PEER REVIEW

Commentary and information on issues affecting professional regulation and tribunal practice in British Columbia

Volume 1, Number 3, February 1998

DELAY IN DISCIPLINE CASES

ANTHONY G.V. TOBIN,
B.TH. (HONS), LL.B., M.AD.ED.
BARRISTER & SOLICITOR
MEDIATOR

From *The Province* newspaper, February 20, 1998, page A6:

Delays cause trial stay

Nanaimo: -Charges against a man accused of drugging, then sexually assaulting three women in 1995 have been stayed because it took too long for the case to come to trial. The Crown was to blame for most of the 38 month delay in getting (the accused) to court a B.C. Supreme Court has ruled. Crown and police were responsible for 27 months of the delay, most due to scheduling conflicts, while the rest was caused by (the accused) and the court system. The accepted time limit for coming to trial is about 16 months. The Crown may appeal.

Delay in Discipline Cases

The excerpt from *The Province* sets the scene for this issue of *Peer Review*. It underscores the serious nature of the consequences that can flow from inexcusable delay in the prosecution of even the most serious of cases.

Given the limited resources of most self-regulating bodies, the demands placed upon them by their members and the public, together with the fact that volunteer committees are involved in the review of complaints, delay in the processing and prosecution of complaints seems inevitable. The question for consideration here is what is the extent and nature of delay that the courts will tolerate before quashing disciplinary proceedings brought against a professional.

When the Supreme Court of Canada decided the case of R. v. Askov in 1992 the result was the dismissal of thousands of criminal cases which were backlogged in the justice system. It was estimated that 40,000 cases in Ontario were stayed on account of the Askov decision. The name of the case is now synonymous with a stay because of delay. Lawyers will refer to a case as

having been "askoved".

As with many other legal notions this one is almost a commonplace. It is captured in the axiom "Justice delayed is justice denied". If a defendant is deprived of the opportunity of having his or her case heard in a timely fashion then adverse consequences begin to accumulate the longer it takes. Witnesses memories fade, important witnesses may leave the jurisdiction, the defendant's own recollection of events may become impaired all of which may result in prejudice to the defendant.

The issue of delay is first met by the tribunal through an application for counsel for the defendant at the outset of the hearing. The application is usually for an order that the tribunal dismiss the proceedings against the defendant on the ground that there has been such a delay in the prosecution of the case that the regulatory body has lost jurisdiction. Alternatively, the application is on the grounds that the defendant is so prejudiced by the delay that a fair hearing is no longer possible.

In R. v. Morin [1992] 1 S.C.R. 771 the Supreme Court of Canada provided a detailed explanation of the legal principles which must apply to the consideration of any delay argument in a criminal law context.

The Morin case is helpful because it describes several principles that are of practical value and assistance to a disciplinary tribunal confronted with this issue. One must, of course, bear in mind that these principles are in the context of a criminal case, however so was Stinchcombe!
Here are some of the principles enunciated in the Morin case:

- If the delay is reasonable having regard to similar cases, the application (of the defense) will fail;

- As the seriousness of the allegations increases so does the societal demand that the accused be brought to trial;

- The judge must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial;

- The accused has the ultimate burden of proof throughout;

- The period to be scrutinized is the time elapsed from the date of the charge to the end of the trial;

- If the accused chooses to adopt preliminary procedures and strategies then such action will be taken into account in determining what length of delay is reasonable;

- Where there is little or no prejudice to the accused the important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay.

In the same case, Madame Justice McLachlin sets out a two step procedure for courts to follow. The first step is to determine whether a threshold case for unreasonable delay has been made out. If the reasons for the delay are in large part attributable to the defendant then the application will fail. If the threshold test is met then a closer examination of the facts is required. Where the defendant has clearly suffered prejudice which cannot be remedied the balance may tip in the defendant's favour. On the other hand, where the defendant suffers little prejudice his or her interests will be outweighed by the interests of bringing accused persons to trial.

How is the prejudice against the defendant weighed against the public interest? The court says that it is dependent on the circumstances of the case. The more serious the allegations the less likely is the court to dismiss the case or to stay the proceedings.

One sees the weighing of these considerations in the decision of the then Chief Justice of British Columbia in Hammond v. Association of British Columbia Professional Foresters. There the Chief Justice found that even though there had been "inordinate delay" (it took two years to bring the charges before the discipline committee) and that the delay had a "prejudicial tendency" to the petitioner, he could not find that the delay had prejudiced Hammond to the extent that it should prohibit the council from proceeding.

In the February 11, 1998 decision of the Supreme Court of British Columbia in Blencoe v. British Columbia Human Rights Commission et al the issue of inordinate delay was raised. It was contended that 33 months had elapsed from the time the complaints were made to when the hearings were expected to be held.

In the first instance, the decision makes clear that section 7 of the *Charter* is not meant to protect the rights of those involved in a regulatory process. However, it was argued, in the context of prejudice, that personal hardship suffered by the applicant could support the relief he sought despite the inapplicability of section 7 of the *Charter*.

