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)

and

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, 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 SURGOENS, FEDERATION OF LAW SOCIETIES OF CANADA, ALBERTA SECURITIES COMMISSION AND BRITISH COLUMBIA SECURITIES COMMISSION BARREAU DU QUÉBEC and CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Interveners

FACTUM OF THE INTERVENER, FEDERATION OF LAW SOCIETIES OF CANADA

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal invites the Court to revisit the *Blencoe v. British Columbia (Human Rights Commission)*[1] framework for addressing undue delay in administrative proceedings in the context of professional investigative and discipline matters. This requires the Court to reconsider how best to balance the pressing need for effective regulation of the legal profession in the public interest with the impact of delay in investigative and discipline processes on the life, liberty and security interests of lawyers facing regulatory sanctions. Viewed in the context of professional discipline processes, and the spectrum of administrative tribunals, the flexible and context-driven approach established by *Blencoe* appropriately eschews a "one-size fits all" approach and should be reaffirmed.

2. As the national voice of Canada's law societies, the Federation of Law Societies of Canada (the "**Federation**") makes two points:

a. *Blencoe's* contextual analysis best balances the section 7 interests of the subjects of investigative and discipline processes with the need for law societies to regulate professional conduct in the public interest. Law societies are committed to disciplinary processes that are timely, fair and efficient while protecting the public. However, how best to achieve that goal in each particular case by each law society will depend on the context, including the nature of the alleged misconduct and the investigation that is required. Accordingly, the Court should not accede to the invitation to transplant criminal trial delay principles developed under section 11(b) of the *Charter* into the section 7 context of professional discipline; and,

b. While whether a proceeding is fair is reviewed for correctness, what is fair must be assessed in light of the tribunal's statutory mandate and procedural mechanisms.

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[1] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 ["***Blencoe***"].

B. Statements of Facts

3. The Federation is the national coordinating body for the provincial and territorial bodies governing the legal professions in Canada. The Federation works on developing high national standards of regulation to ensure that all Canadians are served by legal professionals who are competent and act with integrity. Despite their varying sizes and the specific needs of the members of the public in their respective jurisdictions, the heart of the mandate of the law societies is to protect the public interest. This guiding principle includes ensuring that any complaint against or suspected misconduct by a licensee is thoroughly and fairly investigated—and, where necessary, adjudicated.

4. The Federation takes no position with respect to the facts of the case or the outcome of the appeal.

PART II – POSITION ON THE QUESTION IN ISSUE

5. The Federation makes submissions on (i) retaining a contextual approach to assessing administrative delay and (ii) the approach to determining the applicable standard of review.

PART III – STATEMENT OF ARGUMENT

A. The Court should reaffirm a flexible and context-driven approach to *Blencoe*

6. The Court should reaffirm the flexible and contextual test in *Blencoe* for determining whether delay in professional investigative and discipline proceedings is an abuse of process warranting a stay of proceedings. *Blencoe* acknowledges that even if delay does not constitute procedural unfairness, it can lead to denial of justice in certain circumstances. But it also recognizes that the impact of delay in administrative proceedings, viewed through the lens of procedural fairness and section 7 of the *Charter* where applicable, must be assessed in a nuanced and contextual manner.

7. Law societies are committed to investigative and discipline processes that are fair and efficient while protecting the public. Like courts,[2] they strive to combat delay.[3] This effort to mitigate delay, however, has to be balanced with ensuring that regulatory bodies have adequate

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[2] *Blencoe*, at paras 145-161.
[3] Federation of Law Societies of Canada "National Discipline Standards" (approved June 7, 2021).

flexibility to meet their obligations to the public. In particular, the Court should be guided by three considerations: (1) administrative bodies come in "all shapes and sizes";[4] (2) a balance must be struck between the consequences of delay and an administrative decision-maker's statutory duties; and (3) when applied to law society proceedings, the *Blencoe* test triggers some unique considerations, including that practicing law is a privilege (and not a right) and that the mandate of law societies is to uphold the public interest.

1. *Administrative bodies and law societies come in "all shapes and sizes"*

8. The *Blencoe* test applies to all administrative bodies; it must therefore be context-driven and flexible so that it can be adapted to the myriad administrative schemes in the Canadian legal landscape.

9. Law societies are a small subset of that landscape and within that subset, each law society's investigation and discipline processes are unique. The *Blencoe* analysis is and should continue to be sensitive to the diverse administrative realities of individual law societies.

