

ALBERTA SECURITIES COMMISSION

RULING

Citation: Re Cerato, 2022 ABASC 56

Date: 20220517

Jan Gregory Cerato (a.k.a. Jan Strzepka)

Panel:	Maryse Saint-Laurent Trudy Curran
Representation:	Don Young Amelia Martin for Commission Staff John C. Zang for the Respondent
Submissions Completed:	April 14, 2022
Date of Oral Ruling:	April 27, 2022
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I. INTRODUCTION

[1] Jan Gregory Cerato (a.k.a. Jan Strzepka) (**Cerato**) applied to the Alberta Securities Commission (the **ASC**) for a stay of proceedings based on the length of time required for an investigation, prosecution and final determination of an alleged contravention of the *Securities Act* (Alberta) (the **Act**). Cerato considered the time to be an unreasonable delay that breached his rights under ss. 7 and 11(b) of the Charter of Rights and Freedoms (the **Charter**), constituted an abuse of process, and failed to provide an efficient, cost-effective and timely determination of the issues raised in the proceeding as required by s. 2.2. of the ASC Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* (**Rule 15-501**).

[2] Following an oral hearing on April 14, 2022, we dismissed Cerato's application on April 27 in a brief oral decision. We indicated at that time that we would provide formal written reasons setting out our analysis and reasons for our decision. These are our reasons for dismissing Cerato's application.

II. BACKGROUND

[3] In an amended investigation order dated October 22, 2018, the ASC authorized an investigation into a cryptocurrency investment opportunity involving Cerato. As part of that investigation, staff (**Staff**) of the ASC collected various documents and interviewed 14 witnesses, including Cerato on March 25, 2019. The last interview occurred on June 4, 2019.

[4] On February 28, 2020, a notice of hearing (the **Notice of Hearing**) was issued by the ASC, which alleged that Cerato contravened s. 110 of the Act by engaging in a distribution of securities without a filed prospectus or an exemption from the prospectus requirement. At a set day hearing on April 15, and in consultation with the parties, a hearing into the merits of the allegation was scheduled to commence in November 2020.

[5] On October 28, 2020, Cerato issued a notice of constitutional question in which he claimed a contravention of his rights under ss. 2(b) and 7 of the Charter. That notice did not indicate that Cerato had any concern regarding the time required for Staff's investigation or with the time leading up to the commencement of the merits hearing. Rather, Cerato made a prehearing request to have the constitutional questions referred to the Alberta Court of Queen's Bench and to adjourn the merits hearing pending that determination. Cerato's request was denied and the hearing proceeded as scheduled. Cerato raised the constitutional questions in the merits hearing as part of his defence to the ASC's allegation.

[6] The merits hearing spanned 10 days. In that time, the hearing panel received documentary and testimonial evidence, and the parties provided their submissions addressing both the constitutional questions raised by Cerato and Staff's allegations against him. The hearing panel reserved its decision after receiving oral submissions on March 9, 2021.

[7] On April 12, 2022, the hearing panel issued its reasons (the **Merits Decision**). In the Merits Decision, Cerato was found to have contravened s. 110 of the Act by distributing securities without a prospectus or an available exemption. The hearing panel also determined that Cerato failed to demonstrate that his Charter rights had been violated. Subject to this application, the proceeding is expected to continue into a second phase for the determination of what, if any, sanctions and cost-recovery orders are appropriate in the circumstances.

[8] In December 2021, and prior to the issuance of the Merits Decision, Cerato requested a stay of proceeding based on "substantial delay" to the proceeding. He did not offer any other basis for the stay request. Cerato was advised to make an application if he wanted to pursue a stay of proceeding.

[9] Cerato submitted his application on January 21, 2022, which included an affidavit (the **Affidavit**) sworn by Cerato on January 20, 2022 and a Notice of Constitutional Question dated January 21, 2022. Staff did not cross-examine Cerato on the Affidavit or submit any additional evidence.

[10] In his written submissions dated February 28, 2022, Cerato requested that the hearing panel recuse themselves from hearing this application, in part because his application alleged that the Merits Decision had not been delivered on a timely basis. To accommodate Cerato, the hearing panel recused themselves from hearing this application.

[11] Staff provided their written submissions on March 14, 2022, and Cerato provided his written reply submissions on March 21.

[12] As mentioned, an oral hearing of the application occurred on April 14, 2022. In an oral decision on April 27, we dismissed Cerato's request for a stay of proceeding.

III. DELAY APPLICATION

[13] Cerato's position was that the delay in resolving the allegation against him violated his rights under ss. 7 and 11(b) of the Charter, constituted a breach of natural justice and procedural fairness resulting in an abuse of process, and failed to provide an efficient cost-effective and timely determination of the issues as required by s. 2.2 of Rule 15-501. Cerato requested a stay of proceedings.

[14] Cerato alleged two periods of delay, both of which he maintained are ongoing. The first commenced with the ASC's investigation, whereas the second began when the hearing panel reserved its decision following oral submissions on March 9, 2021. While the Merits Decision has now been issued and the proceeding is expected to continue into the second phase to assess the appropriate sanction and cost-recovery orders, Cerato submitted that the proceeding will not be finally determined until a decision has been rendered addressing potential sanction and cost-recovery orders.

