important task, this Court must take care not to impose tight or rigid deadlines.

14. If the Court lowers the bar for staying an administrative proceeding due to delay, this could place significant pressure on tribunals and decision-makers who would then be caught between conflicting requirements: the need to produce reasons that adequately justify their decisions, and the need to render decisions quickly enough to avoid a stay. This could ultimately impede the administration of justice.

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[1] *Blencoe*, at paras. 101, 120.
[2] *Blencoe* at para. 117.
[3] See also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para. 65; *Dr. Q v. College of Physicians and Surgeons of British Columbia,* 2003 SCC 19 at para. 21; *Toronto (City) v. Canadian Union of Public Employees (CUPE), Local 79,* 2003 SCC 63 at

The test for unreasonable delay

15. Reduced to its essence, the court in a judicial review proceeding ensures that the executive carries out the will of the legislature and that the will of the legislature is consistent with the rule of law. The determination of what constitutes unreasonable administrative delay should be informed by these foundational principles of administrative law.

16. In *Blencoe*, the Court explained that the test for determining if administrative delay is inordinate considers a number of factors: the nature and complexity of the case, the facts and issues, the nature of the proceedings, whether the respondent has contributed to or waived delay, and the various rights at stake. A reviewing court should determine whether the community's sense of fairness would be offended by the delay.[4]

17. A wide variety of administrative decision-makers conduct a large variety of hearings—both in substance and form. In British Columbia, administrative hearings range from summary appeals conducted over the telephone in a half-hour with decisions issued shortly thereafter (e.g. the Superintendent of Motor Vehicles and the Residential Tenancy Branch), to Ministerial decisions, to complex multi-day (or week) trial-like proceedings before the Labour Relations Board and the Law Society of British Columbia. Many decision-makers in British Columbia have legislated timelines for rendering decisions, and those timelines are variable.[5]

18. In light of this wide variety of administrative decision-makers, and the key role of legislative intent, the Court should refine the articulation of the *Blencoe* factors set out above at paragraph 16 so that they expressly encompass all of the following:

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para. 128; *Canadian Union of Public Employees (CUPE) v. Ontario (Minister of Labour),* 2003 SCC 29 at para. 149.

[4] *Blencoe* at para. 122.

[5] For example, the Superintendent of Motor Vehicles has 21 days to issue a decision on a review application, starting from the date the notice of driving prohibition was served on the applicant, but also has an authority to extend that timeframe (sections 215.5(6) and (7) of the *Motor Vehicle Act*, RSBC 1996 c 318). The Workers' Compensation Appeal Tribunal has a 180-day timeframe for issuing a decision from the date it receives disclosure from the Workers' Compensation Board (section 306(4)(a) of the *Workers Compensation Act*, RSBC 2019 c 1).

a. The statutory and institutional context of the administrative decision-making body, including statutory processes such as internal reviews, appeals, investigative steps,[6] and legislated timelines;

b. The factual circumstances and complexity of the case (combining the first three considerations set out at para. 122 of *Blencoe*);

c. The time taken to complete the matter;

d. The causes of delay beyond the inherent time requirements of the matter (including contribution to or waiver of delay by the affected party, or delay caused by another party to the proceeding); and

e. The impact of the delay. Parties alleging prejudice (including psychological harm) must provide evidence to support such a conclusion. [7]

19. The determination of whether delay is unreasonable will require a court to make findings of fact respecting the length of delay, whether the delay is attributable to a particular party, and the impact of the delay. Where a court finds administrative delay to be reasonable, that is the end of the inquiry and the petition must be dismissed. Conversely, where a court finds administrative delay unreasonable, a stay should not issue automatically. The appropriate remedy is a contextual determination that requires a reviewing court to balance legislative intent and societal interest in adjudication on the merits against prejudice to the individual.

Stay of proceedings

20. *Blencoe* does not explicitly separate the question of whether delay is inordinate from the question of whether a stay should be granted. This case offers the Court an opportunity to provide clarity on this point.

21. The courts' discretion to grant a stay should be guided by the recognition that the legislature has seen fit to entrust a matter to an administrative body.[8] A stay of proceedings is a

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[6] In *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner),* 2020 BCCA 221, the Court held that the chambers judge had erred when he criticized the "convoluted process" followed by the case, as this process was contemplated by the legislation: see paras. 51-52.

[7] See Justice LeBel's reasons in *Blencoe* at para. 160 (dissenting, but not on this point).

blunt tool to control administrative delay, and may prejudice other parties in the proceeding.[9] Therefore, the question should be whether the prejudice to a party seeking a stay is such that the legislature could only have intended that a stay be granted. In most cases, legislative intent will weigh heavily against granting a stay.

22. *Blencoe* provides examples of where a stay of proceedings may be justified, including where witnesses have died, witnesses' memories have significantly faded,[10] or the respondent demonstrates significant psychological damage as a result of the proceedings.[11] These examples should continue to provide guidance.

23. The following considerations from *Vavilov* can also provide guidance respecting the exercise of remedial discretion in cases of unreasonable delay:

> … fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed...[12]

24. In the vast majority of cases, the legislative intent that administrative bodies complete their delegated tasks should weigh heavily against granting a stay of proceedings.