10. The differences in law societies are striking. For example, the Law Society of Ontario—as the largest law society in Canada—regulates approximately 57,000 lawyers and 9,607 paralegals. Compare this to the Law Society of Northwest Territories that governs 542 lawyers. Some law societies have permanent investigators and discipline counsel while others rely on some combination of part time employees and volunteers. There are also differences in the type and the complexity of investigations that law societies undertake—as well as alternative dispute mechanisms used to resolve them. Moreover, among the 14 law societies there are important operational differences in terms of the nature of complaints and the processes in place to protect the public. The framework for assessing the impact of delay in these proceedings must be flexible enough, as the *Blencoe* framework is, to take account of this wide variety of capacities and approaches.

2. *Law societies need flexibility to address issues of delay*

11. The Federation and its member law societies recognize the importance of the timely, transparent and fair determination of any alleged misconduct in carrying out their public interest

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[4] *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123 at para 12.

mandates.[5] However, how best to achieve that goal in each particular case by each law society will depend on the context, including the nature of the alleged misconduct, the investigation that is required, the mandated procedures and the capacity of the law society. The *Blencoe* test allows all these contextual factors to be considered when assessing an allegation that there has been inordinate delay and to assess its impact in light of the public interest.

12. As "masters of their procedures",[6] law societies are uniquely placed to assess the time required for a case, taking into consideration the relative complexity of the matter, whether the legal professional under investigation is causing some or all of the delay, the methods to limit any prejudice to the legal professional, and whether the public interest is protected. *Blencoe* appropriately allows the room for this and—as the Ontario Court of Appeal noted—eschews "prosecutorial" (i.e. criminal law) analysis of delay.[7]

13. Eschewing *Blencoe's* contextual approach and imposing strict timelines upon law societies to conduct investigations and conclude disciplinary proceedings pose significant risks to the ability of law societies to fulfil their mandate to protect the public. Law societies must be free to employ a range of approaches to protecting the public interest, including, for example, using alternative dispute resolution mechanisms and early resolution programs. While going directly to a hearing immediately following an investigation of a complaint may be more expeditious, alternative dispute resolution methods may better serve the public interest even where their use results in delay in finally concluding a proceeding.

14. Moreover, any assessment of delay in disciplinary proceedings must take into account other proceedings, for example criminal prosecutions that may be pending, and the public interest may weigh in favour of waiting for the outcome of those proceedings.

15. Law societies have recognized the need to design appropriate and culturally competent regulatory responses that take into account the needs of the clients they are mandated to protect,

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[5] Federation of Law Societies of Canada "National Discipline Standards" (approved June 7, 2021).
[6] *Canada (Attorney General) v. Sketchley*, 2005 FCA 404 at para 119.
[7] *The Law Society of Upper Canada v. Abbott*, 2017 ONCA 525 at para 61.

as well as the members they are tasked with regulating.[8] This may require innovative procedures and alternative dispute mechanisms, which may be stymied by the importation of rigid time lines for completion of proceedings. All of these factual considerations that align with the public interest mandate of law societies may be undermined by imposing unduly inflexible, judicially-created limitations periods.

16. The Court's decision on the test for undue delay and a remedial stay under the *Blencoe* framework will directly impact law societies' exercise of investigative and discipline authority over their licensees, including:

a. The scope of their authority to investigate members, including in the absence of a complaint initiated by a member of the public;

b. Their ability to conduct thorough investigations into complex matters, such as tax evasion, misuse of trust funds, or fraud;

c. Their options for interim agreements and orders to protect the public interest during the course of an ongoing investigation; and,

d. Their ability to design and reform their investigative and disciplinary procedures to, among other things, respond to the shifting cultural needs of members and the public.

3. *Criminal law principles are not transplantable to administrative proceedings*

17. The Court should not adopt the principles regarding undue delay developed in the criminal and civil context to professional self-regulation.[9] The regulation of the legal professions, the

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[8] For example, the Law Society of Ontario has considered regulatory processes affecting Indigenous communities: see "Review Panel Regulatory and Hearing Processes Affecting Indigenous Peoples" (Report to Convocation May 24, 2018). Similar concerns about systemic barriers in the discipline process have been raised in proceedings involving other law societies, most recently the Law Society of British Columbia: see *Bronstein (Re)*, 2021 LSBC 19.

[9] *R. v. Jordan*, 2016 SCC 27.

complaints and discipline processes in particular, is fundamentally different from criminal proceedings, which are adversarial proceedings between the state and accused individuals, as well as from other administrative regimes, which are not premised on self-regulation. The balance of interests at stake in an administrative proceeding will depend on the context at issue; for disciplinary proceedings in the legal professions, upholding the public interest is fundamental.