[15] Cerato claimed that administrative delay in the proceeding resulted in various forms of prejudice to him, including adverse health impacts (such as psychological harm, anxiety, serious stress and insomnia), stigma to his professional reputation, threats to his personal safety that forced him to relocate to Mexico, and impacts on his personal relationships.

IV. AFFIDAVIT EVIDENCE

[16] According to the Affidavit, the allegation against Cerato related to events that occurred from December 2017 to May 2018 and involved uncomplicated cryptocurrency transactions that did not produce a significant number of records. Cerato said that his lack of experience and knowledge of securities laws made him "very concerned" when he learned of an investigation in late January or early February 2018, and that he experienced "serious prejudice and medical

consequences" that were not initially apparent to him but arose during, and resulted from, the alleged delays.

[17] In the Affidavit, Cerato described the adverse effects that he said were attributed to administrative delays:

- Health impacts consisting of "psychological harm, anxiety, serious stress and insomnia". Cerato indicated that these impacts "became more apparent" as the matter progressed, that they persisted after the merits hearing despite his hope that they might diminish, and that they were debilitating and prevented him from pursuing a normal life. While he indicated that he sought "medical/psychological attention" for these health impacts, the Affidavit did not provide any medical documentation or otherwise describe what steps were taken to address his health impacts.
- Threats of harm, most notably communications from two individuals that "occurred over the last twelve months". Cerato did not provide any physical evidence of these threats nor did he indicate what was said in the communications, other than to surmise that it was "clear from their communications that given the delays in getting a decision in these Proceedings they are threatening to take matters into their own hands". He also stated in his Affidavit that he attempted to "deal with the threats", although he did not identify any specific steps in this regard.
- A feeling of "a loss of all of my freedoms" – ostensibly based on threats of harm to him and his family, as well as his own well-being and health – that "forced" him to leave Canada and become a "Mexico resident".
- A negative impact from the inability to communicate during the delay period.
- Impacts on his "serious personal relationships", including the cessation of his relationship with a former girlfriend (who experienced a mental breakdown during the delay and entered into a substance abuse program) and the deprivation of his care and companionship with his adult daughter, who heard derogatory comments about Cerato, which he "can tell . . . effects her trust and respect of me".
- Impact on his "serious life choices" from the deliberation time, including his reticence about "mov[ing] to the next step" with a more recent serious relationship without knowing his financial circumstances.
- A stigma to his reputation from the ongoing focus by the public press on the proceeding, which affected his ability to earn income and "caused a continuous cloud of suspicion over me and my business and personal relationships". In support, he provided a single news article published after the merits hearing.

[18] While he indicated that the negative effects were present throughout the alleged delay periods, Cerato stated that the impacts did not arise from the existence of the ASC proceedings because he had "dealt with that fact long ago" and that the impact was from the delay in getting a result and "knowing the truth and what position I am in". He also claimed that the "negative environment" had "gone to the core of my being" and that the lack of resolution caused his colleagues to continually question him, which he speculated would continue to result in his "black-balling" in the crypto community until the delays are resolved.

[19] The Affidavit also indicated that the public is now aware of the "trading issues regarding crypto currencies", such that there is no need to educate the public or use Cerato as an example if he is found to have breached the Act. While he claimed to be unable to communicate during the delay period, Cerato said that individuals he associated with have expressed "serious concerns as the viability of the ASC to properly govern the crypto currency marketplaces" and that they (and Cerato) considered the asserted delay to be an indication that "the ASC should not be relied upon to adjudicate matters if it cannot provide a timely response".

[20] Staff did not cross-examine Cerato on his Affidavit or file any evidence. Staff offered certain factual clarifications in their submissions, namely that Cerato failed to mention the constitutional issues he raised shortly before the merits hearing or the emergence of the COVID-19 pandemic shortly after the issuance of the Notice of Hearing.

[21] Staff asserted that the subjective, self-serving statements in the Affidavit, combined with the lack of objective evidence about his health and psychological impacts and the threatening communications failed to meet the high evidentiary threshold required to establish a Charter violation or an abuse of process. Staff argued that the Affidavit was similar to the "unsupported, self-serving protestations of harm" considered in *Zang v. Alberta Securities Commission*, 2019 CarswellAlta 2233 (QB), where Justice Millar denied a claimed contravention of s. 7 of the Charter based on affidavit evidence that lacked objective medical evidence to establish state-caused harm.

[22] In oral submissions, Staff identified specific concerns about the Affidavit evidence, including:

- internal inconsistencies, such as Cerato's claim that the delay impacted his close, personal relationships while also stating that he had entered into a new serious relationship;
- the lack of objective evidence, specifically that Cerato indicated he received communications threatening harm to him but he did not indicate what those threats were, or the nature of those communications to him; and
- exaggerated statements, such as the claim that various articles were written about him during the period of delay but he only identified a single article.

