S.C.C. File No. 39340

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

B E T W E E N:

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 SURGEONS OF ONTARIO, 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
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Pursuant to Rule 42 of the Rules of the Supreme Court of Canada

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PARTS I AND II – OVERVIEW AND STATEMENT OF POSITION

1. The Canadian Association of Refugee Lawyers ["CARL"] intervenes on the following: whether the principles established in *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 [*Blencoe*], concerning the obligation on administrative decision-makers to act without undue delay, ought to take into account the access to justice considerations noted in *Hryniak v. Mauldin,* 2014 SCC 7 [*Hryniak*] and *R. v. Jordan,* 2016 SCC 27 [*Jordan*]. *Blencoe* set out two circumstances where delay could amount to an abuse of process: (1) where delay causes unfairness in the hearing and (2) where delay is so oppressive and prejudicial that it taints the proceedings ["second *Blencoe* branch"].[1]

2. CARL submits that this Court should temper the "unambiguously" high threshold[2] that claimants must surpass to establish an abuse of process and obtain remedies under the second *Blencoe* branch. This recalibration is necessary to ensure meaningful access to justice, particularly for vulnerable groups (i.e. non-citizens) disproportionately impacted by administrative delay. CARL also submits that a stay is not an appropriate remedy in all cases of inordinate delay and remedial flexibility is necessary to ensure access to justice. Finally, CARL submits that the standard of review framework has no application to questions of procedural fairness. CARL will offer perspective on the appropriate interpretation of *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, 243 NR 22 [*Baker*] regarding the procedural choices of decision-makers. CARL takes no position on the facts or outcome of this appeal.

PART III – STATEMENT OF ARGUMENT

A. The *Blencoe* framework should reflect access to justice principles animating the civil and criminal contexts.

3. Access to justice is a critical justification for the administrative state.[3] Administrative tribunals "are designed to be less cumbersome, less expensive, less formal and less delayed [...] these impartial decision-making bodies were to resolve disputes in their area of specialization more

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[1] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at paras 102, 115, 120-122 [*Blencoe*].
[2] *Abrametz v. Law Society of Saskatchewan,* 2020 SKCA 81 at para 4 [*Abrametz SKCA*]
[3] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para 140 [*Vavilov*].

expeditiously and more accessibly."[4] As stated by the former Chief Justice Beverly McLachlin, "in an age when access to justice is increasingly lacking, [administrative tribunals] fill the gap [by offering] flexible, swift and relevant justice."[5]

4. CARL submits that courts must intervene when administrative bodies fail to abide by their fundamental mandate to ensure timely access to justice. Courts have long intervened to ensure that administrative tribunals "exercise their power in a manner consistent with their delegated mandate" and to "ensure that administrative tribunals administer justice in conformity to the fundamental tenets of the rule of law".[6] The timeliness of proceedings is "an indicator of the health and proper functioning of the system itself".[7] Delay can prejudice litigants, frustrate the achievement of justice, or even lead to a denial of justice altogether. Ensuring fair, efficient, and timely administrative justice for vulnerable individuals is especially important, as recognized in *Canada (Minister of Citizenship and Immigration) v. Vavilov* [*Vavilov*].[8]

5. *Blencoe* explicitly recognized that chronic administrative delay is "a problem that must be brought under control if we are to maintain an effective system of justice".[9] However, the second branch of the current *Blencoe* framework has not been effective in addressing this problem of administrative delay because the threshold for establishing abuse of process is *so* high that it

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[4] *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 DLR (4th) 683, 17 OR (3d) 267 (CA) at 279 (cited with approval in *Vavilov, ibid* at para 204).

[5] Beverley McLachlin, "Administrative Tribunals and the Courts: An Evolutionary Relationship", (remarks delivered at the 6th Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, 27 May 2013).

[6] *Ibid.*

[7] *R. v. Jordan,* 2016 SCC 27 at para 3 [*Jordan*].

[8] *Abrametz SKCA, supra* note 2 at para 9 (citing *Vavilov, supra* note 3 at para 242, Abella and Karakatsanis JJ (concurring)). This Court has recognized the inherent vulnerability of non-citizens (*Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 91 NR 255 at 152). The Federal Court and Federal Court of Appeal have particularly highlighted refugee claimants as a "vulnerable, poor and disadvantaged group" (*Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at para 13; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para 36).

