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Administrative Law

SCC recognizes complexities of professional discipline | Sara Blake

By **Sara Blake**

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(July 13, 2022, 8:31 AM EDT) -- In the *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, the Supreme Court of Canada allows regulators procedural flexibility to deal effectively with the wide variety of circumstances that warrant disciplinary action and gives deference to their findings of fact on questions of procedural fairness.

Peter Abrametz alleged that the delay of the law society in conducting its investigation and discipline proceeding against him amounted to an abuse of process. The court disagreed and upheld the ruling of the hearing committee dismissing his motion.

The court recognizes that procedural delay is a concern not only for the member but also for the complainant and the public. For members, the duration of the impact of proceedings on their professional and personal life is a matter of procedural fairness. Complainants also need a timely opportunity to be heard so that they can put the matter behind them. And the public has an interest in effective and timely regulation of the profession.

Abrametz advocated application of the strict test applied to dismiss a criminal prosecution for delay. The court rejected this argument because the Charter right to a trial within a reasonable time does not apply to administrative proceedings and because of the different purposes of criminal prosecution and regulation of a profession. I note the tendency of some to forget that a licence to practise a profession is a privilege — not a right akin to the right to liberty.

The court affirmed and added strength to the test established in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, to determine whether the delay amounts to an abuse of process.

The first requirement, that the delay be inordinate, is not based on how long the proceeding takes. The complexity of the facts and issues in a case will affect the time required to decide the matter. Whether the delay is inordinate turns on contextual factors including (a) the nature and purpose of the proceedings, (b) the length and causes of the delay, and (c) the complexity of the facts and issues in the case. Evidence may be required to prove some of these contextual factors, if they are not already established by the materials on file with the hearing panel or within its knowledge of the statutory purposes of regulatory discipline.

The second requirement, that the delay must have directly caused significant prejudice to the member, is concerned with two types of prejudice. The first is whether the fairness of the hearing is compromised because delay has impaired the member's ability to answer the complaint, such as when memories have faded, essential witnesses are unavailable or evidence has been lost. The second concerns the reality that a discipline proceeding may disrupt the member's professional and personal life, causing significant psychological harm, attaching stigma to the member's reputation, disrupting family life and may result in loss of work or business opportunities. It is not enough for the member to demonstrate these types of prejudice as they are normal consequences of disciplinary proceedings. Rather, the focus is on exacerbation of this prejudice by delays in the proceeding. The prejudice due to the delays must be proven by the member with evidence.

If these two requirements are proven, the tribunal conducts a further assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute.

The member may not wait in the weeds but is expected to take steps to move the proceeding forward, including raising the issue of delay on the record before the hearing panel, with information as to the prejudice caused by the delay. The court even suggests an application to superior court for *mandamus* to require that the hearing be expedited. Failure to take these steps may be regarded as acquiescence in the delay.

If abuse of process is found, a stay is not an automatic remedy. Rather, it is a remedy of last resort to be used only in the clearest of cases because, otherwise, the complaint will go unheard, and the public will not be protected. A stay may be refused where the allegations, if proven, are serious enough to present a greater need for public protection. In most circumstances, there are other discretionary remedies short of a stay that are within the power of the tribunal, such as costs or a reduction in the sanction (unless the presumptive sanction for the misconduct is licence revocation).

The court clarified the standard of review on appeal from a discipline decision. Whether the circumstances amount to an abuse of process is a question of law. However, the court gave deference to the findings of fact made by hearing committee, finding no palpable and overriding error.

I note that most allegations of procedural unfairness turn on the tribunal's findings of fact including the contextual factors such as the purposes and complexity of the proceeding. Under any standard of review, findings of fact are given deference by the court. This is a significant development from prior appellate cases ruling that a question of procedural fairness is reviewed on a standard of correctness, without elaborating on what that means.

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