[23] Cerato denied that the Affidavit was self-serving. He indicated that it provided corroboratory evidence when available and that Cerato should not be required to release his complete health file without a sealing order. To note, such an order was not requested by Cerato. Staff suggested that the presumption from this was that there was no evidence available for uncorroborated statements in the Affidavit, and that unsubstantiated claims of harm "in no way meet the threshold of seriousness envisioned by" the Supreme Court when assessing the abuse of process test.

[24] In our oral decision, we determined that Cerato's Affidavit evidence was not compelling, that it was speculative, self-serving, and, at times, contradictory, and that most assertions in the Affidavit were unsupported by objective documentation.

[25] Key to Cerato's position was evidence of his health impacts, for which he provided no objective evidence supporting the generic and conclusory statements in the Affidavit. In particular,

Cerato offered insufficient detail about the symptoms he experienced so that we could gauge the severity of his health impacts. Moreover, he provided no information about the "medical/psychological attention" he sought, such as the identity and qualifications of any medical personnel he spoke with, any tests he underwent, any diagnosis he may have received or medications he may have been prescribed, or whether he was provided and followed a proposed course of treatment. Although Cerato surmised in the Affidavit that the effects were caused by the delays, he provided little detail as to the timing of the impact of the delays on him and did not indicate when he sought medical attention. In short, the Affidavit failed to provide a sufficient basis for us to assess whether the health impacts he experienced met the high threshold required to justify a stay of proceeding or to confidently determine that the effects were, in fact, caused by the alleged delay.

[26] Similarly, the threats made to Cerato by others lacked sufficient detail for us to draw any reliable conclusions. Aside from two individuals identified as having made threatening communications within the past year, we do not know how many threats he received, who made those threats, or when they were conveyed. We also do not know the content of those threats, how they were communicated to him, or what steps he took in an attempt to deal with them. Without knowing such information, the suggestion that individuals were taking matters into their own hands based on administrative delay was speculative and we find somewhat implausible. We essentially gave no weight to these assertions.

[27] There was also numerous inconsistencies within the Affidavit. Staff identified some of these in their submissions. The Affidavit also claimed that Cerato was unable to communicate with others, but he seemed able to discuss the ASC and this proceeding with various associates and with the author of the news article attached to the Affidavit. There was also no plausible explanation why Cerato could not similarly discuss the proceeding with his daughter. His supposition that he could not otherwise re-establish his bond with her was unconvincing.

[28] We also gave no weight to the opinions offered by Cerato in the Affidavit about "how the media works" as there is no evidence before us that he is competent to provide such evidence.

[29] Cerato's contention that he experienced a stigma based on ongoing media attention to this proceeding was also not established from a single news article, and the lack of detail as to his ability to earn income based on this stigma was not established.

V. ADMINISTRATIVE DELAY

[30] The leading case relating to delay in administrative proceedings is *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, where the Supreme Court determined that administrative delay may be addressed by resorting to s. 7 of the Charter or the common law principle of an abuse of process.

[31] Cerato largely relied on *Abrametz v. Law Society of Saskatchewan*, 2020 SKCA 81, a decision that has since been appealed and argued before the Supreme Court of Canada, although a decision has not yet been issued. In *Abrametz*, the Court of Appeal found an abuse of process based on administrative delay. While the court considered the result to be consistent with the principles established in *Blencoe*, it also indicated that if the decision represented a "step forward" then it was "an incremental step that is necessary to enable *Blencoe* to better serve its remedial purpose

for the benefit of both those caught up in the machinery of the administrative state and, ultimately, administrative decision-makers themselves" (para. 10).

[32] Cerato submitted that the principle of abuse of process is fully subsumed within s. 7 of the Charter and that there was no utility in maintaining two distinct approaches to address administrative delay. He cited commentary in *R. v. O'Connor*, [1995] 4 S.C.R. 411 (at para. 70) comparing the analytical framework applicable to the common law doctrine of abuse of process and the jurisprudence under s. 7 Charter, where it was observed that: ". . . the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process".

[33] These comments in *O'Connor*, a criminal case, addressing the disclosure of complainants' therapeutic records in a sexual assault case, were made at a time when there seemed to be some uncertainty as to the application of s. 7 of the Charter in respect of administrative tribunals, which led the Supreme Court to opine, subsequently, in *Blencoe* that s. 7 is not limited to the penal context and can be applied to address administrative delay if the respondent's s. 7 rights are engaged, although administrative law principles may also be considered if an infringement has not been established (*Blencoe* at paras. 45-46). Based on this, it is unclear whether the determination in *O'Connor* is applicable outside the criminal law field. In any event, *Blencoe* established the appropriate analytical framework and we will address Cerato's application consistent with that approach.

A. Section 11(b) of the Charter Not Applicable

[34] Cerato's application also relied on s. 11(b) of the Charter, which provides that any person charged with an offence has the right to be tried within a reasonable time.