[9] *Blencoe, supra* note 1 at para 140.

renders access to justice illusory. CARL submits that this Court should revise and clarify this high threshold with a view of ensuring that vulnerable individuals are not barred from attaining meaningful access to justice. Developments in access to justice principles animating civil and criminal proceedings (set out in *Hryniak* and *Jordan,* respectively) should also animate the *Blencoe* analysis in the administrative law context. This Court in *Hryniak* emphasized that timely and accessible justice is necessary to uphold the rule of law, an element equally essential to a robust administrative law system.[10] *Jordan* stated that timely and fair criminal proceedings are in the public interest and helps build confidence in the administration of justice; this principle is equally applicable to the administrative law system.[11]

6. CARL acknowledges that, unlike criminal or civil processes, administrative regimes are diverse, and it may not be appropriate to declare a single timeline or ceiling beyond which delay is presumptively unreasonable. However, CARL submits that incorporating *Jordan*'s commitment to access to justice into the second branch of the *Blencoe* framework is both consistent with the genesis of the framework itself and necessary for the administration of justice. The majority in *Blencoe* relied on Justice L'Heureux-Dubé's characterization of delay that rises to an abuse of process in the criminal law context, writing that it "would apply equally to abuse of process in administrative law proceedings."[12] In the decades since *Blencoe* was written, the criminal law understanding of what constitutes an abuse of process has evolved to include concerns of access to justice. Incorporating the principle of access to justice into the second *Blencoe* branch would reflect this evolution and facilitate a judicial remedy for systemic undue delay that is still flexible enough to apply to a wide variety of administrative proceedings. A measured recalibration of the exceptionally high threshold of the second *Blencoe* branch is thus necessary to strengthen public confidence in the immigration system and other administrative law regimes. As with lengthy criminal proceedings, unreasonable delay in immigration proceedings can bring the administrative system into disrepute[13] by severely eroding the fabric of the proper administration

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[10] *Vavilov, supra* note 3 at para 242 (citing *Hryniak v. Mauldin,* 2014 SCC 7 at para 1).
[11] *Jordan, supra* note 7 at paras 55, 27.
[12] *Blencoe, supra* note 1 at para 120 (citing *R. v. Power,* [1994] 1 SCR 601, 165 NR 241 at 616).
[13] *Jordan, supra* note 7 at paras 55, 27; *Blencoe, supra* note 1 at para 115.

of justice, frustrating policy goals, and disproportionately impacting vulnerable individuals.

7. *Jordan* noted that the criminal justice system was plagued by a "culture of complacency".[14] An analogous culture of complacency exists within the refugee and immigration decision-making system: delay is endemic and access to meaningful remedies can be elusive.[15] Non-citizens are often subject to applications that have short deadlines for application, but long, indefinite timelines for decisions.[16] The harmful impact on vulnerable individuals that flows from undue

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[14] *Jordan, supra* note 7 at paras 4, 40.

[15] See e.g. *Memon v. Canada (Minister of Public Safety and Emergency Preparedness),* 2015 FC 908 (delay of 12 years not found to be inordinate); *Bernataviciute v. Canada (Citizenship and Immigration),* 2019 FC 953 at para 34 (delay of six years was not found to be inordinate); *Chabanov v. Canada (Minister of Citizenship and Immigration),* 2017 FC 73 at para 65 (delay of 11 years was not found to be inordinate); *Ratnasingam v. Canada (Public Safety and Emergency Preparedness),* 2007 FC 1096 at para 33 (delay of six years was unreasonable but did not outweigh public interest considerations of investigation into alleged crimes against humanity); *Ching v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839 (delay of seven years was not found to be inordinate); *I.P.P. v. Canada (Citizenship and Immigration),* 2018 FC 123 at para 338 (the Federal Court recognized that there was delay but declined to order extraordinary remedies); See also "Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum" (2018) online: <https://www.canada.ca/en/immigration- refugees-citizenship/corporate/publications-manuals/report-independent-review-immigration-and-refugee-board.html>.