<u>*Mandamus* should be the primary remedy for delay</u>

25. As a consequence of the foregoing, the remedy of *mandamus*, rather than a stay, should be the primary remedy in cases of unreasonable administrative delay. This would respect the legislative intent that administrative decision-makers complete their delegated tasks, and be consistent with the courts' role as guardians of the rule of law.[13] Finally, such a finding from this Court would provide clarity regarding the appropriate remedy and thus reduce unnecessary litigation.

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[8] *Vavilov* at para. 140.
[9] *Blencoe* at para. 117.
[10] *Blencoe* at para. 102
[11] *Blencoe* at para. 115.
[12] *Vavilov* at para. 142.
[13] *Dr. Q v. College of Physicians and Surgeons of British Columbia,* 2003 SCC 19 at para. 21; see also *Toronto (City) v. Canadian Union of Public Employees (CUPE), Local 79,* 2003 SCC 63 at para. 128.

26. As Justice LeBel explained in *Blencoe* (in dissent, but not on this point), *mandamus* is a "storied writ" that allows the courts to fulfill their supervisory role while respecting the intent of legislature that administrative decision-makers decide the matters within their delegated authority:[14]

> [149] Today, there is no doubt that *mandamus* may be used to control procedural delays. In the middle of the last century, a British Columbia Court of Appeal judgment recognized the principles behind *mandamus*, stating that "[t]he high prerogative writ of mandamus was brought into being to supply defects in administering justice" (*The King ex rel. Lee v. Workmen's Compensation Board*, [1942] 2 D.L.R. 665, at p. 678). It went on to note that the granting of *mandamus* was "to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice" (at p. 678, cited with approval in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561). Members of our Court have on occasion alluded to the use of *mandamus* specifically to control delay…

27. Since *Blencoe*, courts in British Columbia have continued to find an order in the nature of *mandamus* the appropriate remedy in cases of unreasonable administrative delay. For example, in *Wu v. Vancouver (City)*, 2019 BCCA 23, the Court of Appeal held (at para. 47) that "[a] failure to act as required by statutory authority is properly remedied by an order in the nature of *mandamus* compelling the authority to decide."[15] Courts in other jurisdictions have ruled similarly.[16]

28. The remedy of *mandamus* is available where a public body has a duty to act, but has unreasonably refused to perform its duty. *Mandamus* will generally not be ordered where the applicant has an adequate alternative remedy to judicial review.[17]

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[14] *Blencoe,* at paras. 148-150.

[15] See also *Morris v. British Columbia (Workers' Compensation Board)*, 2020 BCCA 293 at paras. 10-11.

[16] See, for example, *RP v. Alberta (Director of Child Youth and Family Enhancement)*, 2016 ABQB 306 at para. 108 ("Ordinarily, the remedy sought for a failure by a statutory decision-maker to perform a legal duty would be an order in the nature of mandamus, in this case to compel the decision-maker to reconsider the…decision or confirm that it will not be reconsidered, within a specified period of time."); *Nunatsiavut Government v. Newfoundland and Labrador (Municipal Affairs)*, 2013 CanLII 69937 (NL SC) at paras. 68-75; *Bancroft v. Nova Scotia (Lands and Forests)*, 2020 NSSC 175 at paras. 137-170.

[17] *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.

29. The well-established test for an order of *mandamus* is set out in *Apotex Inc. v. Canada (Attorney General),* [1994] 1 F.C. 742 (CA) at para. 55, affirmed [1994] 3 S.C.R. 1100 ("*Apotex*"). In summary, those requirements are:

a. a public legal duty to act which is owed to the applicant;

b. a clear right to performance of that duty, including the satisfaction of all conditions precedent giving rise to the duty, and:

(i) a prior demand for performance of the duty;

(ii) a reasonable time given to comply with the demand unless refused outright; and

(iii) a subsequent refusal which can be either express or implied;

c. no other adequate remedy is available;

d. *mandamus* will be of some practical value and effect;

e. there is no equitable bar to the exercise of discretion; and

f. on a balance of convenience, *mandamus* should issue.

30. An order of *mandamus*, in cases of delay, does not require the administrative decision-maker to make a specific decision or to reach a particular outcome on the underlying question at issue. It is instead merely an order that a decision be made,[18] sometimes within a specified period of time.[19] As a result, an order of *mandamus* respects legislative intent to delegate certain functions to particular administrative decision-makers, and should be the primary remedy for unreasonable administrative delay.

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[18] See, e.g. *Morris v. British Columbia (Workers' Compensation Board)*, 2020 BCCA 293 at paras. 10-11.

[19] See, e.g. *Douze v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 1337, at paras 31-34; *Thomas v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164, at paras 29-33.

Conclusion

31. While the *Blencoe* framework for assessing administrative delay remains generally appropriate, this Court should refine its guidance to make express that respect for legislative intent guides the determination of when delay is unreasonable and the appropriate remedy where unreasonable delay is found. The intent of legislature that administrative bodies complete their delegated tasks weighs heavily against granting a stay of proceedings, except in exceptional circumstances. Thus, the remedy of *mandamus* should be the primary remedy for administrative delay.

PART IV – COSTS

32. The AGBC does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

33. The AGBC takes no position regarding the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of September 2021.

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Part V – AUTHORITIES

Case Law	Paragraph
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