[35] Section 11 does not generally apply to securities commission proceedings because the allegations are not criminal in nature and the sanctioning authority does not produce "true penal consequences" in purpose or effect (*Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 at para. 20-25; see also *Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54, *Rowan v. Ontario Securities Commission*, 2012 ONCA 208 at para. 5, and *R. v. Samji*, 2017 BCCA 415 at paras. 53-54).

[36] Cerato acknowledged that s. 11 has not been applied to a regulatory body such as the ASC, although he expressed some reservation about conceding the issue given that there might be some determination by the Supreme Court when it renders its decision in the *Abrametz* appeal. As Staff pointed out, there is no expectation that the Supreme Court will decide the appeal based on Charter principles, given that the Saskatchewan Court of Appeal decision was rendered solely on basis of the common law abuse of process doctrine without consideration of Charter issues (*Abrametz* at para. 55).

[37] We also observe that analytical principles underlying s. 11(b) of the Charter are not applicable when assessing administrative delay under s. 7 of the Charter. As stated in *Blencoe*, the Supreme Court has "often cautioned against the direct application of criminal justice standards in the administrative law area" and that s. 11(b) "has no application in civil or administrative proceedings" (*Blencoe* at para. 88).

[38] Accordingly, we do not consider s. 11(b) applicable to the Application.

B. Administrative Delay and Section 7 of the Charter

[39] Section 7 of the Charter provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

1. Infringement of Liberty or Security of the Person

[40] When assessing administrative delay in the context of s. 7 of the Charter, the question is not whether the impugned delay was unreasonable but whether it infringed the claimant's right to life, liberty or security of the person and whether the deprivation was in accordance with principles of fundamental justice (*Blencoe* at para. 46). If the claimant's liberty or security of the person interests have not been infringed, the application for a Charter remedy fails.

[41] The liberty interest under s. 7 is engaged where state compulsions or prohibitions interfere with an individual's personal autonomy to make important, fundamental life choices, although such autonomy "is not synonymous with unconstrained freedom" and s. 7 does not provide a right to economic liberty or security (*Blencoe* at paras. 49-54).

[42] The right to security of the person offers protection from "serious state-imposed psychological stress" (*Blencoe* at paras. 55, 57). In terms of administrative delay, the security of the person interest arises "only in exceptional cases" where the impugned state-caused delay gave rise to "a serious and profound effect" on the claimant's psychological integrity and "would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings" (*Blencoe* at paras. 59-60 and paras. 81-84).

2. Analysis of the Law and Application in These Circumstances

[43] As mentioned, Cerato did not make specific submissions addressing his right to liberty or security of the person, and instead focused on whether the administrative delay gave rise to an abuse of process. Staff's position was that Cerato failed to establish any deprivation of his s. 7 interests. In Staff's view, Cerato failed to show any ASC-imposed restrictions on his fundamental life choices, and he remained free to make important decisions such as determining where he wants to live and what vocation he wants to pursue. Staff also submitted that Cerato has not shown "serious" psychological harm, that any such harm was caused by administrative delay attributable to the ASC's processes and proceedings, or that it met the high threshold required to engage his s. 7 Charter rights.

[44] We determined in our oral ruling that the alleged administrative delay did not engage Cerato's liberty or security of the person interests, at least one of which was necessary to establish a contravention of s. 7 of the Charter.

[45] In respect of his liberty interest, Cerato failed to demonstrate any state compulsions or prohibitions that affected his fundamental life choices. Cerato is not subject to any ASC interim orders pursuant to s. 33 of the Act, and his ability to participate in the capital market has not been impeded by any ASC-based action.

[46] Cerato claimed that he was unable to communicate during the delay period. We inferred that his complaint related to s. 45 of the Act, which generally prevents the divulging of confidential

information or evidence obtained pursuant to an investigation. Cerato's evidence did not establish that his ability to communicate was impeded in any meaningful way by the delay, particularly in light of the suggestion in his Affidavit evidence that he freely communicated with associates about the ASC and this proceeding.

[47] Cerato also asserted that the administrative delay caused him to feel "a loss of all of my freedoms that Canada former [sic] provided" and "forced" him to relocate to Mexico. We considered Cerato's move to be a personal choice and reflected his ability to continue making important life choices for himself. To the extent that his move was predicated on the threats of harm, s. 7 of the Charter does not allocate liability to the ASC based on the actions of third parties.

[48] Turning to the security of the person interest, Cerato claimed that he experienced psychological harm, anxiety, and "serious" stress that was debilitating to him despite seeking "medical/psychological attention". As discussed earlier, without objective medical evidence, we considered these claims to be largely self-serving and unsubstantiated. In light of this and the lack of particulars or details, we are unable to determine that his alleged impacts exceeded the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer" or that his health impacts derived from the alleged period of administrative delay. But even if we were to accept Cerato's subjective assertions of health and psychological harm, we do not consider that they met the high threshold established in *Blencoe*.

[49] Accordingly, we determined that Cerato failed to establish that his s. 7 interests in liberty and security of the person have been engaged, and it is therefore unnecessary to address whether the alleged deprivation was in accordance with the principles of administrative justice.

[50] We deny Cerato's claim for a stay of proceeding based on any alleged contravention of s. 7 of the Charter.