18. The criminal law approach to delay is not appropriate in administrative proceedings generally or in professional discipline processes in particular because the doctrinal underpinnings and the interests at stake are different:[10]

a. Unlike criminal cases that are governed by an explicit right to be tried within a reasonable time under section 11(b) of the *Charter*, administrative proceedings will only engage section 7 of the *Charter* in exceptional cases where (i) there is a sufficient causal connection between the delay caused by the decision-maker and the prejudice to the respondent and (ii) the respondent was prevented from making fundamental personal choices or the delay had a serious or profound effect on the psychological integrity of the respondent;[11]

b. This Court has confirmed that section 7 of the *Charter* does not protect the right to practice a profession or occupation.[12] The revocation of one's license to practice affects an economic interest that is not protected by section 7 of the *Charter*.[13] Therefore, section 7 will generally not be engaged by legal professional discipline proceedings;

c. Security of the person is not engaged by the revocation regardless of the stress, anxiety, or stigma to which the discipline process may give rise.[14] Section 7 protects

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[10] *R v. Sheppard*, 2002 SCC 26 at para 19; *Rosiek v. British Columbia (Securities Commission)*, 2010 BCCA 257 at para 16.
[11] *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 at para 35; *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653, 248 DLR (4th) 632 (ONCA).
[12] *Walker v. Prince Edward Island*, 1995 CanLII 92 (SCC), [1995] 2 S.C.R. 407; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at para 45.
[13] *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 at para 35.
[14] *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 at para 35; *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653, 248 DLR (4th) 632 (ONCA).

"only those fundamental choices concerning which individuals have a genuine and legitimate claim grounded in the values of human autonomy…";[15] and,

d. Revocation of the right to practice a profession does not constitute punishment and, even if it did, it could not be considered cruel and unusual.[16]

19. A license to practice law is a privilege, not a right.[17] This is a key distinguishing factor from criminal proceedings. Legal professionals voluntarily enter the legal professions on the understanding that they will be governed, and where applicable investigated and disciplined, by law societies and will be required to meet established professional standards designed to protect the public. As the Ontario Court of Appeal recently noted:

> …[w]ith the privilege of being admitted to a self-regulated profession comes the responsibility to know one's obligations…The reputation of the legal profession rests on the public's confidence that self-regulation is taken seriously by the legal profession. This can only occur where the legal profession has at hand effective and efficient tools by which to achieve accountability among its members. This is fundamental to the health and vibrancy of the legal profession.[18]

20. Ultimately, the remedy of a stay for delay in legal professional discipline proceedings should be granted only in exceptional circumstances as this Court defined them in *Blencoe*.

B. Courts owe deference to administrative bodies on questions of delay

21. Regardless of the standard of review this Court adopts in this appeal, a deferential approach should be taken to reviewing the governance choices made by regulatory bodies responsible for upholding the public interest.[19] In particular, if this Court concludes that questions of delay are subject to a procedural fairness analysis, this Court should clarify that a court must be alert to the

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[15] *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 at para 35.
[16] *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 at para 35; *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653, 248 DLR (4th) 632 (ONCA).
[17] *Kay v. Law Society of British Columbia*, 2015 BCCA 303 at para 20; *Levenson v. Law Society of Upper Canada*, 2009 ONLSHP 98 at para 14.
[18] *Law Society of Ontario v. Diamond*, 2021 ONCA 255 at para 58.
[19] Derek McKee, "The Standard of Review for Questions of Procedural Fairness" (2016) Queen's LJ 355 at 401.

administrative body's choices and where appropriate defer to them, even if the court is applying the correctness standard.

22. Canadian jurisprudence includes broad statements on administrative delay and how questions of procedural fairness are reviewed generally. For example, in applying *Blencoe*, administrative delay is often analyzed through the lens of procedural fairness.[20] Issues of procedural fairness are often reviewed on a correctness standard.[21] Some courts have noted that "[a]ttempting to shoehorn the question of procedural fairness into a standard of review analysis is … an unprofitable exercise."[22] As such, questions of procedural fairness are not decided according to any particular standard of review but rather by asking whether the procedure was "fair."[23]

23. The Federation submits that a blanket call for correctness review in *all* procedural fairness cases—devoid of any deference—disregards the range of different contexts in such cases and risks inconsistency in the case law.[24] This Court's jurisprudence provides that correctness review is not antithetical to deference. While applying the correctness standard to questions of procedural fairness, this Court has found that there can be room for "margins of deference" in view of the operational realities of administrative bodies.[25] In *Council of Canadians with Disabilities v. VIA Rail Canada Inc*, Justice Abella distilled this Court's case law as follows:

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[20] *Blencoe*, at paras 105-07; *Wachtler v. College of Physicians and Surgeons of the Province of Alberta*, 2009 ABCA 130 at para 23; *Bergey v. Canada,* 2017 FCA 30 at para 66; *Camara v. Canada*, 2015 FCA 43 at para 6.
[21] *Mission Institution v. Khela*, 2014 SCC 24 at para 79; *Ahousaht First Nation v. Canada*, 2021 FCA 135 at para 31.
[22] *Canadian Pacific Railway Company v. Canada,* 2018 FCA 69 at para 55.
[23] *Canadian Pacific Railway Company v. Canada,* 2018 FCA 69 at paras 54-55.
[24] Derek McKee, "The Standard of Review for Questions of Procedural Fairness" (2016) Queen's LJ 355 at 401.
[25] *Mission Institution v. Khela*, 2014 SCC 24 at para 89; *Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11 at para 81. Other courts have also recognized that there can be room for deference with respect to issues of procedural fairness: *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at para 237; *Sheriff v. Canada (Attorney General)*, 2005 FC 305 at para 32; *Nova Scotia Construction Safety Assn v. Nova Scotia Human Rights Commission*, 2006 NSCA 63 at paras 57; *Colhoun v. Hydro One Networks Inc*, 2014 ONSC 163

> Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process. The determination of the scope and content of a duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the Agency's constituencies.[26]

24. Providing some level of deference to the procedural decisions of a tribunal on correctness review is neither novel nor an invitation to create a third standard of review. On the contrary, such an approach is a *practical* way of applying the correctness standard while being attuned to the unique circumstances of a case—in particular, the procedural choices made by a tribunal in view of its operational realities. Justice Evans of the Federal Court of Appeal noted that while the "black-letter rule" may require that "courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness," courts have some flexibility with respect to the "black-letter rule":

> [W]hether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.[27]

25. The foregoing approach is especially important in administrative delay cases. Typically, procedural fairness cases raise one of two issues: that the tribunal's rule is in and of itself unfair; or that the tribunal applied the rule in an unfair way. The former cases may elicit greater deference from the courts as tribunals are "masters of their procedures" whereas the latter cases may not garner deference as the courts have an interest in upholding natural justice. However, administrative delay cases often raise a combination of issues, including the choices that the

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at para 8; *Nova Scotia (Community Services) v. NNM,* 2008 NSCA 69 at para 40; *Hennig v. Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)*, 2008 ABCA 241 at para 12.

[26] *Council of Canadians with Disabilities v. VIA Rail Canada Inc*, 2007 SCC 15 at para 231.
[27] *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at para 42 [emphasis added].

regulatory body made to meet its operational realities and its public interest mandate and whether the regulatory body appropriately applied its existing rules. Regardless of how this Court articulates the standard of review, this "in-between" nature means that some level of deference is necessary to the choices and rules set by an administrative body.

26. Moreover, under *Blencoe*, a reviewing court must take into account the findings of the regulatory body in assessing the delay, prejudice and appropriate remedy, as well as respect for the procedural choices of the regulatory body which are necessarily incorporated into the contextual analysis. Such an approach would further call for pragmatism and an eye to deferring to the choices made by a regulatory body based on its administrative realities.

PART IV – SUBMISSIONS ON COSTS

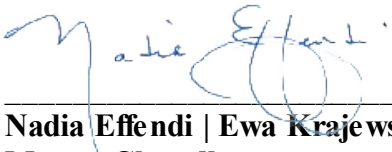
27. The Federation seeks no costs and asks that costs not be awarded against it.

PART VI – SUBMISSIONS ON PUBLICATION

N/A

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September 2021.

Per:



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PART VII – TABLE OF AUTHORITIES

Caselaw

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3.	*Bergey v. Canada,* 2017 FCA 30	22
4.	*Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44	1, 2, 6-13, 16, 20, 22, 26
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14.	*Mission Institution v. Khela,* 2014 SCC 24	22, 23
15.	*Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11	23
16.	*Mussani v. College of Physicians and Surgeons of Ontario,* 2004 CanLII 48653 (ONCA)	18(a), 18(c), 18(d)
17.	*Nova Scotia (Community Services) v. NNM,* 2008 NSCA 69	23
18.	*Nova Scotia Construction Safety Assn. v. Nova Scotia Human Rights Commission,* 2006 NSCA 63	23

19.	*R. v. Jordan*, 2016 SCC 27	17
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27.	*Walker v. Prince Edward Island*, 1995 CanLII 92 (SCC)	18(b)

Secondary Sources

No.	Secondary Source	Paragraph Reference
1.	Derek McKee, "The Standard of Review for Questions of Procedural Fairness" (2016) Queen's LJ	21, 23
2.	Federation of Law Societies of Canada "National Discipline Standards" (approved June 10, 2019).	7, 11

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