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CASE SUMMARY: TRIBUNAL OF THE FINANCIAL AND CONSUMER SERVICES COMMISSION'S DECISION TO GRANT STAY OF PROCEEDINGS FOR REASON OF DELAY SET ASIDE

Edmond deals with the issue of when, and under what circumstances, a delay in the administrative process will warrant an order granting a stay of proceedings.

Administrative law; Decisions of administrative tribunals; Securities Commission; Jurisdiction; Judicial review; Stay of proceedings; Delay; Appeals; Standard of review

New Brunswick (Financial and Consumer Services Commission) v. Edmond, [2017] N.B.J. No. 135, 2017 NBCA 28, New Brunswick Court of Appeal, June 15, 2017, M.E.L. Larlee, J.C.M. Richard and B.L. Baird JJ.A.

The key facts were this: Mr. Edmond and Mr. Drapeau (the respondents) were alleged to have promoted or participated in the sale of illegal investments in contravention of the relevant provincial securities legislation. On June 24, 2010, the Commission filed a Statement of Allegations against the respondents to this effect. On December 7, 2010, the Commission issued a Notice of Hearing. Ultimately, the hearing was not scheduled to proceed until May 2, 2016, some six years after the complaint was filed. Given this, when the matter went ahead, the Tribunal, as a preliminary matter, requested the parties' submissions on the question of delay. Following submissions, the Tribunal ordered a stay of proceedings on the grounds the Tribunal lost jurisdiction by reason of delay. The Commission appealed this decision.

There were two central issues raised on the appeal.

The first issue was whether the Tribunal overstepped its jurisdiction when, under its own initiative, sought a hearing on the preliminary matter of delay. The Court of Appeal applied the standard of reasonableness. The Court of Appeal began by noting that both parties acknowledged that the Tribunal had a discretionary power to control its own process. However, despite this, the appellant argued that the discretion was inappropriately exercised in this case. The primary argument from the appellant was that the Tribunal ought not to have usurped its own jurisdiction to decide the merits of the case by pre-emptively dealing with the issue of delay. The Court of Appeal disagreed. In its reasons, the Court heavily relied on the importance that administrative bodies have control over their own processes, subject to any legislative constraints and the principles of administrative fairness. The decision of the Tribunal to seek submissions on the issue of delay was in the Court's view completely reasonable and, in fact, done "in the interest of time and financial economies".

The second, and more contentious issue, was whether the Tribunal was correct in ordering a stay of proceedings on the basis of the delay. Not surprisingly, the Court heavily relied on the Supreme Court of Canada's earlier decision in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, which concerned the issue of delay in the administrative context. In that case, the Supreme Court held that there must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected (para. 133). The Court of Appeal held that this threshold had not been satisfied in this case.

From a factual standpoint, the Court of Appeal's reasoning was strongly driven by the respondents' conduct and litigious nature. Specifically, the Court held that, subject to one exception, the delays were largely the result of adjournments at the request of the respondents and various interlocutory applications. After reviewing this evidence, the Court of Appeal noted that: "Clearly, the timing of the decisions from this Court was not within the control of the Commission... It is clear the Commission did not abandon the process." The Court was clearly concerned about the apparent self-serving conduct of the respondents, which may lead to a stay of proceedings.

As to the issue of prejudice, the Tribunal at first instance was heavily influenced by what it characterized as "irreparable stigmatism" to the respondents as a result of the delay, including Mr. Drapeau's loss of employment, income, reputation and emotional distress. The Court of Appeal, on the other hand, was largely unconvinced by this evidence, noting that there was "no persuasive evidence of psychological or physiological harm before the Tribunal". The Court of Appeal also held that the Tribunal erred by failing to consider whether the community's sense of fairness would be offended by the decision, one of the factors explored in *Blencoe*. The Court of Appeal held that this factor heavily weighted in favour of not granting the stay. The failure to consider this point was a critical downfall.

In the end, the Court of Appeal held that there was insufficient evidence to support the conclusion that the delay rose to the level of prejudice necessary to grant a stay. Further, the Court held that had this test been properly applied, these criteria lead to the conclusion the proceedings should not have been stayed. Accordingly, the appeal was allowed, the Tribunal's decision set aside and remitted back for determination on the merits.

This case was digested by [Adam R. Way](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at away@harpergrey.com or review his biography at <http://www.harpergrey.com>.