C. Administrative Delay and Abuse of Process

[51] Administrative delay alone does not give rise to an abuse of process warranting a stay of proceedings (*Blencoe* at para. 121). Aside from circumstances where hearing fairness has been prejudiced, administrative delay may only give rise to an abuse of process where it was clearly unacceptable and inordinate and directly caused significant prejudice, such that it affected the community's sense of decency or fairness and would bring the administrative process into disrepute (*Blencoe* at paras. 115, 121-122, *Abrametz* at para. 140). *Blencoe* "for very good reasons, unambiguously set a high threshold for finding an abuse of process where hearing fairness has not been compromised" (*Abrametz* at para. 4).

[52] Cerato did not suggest that administrative delay prejudiced the fairness of the merits hearing, in the sense that it impaired his ability to make full answer and defence to the ASC's allegation. Accordingly, Cerato must show administrative delay that was inordinate and prejudiced him to such a degree that it outweighs the public interest in the enforcement of Alberta securities laws and should be remedied by way of a stay of proceeding

[53] Our analysis requires an assessment of three elements: inordinate delay, significant prejudice and weighing the competing interests.

1. Inordinate Delay

[54] The following principles regarding inordinate delay flow from the decisions in *Blencoe* and *Abrametz*:

- the respondent must demonstrate that administrative delay was "unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para. 121);
- a stay of proceedings based solely on the "mere passage of time would be tantamount to imposing a judicially created limitation period" (*Blencoe* at para. 101, *Abrametz* at para. 142);
- assessing whether delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to or waived the delay, and other relevant circumstances (*Blencoe* at para. 122, *Abrametz* at para. 142); and
- the focus is not on the length of the delay alone but on contextual factors, including the nature of the various rights at stake to determine whether the community's sense of fairness would be offended by the administrative delay (*Blencoe* at para. 122);

[55] Relevant to the analysis is whether:

- there has been an extended period of inactivity (*Blencoe* at paras. 123, *Abrametz* at para. 144);
- there was ongoing communication among the parties and the administrative body (*Blencoe* at paras. 123 and 132, *Abrametz* at para. 144);
- the delay is attributable to the administrative body (*Abrametz* at para. 145) and whether the respondent contributed to the delay (*Blencoe* at para. 125);
- the respondent attempted to expedite the process or raised with the tribunal specific concerns as the prejudice or hardship (*Blencoe* at para. 128); and
- the delay is analogous to that in other cases (albeit this factor has limited weight) (*Blencoe* at paras. 129-130, *Abrametz* at para. 144).

[56] In terms of calculating the period of delay, the court in *Abrametz* indicated that it commences "when the regulator or other administrative entity knows enough about the nature of and foundation for a complaint or issue that might engage its investigatory, charge, decision-making and/or enforcement processes that it would be obliged to consider taking action" (*Abrametz* at para. 148). Depending on the nature of the administrative tribunal, the relevant time might begin on the date the complaint was received rather than the time when the investigation commenced or when charges are laid (*Abrametz* at para. 149). While the relevant time period would typically end at the date of the hearing, delay after the commencement or conclusion of the hearing may also be considered where appropriate (*Abrametz* at para. 150). Because the focus is on unnecessary delay, the assessment also requires consideration of the inherent time requirements and the extent to which the unnecessary delay that is attributable to the administrative body caused certain forms of prejudice (*Abrametz* at para. 147).

[57] Cerato pointed to two periods of delay that he claimed resulted in prejudice to him. The first period (which he termed "Proceedings Delay") began with the commencement of investigation on October 22, 2018 and continues to the final determination of the proceeding. The second period (which he termed the "Decision Delay") began when the hearing panel reserved its

decision on March 9, 2021. Cerato submitted that both periods of delay remain ongoing and were distinct, although he also indicated that the "Decision Delay" was included within the alleged "Proceedings Delay".

[58] We understood his concern was with the overall time required by the ASC to resolve the issues in dispute, from the time the investigation commenced until a final determination has been rendered and included the time period for the merits panel to issue the Merits Decision.

[59] We have divided our analysis into three distinct timeframes, specifically the time required for the investigation, the time related to the hearing, and the deliberation time after the panel had reserved its decision. We do this in part because the nature of the prejudice differs for a respondent at these various stages. For example, an ASC investigation remains confidential and individuals are not in "legal jeopardy" before a notice of hearing has been issued (*Zang* at para. 42). Once a notice of hearing has been issued, the proceeding becomes public and the respondent's rights come into play, include an ability to access Staff's disclosure and the right to make full answer and defence. Staff also submitted that post-hearing delay is less prejudicial because the evidence is on the record and there is a public benefit for the panel to take the necessary time to render a fair and accurate decision.

[60] While the proceeding will continue until a final determination has been made addressing sanction and cost-recovery orders, we have not incorporated the anticipated time into our analysis. At this point, the timing of a sanction decision is a matter of speculation, although there is no reason to expect that the time required to receive submissions on sanction will extend beyond the inherent time requirements.