[16] See e.g. *Thomas v. Canada (Public Safety and Emergency Preparedness),* 2020 FC 164 (delay of over eight years in deciding ministerial relief if *mandamus* was not granted); *Tameh v. Canada (Public Safety and Emergency Preparedness),* 2017 FC 288 (unexplained delay of four years in deciding ministerial relief); *Beltran v. Canada (Citizenship and Immigration),* 2011 FC 516 (delay of 22 years in bringing inadmissibility proceedings); *Najafi v. Canada (Public Safety and Emergency Preparedness),* 2017 CanLII 145767 (CA IRB) (delay of 13 years in bringing inadmissibility proceedings)*; Immigration and Refugee Protection Act,* SC 2001, c 27, ss 25, 34, 35, 36, 37, 42.1.

delay, as identified by *Jordan* in the criminal context, finds a direct parallel in the refugee and immigration context. Academic literature has firmly established the negative impacts of delay on vulnerable refugees and immigrants. Like accused individuals exposed to the criminal justice system, "stress, anxiety, and stigma"[17] naturally fall upon vulnerable individuals exposed to unreasonable delay in administrative law proceedings.[18] This is particularly the case in inadmissibility proceedings, which are initiated by the state and concern broad allegations of criminal activity.[19] Delays in administrative decision-making can extend the precarious status of those in immigration and refugee proceedings, adversely affecting individuals' employment opportunities even where they possess the requisite legal status to work.[20] Immigrants and refugees are often left waiting for years to be reunited with family members, and the prolonged separation adversely affects their mental health and wellbeing.[21]

8. Explicitly taking access to justice into account in the *Blencoe* analysis, particularly for vulnerable individuals, aligns the approach to administrative delay with the evolution of analogous doctrine in criminal and civil law domains. Contrary to the submissions of the Appellant, assessing the requirements of the doctrine of delay against its impact on access to justice does not depart from, supplement, or "supercharge" the basic principles animating the common law doctrine of delay.[22] The term "supercharge" conveys the misleading impression that this incremental[23] evolution of common law doctrine, and cross-fertilization of different fields of law, is excessive or extreme. Properly understood, it actually promotes fulfilment of one of the goals of administrative justice, which is to provide a more expeditious resolution of cases.

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[17] *Jordan, supra* note 7 at para 20.
[18] *Blencoe, supra* note 1 at para 115.
[19] *Immigration and Refugee Protection Act,* SC 2001, c 27, ss 34, 35, 36, 37, 42.1.
[20] See e.g. Samantha Jackson and Harald Bauder, "Neither Temporary, Nor Permanent: The Precarious Employment Experiences of Refugee Claimants in Canada" (2013) Journal of Refugee Studies 27:3 at 371; Marie McKeary and Bruce Newbold, "Barriers to Care: The Challenges for Canadian Refugees and their Health Care Providers" (2010) Journal of Refugee Studies 23:4 at 526, 535.
[21] See e.g. Tim Coates and Caitlin Hayward, "The Costs of Legal Limbo for Refugees in Canada: A Preliminary Study" (2005) Refuge 22:2.
[22] Appellant's Factum at paras 5, 27, 34.
[23] *Abrametz SKCA, supra* note 2 at para 10.

B. A stay of proceedings will not be an appropriate remedy in all cases.

9. A stay of proceedings may not be an appropriate remedy in all cases of inordinate delay; remedial flexibility is necessary to ensure access to justice.[24] A stay of proceedings may be an appropriate remedy where a vulnerable person is a respondent in a matter. For instance, in the immigration context, where the state initiates inadmissibility or removal proceedings against an individual, a stay of proceedings can be an appropriate remedy to redress inordinate delay.

10. However, a stay of proceedings will not be an appropriate or meaningful remedy where the vulnerable person is an applicant seeking positive rights or a benefit in the proceeding, such as recognition of Convention[25] refugee status or conferral of citizenship. In such cases, a stay of proceedings would require a re-engagement with the administrative process, causing further delay. A stay of proceedings in such cases is analogous to a remittal for redetermination and would not be a meaningful remedy.

