Delay processing disciplinary complaints: abuse of process?

BY JOHN SHEVCHUK
Litigation Counsel, C.Arb, AACI(Hon), RI

It is implicit in the Appraisal Institute of Canada (AIC) *Consolidated Regulations* that members of the AIC who are the subject of discipline hearings are to be afforded procedural fairness. If this were not so, there would be no need to establish a standard of review governing the Appeal Subcommittee, when appeals to that subcommittee raise questions of natural justice and procedural fairness.[1] One aspect of procedural fairness is that the length of time it takes to process a disciplinary matter should not be inordinate.

But what is 'inordinate' delay? And if there is such delay, what is the appropriate remedy? The Supreme Court of Canada decision in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [*Abrametz*] addresses these questions.

It should be noted at the outset that *Abrametz* involved a lawyer in a disciplinary process enacted pursuant to a statute that provides a right of appeal to the courts. This is a different process than the contractual arrangement the courts have found exists between members of the AIC and the AIC. However, as we know from past cases, the courts nevertheless exercise a form of supervision in relation to AIC discipline proceedings and, as noted above, the AIC Professional Practice Committee and its sub-committees owe a duty of procedural fairness to members subject to complaints. Thus, the court's guidance in *Abrametz* could have some application to the AIC discipline process.

Abrametz background

Turning to the facts in *Abrametz*, in 2012 a lawyer was charged by the Saskatchewan Law Society with several breaches of trust accounting rules. The lawyer was permitted to continue in the practice of law during the discipline process, but with conditions. In October 2014, an audit report was submitted to the Law Society. In October 2015, the Law Society issued a formal complaint charging the lawyer and a Hearing Committee was appointed. At the same time, an investigation into the lawyer's tax situation gave rise to litigation in the courts. In March 2016, the lawyer applied to the Hearing Committee for an interim stay of the disciplinary proceedings until resolution of the tax investigation, but it was not until August 2016 that the Hearing Committee dismissed the request. The Hearing Committee heard the disciplinary matter at various dates in 2017, ending in September 2017. A decision dealing with the lawyer's conduct was rendered on January 10, 2018 wherein the lawyer was found guilty. On July 13, 2018, the lawyer applied for a stay of proceedings, arguing that the time taken to investigate and decide his case constituted an abuse of process. The application for a stay, together with submissions on the appropriate penalty, was heard by the Hearing Committee on September 18, 2018. The stay application was dismissed on November 9, 2018. On January 20, 2019, the penalty decision was issued; the Hearing Committee ordered that the lawyer was to be disbarred without a right to apply for readmission until January 1, 2021.

The length of time from notice of investigation to the order of disbarment was in the neighbourhood of nine years (2012-2021). The stay application in 2018 came six years into the process.

The Hearing Committee decision to deny the 2018 application for a stay of proceedings was based on its finding that, while the time to process the charges against the lawyer was long, the time taken was not inordinate under the circumstances, and, further, the lawyer was in part to blame for the delay. On appeal to the Saskatchewan Court of Appeal, the November 2018 Hearing Committee decision on the stay application was overturned and a stay was ordered. On appeal by the Law Society to the Supreme Court of Canada, the Court of Appeal decision was overturned and the Hearing Committee decision refusing the stay of proceedings was upheld.

The purpose of disciplinary bodies

In *Abrametz*, the Supreme Court of Canada noted that the purposes of disciplinary bodies are:

- to protect the public;
- to regulate the profession; and
- to preserve public confidence.[2]

To Members of the AIC, these purposes will strike a familiar chord. In one form or another, they are manifested in the AIC *Code of Conduct*, the *Consolidate Regulations* and the *Canadian Uniform Standards of Professional Appraisal Practice* (*CUSPAP*).

While recognizing the purpose of disciplinary bodies, Justice Rowe, writing for the majority of the court, observed that:

> ... inordinate delay can be harmful to members of professional bodies, complainants and the public in general. Allegations of misconduct against a member can weigh heavily on that person. They can overshadow his or her professional reputation, career and personal life. Anxiety and stress caused by the uncertainty of the outcome and the stigma attached to outstanding complaints are good reasons to investigate and prosecute in a timely way. Disciplinary bodies have a duty to deal fairly with members whose livelihood and reputation are affected by such proceedings ...

The court noted that:

> Complainants ... benefit from having their case proceed promptly, so that they can be heard and move on to put the matter behind them. Finally, the public at large expects professionals guilty of misconduct to be effectively regulated and properly sanctioned. Given their role to protect the public from harmful professional conduct, disciplinary bodies must ensure that the public's concerns are addressed on a timely basis ...[3]

In other words, disciplinary bodies have a balancing act to perform and must achieve this balance in a timely fashion.