(a) Investigation Time

[61] Cerato maintained that Staff's investigation was not pursued in a timely fashion. He indicated in the Affidavit that the underlying transactions were relatively simple and did not result in a significant number of documents, and that the events occurred over a relatively short period of time of approximately six months. Staff submitted that an investigation into potential capital market misconduct has obvious inherent time requirements, so that investigators can assess the underlying complaint and determine whether further action is warranted. Included within the scope of this is assessing whether further investigative steps are necessary, whether to commence a proceeding and whether that proceeding is brought as a prosecution in provincial court or a hearing before an ASC panel (*Re Arbour Energy Inc.*, 2010 ABASC 11 at para. 70).

[62] The only restriction in the Act pertinent to the timing of an investigation is the limitation period in s. 201, which precludes a proceeding from being commenced more than six years from the day of the occurrence of the last event on which it is based. Here, Staff's investigation was such that the Notice of Hearing was issued within two years of the events that gave rise to Staff's allegations. While the Affidavit provided that the underlying matters were simple, uncomplicated transactions that did not give rise to a significant number of records, that alone does not necessarily make the investigation any easier or less complicated. While we were not provided evidence of the time required for comparable investigations, we find that the investigation seemed to have proceeded in a timely fashion and note the number of interviews and the amount of materials covered on a relatively new topic of cryptocurrency was involved.

[63] While Cerato acknowledged the inherent time requirements necessary for a securities investigation, he pointed to a period of apparent inactivity during the investigation – from June 2019 when the last witness was interviewed to the issuance of the Notice of Hearing on February 28, 2020 – that remained unexplained. He submitted that without an explanation, the ASC should bear responsibility for the entirety of this apparent gap. Staff pointed out that the confidential nature of its investigations can make it seem like there are periods of inactivity despite significant, ongoing investigative activities being undertaken behind the scenes. This point was discussed in *Re Application 20210107*, 2021 BCSECCOM 394 (at para 54), leave to appeal granted on other grounds (*sub nom. Morabito v. British Columbia (Securities Commission)*, 2021 BCCA 473):

Investigations often include phases where significant amounts of documents and related information are collected, followed by periods which might look like inactivity to those outside of the investigation but which include significant analytical work by investigators, including work which might lead to further rounds of information collection. To find that the investigation has been "inactive" based solely on outside appearances of inactivity, when the total duration of the investigation is not beyond the norm, would be speculation.

[64] By June 2019, investigators had collected an unknown number of documents and obtained information from interviewing 14 witnesses. We had no evidence indicating that investigators were not actively engaged in assessing and analyzing this information beyond that date, and we considered it a matter of speculation to suggest that the investigation was potentially inactive until the Notice of Hearing was issued in February 2020. Certainly, the expectation is that a securities enforcement investigation should proceed expeditiously, but it should not be at the expense of a careful assessment as to whether further investigative or enforcement action is necessary and in the public interest.

[65] Here, Staff investigated an unregistered cryptocurrency investment opportunity, which conceivably required careful deliberation when deciding whether to proceed with allegations and a hearing. Pending that determination, Staff's investigation remained confidential and Cerato was not in "legal jeopardy", in the sense that he did not face any allegations nor was he subject to any interim orders (*Zang* at para. 42). We considered Staff's investigation time to be reasonable in the circumstances and not reflective of any undue delay.

(b) Hearing-Related Time

[66] Cerato did not specifically challenge the time required for hearing-related matters – namely, from the issuance of the Notice of Hearing to the conclusion of oral submissions – other than to submit that Staff did not pursue a timely hearing. Staff pointed out that the hearing dates were established in consultation with the parties and Cerato did not press for earlier hearing dates nor did he raise any concerns relative to the timing of the hearing. Instead, Cerato's request for an adjournment of the hearing was denied. In the circumstances, Staff submitted that the ASC cannot be held accountable for not setting an earlier hearing date.

[67] The time required to commence a hearing after the issuance of a notice of hearing is necessary to provide a respondent with a fair opportunity to retain counsel, review and assess Staff's disclosure, consider whether the allegations are sufficiently particularized, and provide an opportunity to prepare a defence. The time may also permit some consideration about pursuing alternative resolutions, including to potentially resolve the allegations. In the circumstances, we considered that the period of time from the Notice of Hearing to the start of the merits hearing was

reasonable and within the normal and inherent time requirements of an ASC enforcement proceeding. We took no guidance from Cerato's suggestion that the delay in this matter exceeded the presumptive ceilings established in *R. v. Jordan*, 2016 SCC 27, largely because *Jordan* was decided in the context of s. 11(b) of the Charter but also because those ceilings are calculated from the date of the criminal charge until the actual or anticipated end of evidence and argument and were not intended to include time for investigation or deliberation.

(c) Deliberation Time

[68] Cerato's position was that the time to deliberate and provide reasons for a decision forms part of the administrative delay (see *Abrametz* at para. 150). He argued that the 13 months required for the hearing panel to issue the Merits Decision was "too long a period of time for any decision to be made", that "13 months is dilatory to the extreme", and that the deliberation time, on its own, constituted an abuse of process.