11. CARL submits that, in some administrative cases, a "directed result" will be a more appropriate remedy where delay is found to constitute an abuse of process.[26] As this Court observed in

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[24] *Vavilov, supra* note 3 at para 140. This Court emphasized that the question of remedy on judicial review must be guided by access to justice considerations.

[25] *The 1951 Convention Relating to the Status of Refugees,* 28 July 1951, Treaty Series, Vol. 18.

[26] *Bessette v. British Columbia (Attorney General),* 2019 SCC 31 at para 94; *Canada (Citizenship and Immigration) v. Tennant,* 2019 FCA 206 at paras 72, 79-82 [*Tennant*]*; Canada (Public Safety and Emergency Preparedness) v. LeBon,* 2013 FCA 55 at para 14 [*LeBon*]; *D'Errico v. Canada (Attorney General),* 2014 FCA 95 at paras 16-21 [*D'Errico*]*; Pointon v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516 at para 27 [*Pointon*]; *Renaud v. Québec (Commission des affaires sociales),* [1999] 3 SCR 855, 249 NR 389 at para 3. The case law commonly refers to this type of remedy as a "directed verdict". The Federal Court of Appeal has defined a "directed verdict" as a "combination of *certiorari* and *mandamus* relief" in which the court quashes the tribunal's decision and gives directions requiring the decision maker to reach a particular result. In effect, the court substitutes its decision for that made by the

Blencoe, a stay is not the only remedy available in administrative law proceedings.[27] Alternative remedies could include: a reduction of a penalty,[28] a generous cost award,[29] or an order compelling a speedy resolution.[30]

12. The Federal Court of Appeal and provincial Courts of Appeal have granted directed results in cases where there has been substantial delay and where the additional delay caused by remitting the matter would threaten to bring the administration of justice into disrepute.[31] For instance, in *D'Errico v. Canada (Attorney General)*, the Federal Court of Appeal held that it was appropriate to order a directed result in part due to the substantial delay the applicant faced and the prejudice that would be caused by further delay in remitting the matter. In *Pointon v. British Columbia (Superintendent of Motor Vehicles)*, the British Columbia Court of Appeal decided to grant a directed result rather than remit the matter to be reheard as the appellant had already participated in several hearings over an extended period of time. More recently, in *Vavilov,* a directed result was one remedy contemplated by this Court to further access to justice:

> [T]here are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended… Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute… may also influence the exercise of a court's discretion to remit a matter.[32]

13. This remedial flexibility referred to in *Vavilov* is in line with *Blencoe's* focus on a contextual analysis. Just as delay should be analyzed based on, among other things, the nature of the proceeding and the rights at stake, such context should inform a prospective remedy. Remedial flexibility that accounts for the substantive and procedural diversity in administrative forums is

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tribunal (*Tennant* paras 72-73). The Federal Court of Appeal has also used the terminology "direct substitution" to avoid confusion with the criminal law concept of a "directed verdict" (see *Tennant* at paras 74-79).

[27] *Blencoe, supra* note 1 at paras 117, 155, 179.
[28] *Law Society of Upper Canada v. Abbott,* 2017 ONCA 525 at para 90.
[29] *Wachtler v. College of Physicians and Surgeons of the Province of Alberta,* 2009 ABCA 130 at para 50.
[30] *A.D.M. v. Canadian Institute of Actuaries,* 2008 ABQB 522 at para 46.
[31] *D'Errico, supra* note 26 at paras 16-21; *LeBon, supra* note 26 at para 14; *Norgard v. Anmore (Village)*, 2009 BCSC 823 at para 46; *Pointon, supra* note 26 at para 27.
[32] *Vavilov, supra* note 3 at para 142.

necessary to ensure meaningful access to justice.

C. Reviewing courts should not defer to the procedural choices of administrative decision-makers.

14. This appeal furnishes the opportunity for this Court to clarify the position of reviewing courts toward questions of procedural fairness. CARL endorses the settled law that no deference is owed on matters of procedural fairness, and that the relevant metric is only and always whether the process is fair.[33] Fairness requires that parties know the case to be met, have a meaningful opportunity to participate and, in most cases, receive reasoned justification for the decision. This Court should not frame questions of procedural fairness as reviewable on a standard of review of "correctness", with the possible exception of statutory interpretation of legislative provisions that set out a specific procedure.