Abuse of process arising from delay

According to the majority of the court in *Abrametz*, two ways in which abuse of process might arise are: 1) a lack of hearing fairness, and 2) significant prejudice due to inordinate delay. In *Abrametz*, inordinate delay was the focus.[4] Inordinate delay as the basis for abuse of process depends upon a three-step test:

- the delay must be inordinate;
- the delay must have directly caused significant prejudice; and
- if the first two steps are met, there is a "... final 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".[5]

Inordinate delay

Whether there is inordinate delay requires a consideration of a) the nature and purpose of the proceedings, b) the length and causes of the delay, and c) the facts and issues of the case. These three factors are not exhaustive – there may be other contextual factors in a particular case that come into play.[6]

Regarding the nature and purpose of proceedings, the court suggested that decisions required of tribunals range in complexity and significance with the intimation that the more complex a case, the greater the time that may be needed.[7] There is the added consideration that important purposes of disciplinary proceedings include protection of the public and preservation of public confidence in the profession.[8]

As for the length and causes of delays, there is the fundamental duty of a tribunal to be fair at all stages of a proceeding. "When assessing the actual time period of delay, the starting point should be when the administrative decision maker's obligations, as well as the interests of the public and the parties in a timely process, are engaged. It should end when the proceeding is completed, including the time taken to render a decision."[9] There can be good reason for delay, e.g., suspension of proceedings while parallel criminal or civil proceedings are underway. Delay might have been waived – expressly or implicitly.[10]

The complexity of the facts and issues will also be a factor in determining if delay has been inordinate.

Significant prejudice

There must be significant prejudice to the charged party that flows directly from the inordinate delay, as opposed to the prejudice that likely results from the bringing of the allegation itself. There will likely be prejudice in various forms to a person charged with offending codes of professional conduct, but the question in considering abuse of process is whether the delay in processing the allegations creates the prejudice. A non-exhaustive list of forms of prejudice could include psychological harm, stigma attached to reputation, disruption of family life, loss of work or business opportunities, extensive media intrusion.[11] But, it should come as no surprise that mere suggestion of such prejudice will not suffice – reliable evidence demonstrating that prejudice was measurable and significant will be necessary. It must be great enough to displace the need to protect the public interest.

Manifestly unfair or disrepute for administration of the profession

The majority of the court in *Abrametz* said that, if inordinate delay and significant prejudice is established, the court or tribunal must then move to the third step – is the delay manifestly unfair to the charged party or does the delay bring the administration of the process into disrepute? So, it appears that a finding that the delay was inordinate and that there was significant prejudice will not necessarily lead to the conclusion that there was an abuse of process. However, what is "manifestly unfair" or what would bring the administration of a process into "disrepute" is not elucidated in the majority decision and will require a thorough review of the case authorities referenced by the majority.

Remedies for abuse of process arising from delay

In *Abrametz*, the court discussed three remedies, while noting these were not exhaustive:

- stay of proceedings;
- *mandamus* (an order directing the tribunal to take action); and
- reduction in sanction/costs.

In most cases, the affected party should look to remedies available in the tribunal procedures before resorting to the courts. This could be as simple as asking a tribunal to speed up the process. Sitting back without pressing for a speedier resolution is not a good strategy for arguing there has been an abuse of process.

In administrative law, a party can seek an order of the court directing a lower tribunal to take action (*mandamus*). The extent to which that is a viable option in an AIC disciplinary proceeding is outside the scope of this article.

A stay of proceedings is the ultimate remedy for a charged party. However, the result is that the charges will not be addressed leading to the question of harm to the public interest. As the gravity of charges increases, the concern for protecting the public will intensify and the threshold for a stay of proceedings increases.

The threshold for obtaining reductions in sanctions or costs will generally be lower[12] than achieving a stay of proceedings, but a reduction in either sanctions or costs might be an imperfect salve for a charged member.

Closing

Abuse of process arising from delay in processing disciplinary charges is possible on the basis that a duty of fairness is owed to an AIC Member throughout the disciplinary process. However, the threshold for a conclusion that there has been an abuse of process is high:

- there must be inordinate delay;
- there must be significant prejudice arising directly from the delay; and
- the delay and prejudice must result in manifest unfairness to the charged party or must bring the disciplinary process into disrepute.

The remedy for delay leading to abuse of process will not often be a stay of proceedings. The countervailing interest of the public must be considered. A stay results in an offending Member not being sanctioned. More likely is a remedy in the form of a reduced sanction or reduced costs. Further, any remedy is likely not available if a party has not actively complained of lack of progress or 'sat in the weeds' before raising a complaint in relation to delay.

To place all of this in context, in *Abrametz*, there was at least a six-year delay between charge brought and the application for a stay. There was a finding that 32 months of the delay were unexplained and that the lawyer might have contributed only a relatively small amount of the delay. There was evidence that the lawyer had suffered professionally, financially and medically and that his family suffered as well. Despite all this, the Supreme Court of Canada held that the decision of the Law Society Hearing Committee not to grant the application for a stay of proceedings was sustainable.

End notes

1 AIC Consolidated Regulations effective June 15, 2020, Regulations 5.29.1.3, 5.29.5
2 *Abrametz*, para. 53
3 *Abrametz*, paras. 55-56
4 *Abrametz*, paras. 41, 42
5 *Abrametz*, para. 43
6 *Abrametz*, para. 51
7 *Abrametz*, para. 52
8 *Abrametz*, para. 53
9 *Abrametz*, para. 58
10 *Abrametz*, para. 63
11 *Abrametz*, para. 69
12 *Abrametz*, paras. 90-100

This article is provided for the purposes of generating discussion. It is not to be taken as legal advice. Any questions arising from this article in particular circumstances should be put to qualified legal and appraisal practitioners.