[69] Cerato cited the Supreme Court decision of *R. v. KGK*, 2020 SCC 7, which considered the time required for a criminal trial judge to deliberate and render a verdict in the context of an accused's right to be tried within a reasonable period of time under s. 11(b) of the Charter. Cerato submitted that an ASC panel's deliberation time should be at least the same as it is for a court, and pointed to the Canadian Judicial Council guideline referenced in *KGK* (at para. 63), which indicated that judgments should be delivered within six months after hearings (albeit subject to special circumstances).

[70] Staff did not suggest that deliberation time should not be considered as part of administrative delay but submitted that the analysis should follow the *Blencoe* approach given that *KGK* was a criminal case determined in the context of s. 11(b) of the Charter. Staff also observed that the result in *KGK* seemed to undermine Cerato's position, given that the nine to ten months required by the trial judge to render a verdict in that case (at a time when the accused's liberty was at stake) was upheld by the Supreme Court of Canada. Staff also pointed to commentary in *KGK* (at para. 60) indicating that deliberation time is less prejudicial to hearing fairness and benefits both the accused and society at large because it helps ensure fair and accurate decision making.

[71] Cerato listed a dozen ASC decisions rendered within the past two years, and pointed out that only one exceeded 12 months in deliberation time (ostensibly because it was a more complicated proceeding relating to an "elaborate pump and dump scheme"). Staff submitted that the timelines in other cases are considered to be of limited utility and weight, and that the cases cited by Cerato were not an "apples to apples" comparison as they included a variety of applications and not necessarily a merit hearing such as this.

[72] Finally, Cerato submitted that Staff's allegations were not complicated, that the hearing panel had not provided a timeline in relation to providing its decision, and that Staff took no steps to ensure that a timely decision was rendered.

[73] Staff indicated that the alleged deliberation delay was outside their purview, although Staff raised certain contextual factors not raised by Cerato that seemed to add to the complexity of the proceeding and likely had implications for the inherent time required for the hearing panel's deliberations. Taking into account these circumstances, Staff submitted that the time period was not, in context, untimely.

[74] One factor identified by Staff was the emergence of the COVID-19 pandemic, which clearly impacted court and administrative proceedings, in part by creating systemic bottlenecks after hearings were initially adjourned and had to be rescheduled. Staff submitted that this likely had implications for the inherent time requirements of a proceeding, including the time required for ASC panels to issue their decisions.

[75] Another contextual factor was Cerato's raising of constitutional questions on the eve of the hearing, as well as the novel cryptocurrency issues argued in the hearing, which had to be addressed in the Merits Decision. Staff observed that most of the Merits Decision was devoted to the constitutional issues. Moreover, the Merits Decision indicated (at para. 113) that these issues were time-consuming, in large part because they were "convoluted and carelessly drafted" and required "a great deal of effort parsing and untangling Cerato's arguments so they could be addressed in a coherent manner", making the Merits Decision "far more time-consuming than would be the case if the arguments were concisely and intelligibly articulated". Staff accepted that it was within Cerato's purview to contest the constitutional issues as part of the hearing process, but suggested that these matters could have been addressed before the merits hearing and that Cerato should not be taking issue with the hearing panel's deliberation time after unsuccessfully raising substantive issues "on the eve of the hearing". Cerato reiterated that the matter was not complicated and suggested that despite these challenges, there was still a delay in the issuance of the Merits Decision.

[76] While the 13-month time period to issue the Merits Decision may seem unusually long on its face, both *Blencoe* and *Abrametz* make it clear that assessing whether a time period is inordinate requires more than a mathematical calculation of time and involves a contextual analysis of the relevant factors and circumstances to ascertain the reasonableness of the administrative delay. What may be a reasonable timeframe in one context might be considered inordinate in other circumstances.

[77] Although the Notice of Hearing made a single allegation of an illegal distribution, Cerato relied on the private investment club exemption to justify the distribution of securities in the absence of a filed prospectus. We understand from the Merits Decision that there has been few, if any, reported decisions in respect of this exemption, which suggested that the issue was relatively novel and required time to carefully consider it.

[78] Cerato also raised certain constitutional questions, which evidently required considerable resources to address, both during the merits hearing and in the Merits Decision. While the commentary in the Merits Decision does not allow us to ascertain the specific time required to address these issues, we accept that the nature of these issues had some bearing on the inherent time required to issue the Merits Decision and that such time ought not to be attributed to the ASC. We consider this to be consistent with the calculation of delay in *Blencoe* (at para. 125) where it was determined that a respondent may legitimately raise certain challenges in defending against allegations but the corresponding delay should not factor into the assessment of inordinate delay (particularly where, as here, they are unsuccessful).

[79] While there is no evidence about any ongoing communication as to the status of the decision, Cerato waited until December 2021 to advise the hearing panel that a stay of proceeding should be ordered. Even at that point, Cerato gave no indication that he was subject to the alleged prejudice that formed the basis of his application.