15. CARL offers two justifications for distinguishing between procedural fairness and substantive questions of law, fact, and discretion. First, administrative bodies are not institutionally neutral about procedure. Unlike substantive issues, procedural choices have logistical, financial and resource consequences for the administrative body itself. Administrative bodies do not have the same institutional stake as courts do in the interpretations and applications of their substantive legal mandate. CARL submits that this distinction justifies a non-deferential review of procedural fairness, in which independent courts determine what fairness requires. The procedural choices may be more or less costly, time-consuming, convenient, expedient, or labour-intensive. As Binnie J noted in *Canada (Attorney General) v. Mavi:*

> Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on "erroneous, incomplete or ill-considered

[33] *Baldovi v. Canada (Attorney General)*, 2021 FC 779 at paras 26-29; *Garcia Diaz v. Canada (Citizenship and Immigration)*, 2021 FC 321 at para 48; *Grandjambe v. Canada (Parks)*, 2019 FC 1023 at para 23; *Rasiah v. Canada (Citizenship and Immigration)*, 2019 FC 408 at para 13; *Haque v. Canada (Attorney General)*, 2018 FC 651 at para 58; *Yang v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 496 at para 45; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para 43; Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomas Reuters, 2009) (loose-leaf updated 2021), ch 7 at 7:22.

findings of fact, conclusions of law, or exercises of discretion.[34]

16. The second reason for non-deferential review of procedural fairness emanates from the deference owed on substantive issues. If courts on judicial review are to defer to the outcomes reached by administrative decision-makers, it is even more vital that parties and the public have confidence in the fairness of the processes generating those outcomes. The legitimacy of the administration and of judicial review depends on that confidence.[35] The perils of deference are most stark where the decision relates to a vulnerable group, or where the decision engages in interests that tend to be discounted because they are perceived as diffuse, remote, or attached to persons or entities with little political currency. Hence, the deference afforded on matters of substance militates against deference on procedural fairness.

17. In *Baker*, this Court stipulated five non-exhaustive factors for determining the quantum and content of procedural fairness, including the choices of procedure made by the agency itself ["fifth factor"].[36] This includes situations where the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances. Administrative bodies are permitted and often encouraged by legislators to develop rules of procedure that are more refined and detailed than legislated procedures.[37] In so doing, the administrative body may deepen and reveal its institutional expertise. It may also be able to provide a contextual and holistic rationale for the procedural scheme, including the contested procedural choice.

18. CARL submits that the fifth factor in the *Baker* test does not refer to *ad hoc* procedural choices made by individual decision-makers. That would be redundant insofar as the subject of the judicial review is already the individual decision-maker's procedural choice. Instead, the fifth factor is best construed as directing attention toward pre-meditated choices made by the agency

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[34] *Canada (Attorney General) v. Mavi,* 2011 SCC 30 at para 40.
[35] *Ibid.*
[36] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, 243 NR 22 at para 27.
[37] See e.g. *Statutory Powers Procedure Act*, RSO 1990, c S22, ss 25.0.1, 25.1; *Administrative Tribunals Act*, SBC 2004, c 45, s 11; *Land and Property Rights Tribunal Act,* SA 2020, c L-2.3, s 6(1).

itself, communicated in the form of guidelines, policies or rules created by the agency. It appropriately advises courts to consider the contested procedure in light of the rationale provided by the administrative body. The Appellant is thus misplaced in advocating for judicial deference to the individual decision-maker's application of the *Blencoe* principles and to its choice of procedure in the present case.

PARTS IV AND V – SUBMISSIONS ON COSTS AND ORDER REQUESTED

19. CARL does not seek costs and requests that none be awarded against it. CARL takes no position on the outcome of the appeal but asks that the relevant issues be determined in accordance with the foregoing submissions.

All of which is respectfully submitted, this 7th of September, 2021.

p.p._____

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