The court held that personal hardship attributable to unacceptable delay in an administrative process does not constitute a prejudice that will entitle a person to prerogative relief. The court said that there must be some prejudice to a person that relates directly to the ability to respond to the complaint in an evidentiary sense.

A key criterion referred to by the court in Blencoe was whether there was any extended period without any activity in the processing of the complaints. When the court applied this criterion to the facts the court found no inexcusable delay.

The court next referred to the test in Martineau v. Matsqui Institution Disciplinary Board where all nine judges of the Supreme Court of Canada

concurred in the result. In the words of Dickson, J.:

In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all cases dealing with natural justice and fairness.

What is apparent from this very cursory survey of this legal issue is that Colleges would be well served by having in place a system to monitor the processing of complaints. A critical incident time chart or similar device would allow the status of the complaint to be checked at any time. There should be no unaccounted for period of inactivity. Such monitoring would allow preventive action to be taken to remove the possibility of the complaint being "askoved" at the hearing or subsequently by a court.

* * * * *

Criteria for the Assessment of a Tribunal's Decision

The following criteria were formulated by Anthony Tobin and presented at a recent conference on professional regulation held in Vancouver. The purpose of these criteria is to assist tribunals by providing criteria that tribunal members can use to "self-assess" the form and content of a decision and the process by which it was reached. The background for this type of analysis derives from the area of competency based instruction and adult education. Fairness, of course, is the overarching criterion.

THE LAW

1. The decision sets out the procedural background
2. The decision addresses issues of jurisdiction
3. The decision sets out the appropriate legal tests and standards that it applied to the facts
4. The decision identifies any legal issue it has to resolve
5. The decision identifies how any legal issue was resolved
6. The decision states the correct legal test, or its view of what it is
7. The decision quotes any legal tests upon which it relies as they are set out in the case law
8. The decision tracks the particular language of the statute upon which it relies
9. The decision sets out the specific allegations used in the charging document
10. The decision or order of the tribunal refers to and is framed in the relevant language of the governing statute

THE FACTS

1. The decision assesses the evidence in relation to each specific allegation

2. The decision makes explicit findings of credibility and provides reasons for each finding

3. The decision makes explicit findings of fact on all of the relevant issues in contention

4. The decision provides reasons for each of its findings of fact

5. The decision clearly and unambiguously sets out the facts as found by the tribunal

ANALYSIS

1. The decision demonstrates an analysis of the facts as found in relation to or based upon relevant legal principles where required

2. The decision demonstrates an analysis of the material facts in relation to each allegation in the charging document

Performance standards:

1. The decision relies upon the correct legal tests

2. The decision does not ignore relevant evidence

3. The decision does not rely upon or introduce irrelevant considerations

4. The decision relies only upon relevant evidence that is properly before the tribunal

5. The language of the decision is plain and transparent

6. The decision demonstrates the transparency of the tribunal's reasoning process

7. The decision acknowledges the nature of the complaint or the complainant's concerns

8. The reasons for the decision could be identified by a fair-minded and disinterested observer

9. The reasons for the decision are logical and understandable to a fair-minded and disinterested observer

10. The decision demonstrates well-informed and rational conclusions

11. Each of the decision's reasons has a logical underpinning

12. Each of the decision's reasons has a valid evidentiary underpinning

13. The evidence relied upon is sufficiently cogent to make it safe to uphold each of the tribunal's findings of fact

14. The decision does not contain any internal contradictions

15. The decision is intellectually scrupulous

* * * * *

Administrative Fairness Audits

When was the last time your organization conducted a preventive review of its regulatory process and structure, its governing legislation, including rules, policies and procedures, to ensure that they meet appropriate legal standards? Has your organization reviewed its processes to identify problem areas such as disclosure or apprehension of bias? Does your organization have a set of written guidelines or a checklist which address the issue of apprehension of bias and describe those circumstances in which a member ought not to be appointed to a hearing panel, inquiry or discipline committee? Does your organization have a rule or policy concerning disclosure? Do you routinely conduct effective and efficient pre-hearing conferences? Does your organization have an investigation protocol? Have you considered having independent counsel provide your organization with a legal audit report? An ounce of prevention is still worth a pound of cure.

****

Workshops and Seminars: If you would like more information about administrative fairness audits, or in-house workshops or training seminars on this or any of the following topics: writing decisions; managing a hearing; the role of independent legal counsel to the tribunal; basic procedural law for inquiry committees or hearing panels; ways to increase the efficiency of time spent at hearings, conducting an investigation; designing and implementing a mediation program, please feel free to contact our office.

****

If you would like to be included on the mailing list for ***Peer Review*** please contact us at 331-4404 or 331-4406 or by fax to: 331-4409 or e-mail to agvtobin@legalmail.com or post at: 816, 938 Howe Street, Vancouver, British Columbia, V6Z 1N9.

Peer Review is published by the law firm of Anthony G.V. Tobin – usually on schedule every two months. (The irony of the delay in the publication of this issue has been recognized!)