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Top 5 Lessons You *Now* Need to Learn About Administrative Delay

By Marco P. Falco

The delay in a regulatory or administrative process can have a profound impact on the parties affected.

Delay hinders a party's psychological well-being and undermines the public's confidence in the administration of justice.

But when does delay in a tribunal or regulatory process become so inordinate, that the entire proceeding should be stayed?

A new decision of the Supreme Court of Canada ("SCC"), *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, seeks to answer this question in the context of a professional discipline hearing.

Abrametz establishes a refined legal framework for assessing when administrative delay can give rise to an abuse of process.

71 Months

Abrametz involved a professional discipline proceeding by the Law Society of Saskatchewan (the "Law Society") against a lawyer for a range of alleged financial and trust account irregularities.

The Law Society began its audit investigation of the lawyer's financial records in 2012.

In February 2013, the lawyer was served with a notice of intention to suspend his license, but ultimately was allowed to continue to practise law, on conditions.

The auditor submitted a final trust report to the Law Society in October, 2014.

The Law Society charged the lawyer by way of formal complaint in October, 2015 and the matter was referred to a hearing committee.

At the same time, the lawyer's tax circumstances led to litigation about the scope of the Law Society's investigatory jurisdiction. The lawyer applied to the Law Society's hearing committee for a stay of the disciplinary proceedings against him pending the resolution of the tax investigation. The hearing committee denied the request.

Ultimately, the hearing committee held hearings over several days between May and September, 2017 and rendered reasons for decision on January 10, 2018. The lawyer was found guilty on four of seven charges. In January, 2019, the hearing committee disbarred the lawyer, with a right to re-apply for admission two years later.

In July, 2018, the lawyer applied to the hearing committee to stay all the proceedings against him on the basis that the delay in the investigation and decision of his case, amounting to approximately 71 months, constituted an abuse of process.

The hearing committee dismissed the application for a stay. On appeal, the Saskatchewan Court of Appeal allowed the appeal, holding that the Law Society's inordinate delay resulted in significant prejudice to the lawyer and brought the administration of justice into disrepute.

On further appeal to the SCC, the majority of the Court reversed.

The Court held, among other things, that the Court of Appeal should have deferred to the hearing committee's finding that certain delays were attributable to the lawyer himself. There was no significant prejudice to the lawyer as a result of the delay. While the SCC recognized that the Law Society's delay was worthy of sanction, the delay was not so inordinate as to rise to the level of an abuse of process.

In reaching these conclusions, the majority of the Court codified a formal test for how to assess whether inordinate delay gives rise to an abuse of process.

The Court also set out a number of key considerations any party should consider before seeking to stay administrative proceedings on the basis of abuse of process. They are:

1. If it's an Appeal, the Appellate Standards of Review Apply

Citing its most recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Court noted that where questions of procedural fairness, such as abuse of process, are the object of a statutory appeal mechanism, then in assessing the matter on appeal, the Courts should apply the ordinary standards applicable to appeals, being the less deferential standard of "correctness" and the highly deferential standard of "palpable and overriding error", depending on whether the question at issue is one of law, mixed fact and law, or of fact.

The Court was careful to note, however, that this reasoning may not apply where the abuse of process analysis is conducted in the context of a judicial review application, as opposed to a formal appeal.

Since *Abrametz* involved a statutory appeal under Saskatchewan's *Legal Profession Act, 1990*, and the question was one of law because it involved the doctrine of abuse of process, the applicable standard of review was correctness.

2. There are Two Ways Delay Can Give Rise to An Abuse of Process

Citing its 2000 decision in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, the Court identified two ways in which excessive delay in the administrative law context can give rise to an abuse of process:

- Where a hearing's fairness is undermined because the delay impairs the party's right to answer the complaint against them, i.e. "memories have faded, essential witnesses are unavailable or evidence has been lost"; and

- Even if there is no prejudice caused by the delay to the hearing's fairness, an abuse of process happens where there has been "inordinate delay" causing "significant prejudice".

The delay at issue in *Abrametz* was the latter type, requiring proof of inordinate delay and significant prejudice.

3. Criminal Standards of Delay do not Apply to the Administrative Process

The Court rejected the application of the criminal law delay principle from its decision *R. v. Jordan*, 2016 SCC 27 to administrative hearings.

That is, the Court declined to recognize that inordinate delay, in and of itself, gives rise to an abuse of process without evidence of prejudice. This is a criminal law standard, where *Charter* rights are engaged, that has no application to the administrative context.

4. There is Now a Conceptual Framework for Assessing Inordinate Delay.

Building on its analysis in *Blencoe, supra*, the Court refined the conceptual framework through which a claim for "inordinate delay" ought to be assessed.

The following factors now must be taken into account:

1. ***Is the Delay Inordinate?*** The delay must be considered "in light of the circumstances of the case". The following contextual factors are relevant: the nature and purpose of the proceedings; the length and causes of the delay; and the complexity of the facts and issues in the case. The Court noted that these factors were not exhaustive and further factors could be taken into consideration.
2. ***Did the Delay Directly Cause "Significant Prejudice"?*** Only where a delay causes "detriment" to an individual will a Court find that it amounted to an abuse of process. Examples of the types of prejudice that would give rise to an abuse of process include significant psychological harm, stigma attached to an individual's reputation, disruption of family life, loss of work or business opportunities, and extended and intrusive media attention.
3. ***The Final Assessment of the Delay.*** If the two requirements above have been met, the Court must then "conduct a final assessment as to whether the abuse of process is established". The Court considers whether the delay "is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute".

5. What is the Remedy for an Abuse of Process?

A permanent stay of proceedings against the individual as a remedy for an abuse of process is the "ultimate remedy".

It should only be ordered in the "clearest of cases", where "the abuse falls at the high end of the spectrum of seriousness".

The test is whether "going ahead with the proceeding [would] result in more harm to the public interest than if the proceedings were permanently halted". The Court may consider such factors as the gravity of the charges against the individual.

Alternatively, there are other potential remedies for an abuse of process apart from a stay. These include remedies such as a reduction in sanction to the individual, or costs.

The Refined Conceptual Framework for an Abuse of Process

Abrametz represents a genuine effort by the SCC to clarify the conditions in which an administrative proceeding will be permanently halted on the basis of inordinate delay.

The majority of the Court was clearly concerned with the dismissal of substantive proceedings on the basis of a due process concern, in the absence of evidence of "significant prejudice".

The Court was careful, however, to emphasize the contextual grammar through which an inordinate delay ought to be analyzed - each case will inevitably turn on its facts.

There will no doubt be circumstances where a regulatory or tribunal delay is so excessive, and the prejudice to the individual so significant, that an abuse of process arises.

The *Abrametz* framework gives Courts and tribunals the flexibility to recognize those circumstances, with the ultimate goal of protecting the proper administration of justice.

For more information on abuse of process and delay in the context of tribunal or administrative proceedings, contact the author, Marco P. Falco, a partner in the Litigation Department at Torkin Manes LLP, at mfalco@torkinmanes.com. Please note that a conflict of interest check will have to be conducted before discussing any matter with you.

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