[80] The Supreme Court in *KGK* (at paras. 74-77) suggested that in circumstances such as this where a matter has been under reserve for a significant time without any updates, the parties might, in appropriate circumstances and through appropriate channels, request information on the status of a decision. This was thought to potentially help alleviate anxiety and concern about the delay, provide helpful information for the decision maker in managing workloads, and can establish a record.

[81] In our view, taking into account the various contextual factors (including the nature of the case and its complexity, the facts and issues and the parties' conduct), we do not find that the deliberation time required to issue the Merits Decision was unacceptable or unreasonable in all of the circumstances to the level established for it to be an abuse of process.

[82] In making this determination, we are mindful that decisions must be issued in a timely fashion, and that a level of resources must be allocated to avoid and prevent unreasonable delays and ensure that decisions are rendered in a manner that is procedurally fair to respondents (*Blencoe* at para. 135).

2. Significant Prejudice Directly Caused by an Inordinate Delay

[83] Cerato's application also failed because he was unable to establish significant prejudice based on administrative delay.

[84] In the administrative context, an abuse of process requires proof of significant and actual prejudice directly caused by inordinate delay, such that the "public's sense of decency and fairness is affected" and the administrative system "would be brought into disrepute" (*Blencoe* paras. 115 and 133). In *Abrametz*, the Saskatchewan Court of Appeal reiterated that the prejudice must be founded on proof of actual prejudice (para. 155), it must flow from the delay itself rather than the fact that the respondent faces administrative sanction (para. 152), and the magnitude of the prejudice must be such that it offends "the public's sense of decency and fairness" (para. 153).

[85] The type of prejudice giving rise to an abuse of process may include significant psychological harm or a stigma to a person's reputation (*Blencoe* at paras. 115 and 121), as well as damage to physical health, negative economic consequences and negative impacts on family, while potentially taking into account the impact of interim regulatory measures and the extent of the inordinate delay (*Abrametz* at para. 153).

[86] Cerato submitted that the prejudice he experienced was analogous to that in *Abrametz*, which led to a finding of an abuse of process. Staff pointed out that the findings in *Abrametz* were based on considerable evidence establishing a negative impact on the respondent based on lengthier and unacceptable delays, whereas Cerato's subjective claims of harm failed to meet the onus of proving significant prejudice related to administrative delay. Staff also submitted that even if the Affidavit evidence were accepted, it would nevertheless fail to establish an abuse of process. Staff also observed that it is not unreasonable to infer that Cerato's own conduct may be the cause of "ill-perception by others".

[87] As previously mentioned, we did not consider the Affidavit evidence to be compelling. In our view, that evidence failed to demonstrate that Cerato experienced significant and actual prejudice to justify a finding of an abuse of process. Moreover, while Cerato generally claimed

that all of the effects were directly due to the delay, we were unable to discern from the conclusory assertions in the Affidavit that he had established the requisite link between the alleged delay and his claims of prejudice. To be clear, Cerato failed to show that any alleged physical and psychological impacts were due to the delay in having the matter decided rather than the actual events the led to the allegations.

[88] Accordingly, Cerato has not demonstrated that he experienced prejudice of sufficient magnitude, or that the prejudice was caused by administrative delay, so as to establish an abuse of process.

3. Balancing of Competing Interests

[89] To give rise to an abuse of process, the delay must be one that would, in the circumstances of the case, bring the administrative system into disrepute (*Blencoe* at para. 115). The requisite assessment is whether "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (*Blencoe* at para. 120). Few lengthy delays will meet this threshold, and a finding of an abuse of process is "extremely rare" (*Blencoe* at paras. 115 and 120). The requirement to weigh competing interests "lies at the heart of the enquiry", and takes into account the nature of the alleged misconduct, issue or complaint in the context of the regulatory scheme and the interests it is intended to serve and promote (*Abrametz* at paras. 158 and 160).

[90] Factors to balance when assessing the reasonableness of administrative delay may include the time taken relative to the inherent time requirements, the causes of delay beyond the inherent time requirements, and the impact of the delay (*Abrametz* at paras. 169-170). Other relevant contextual factors may include whether the delay was caused by the respondent, the nature of the alleged misconduct and its impact on the affected interests, not only of the relevant public but also of the complainants (*Abrametz* at paras. 171-172). That includes consideration of the gravity of, and the impact on those directly affected by, the alleged misconduct (*Abrametz* at para. 161).

[91] Cerato submitted that administrative delay is no longer tolerated by courts and timely justice is of paramount importance. He pointed to his Affidavit, which indicated that Cerato's colleagues in the crypto-currency community doubted the ASC's ability "to govern crypto currency matters" and that securities commissions must meet the "rapid nature" of the industry to ensure that "crypto players" are provided timely decisions. While Staff submitted that Cerato's failure to establish that there was inordinate delay that gave rise to significant prejudice made it unnecessary to consider whether the ASC would be brought into disrepute, Staff indicated that only in "extremely rare" cases will an abuse of process be established.

[92] As mentioned, the Merits Decision determined that Cerato contravened s. 110 of the Act by distributing securities without a prospectus or an available exemption from the prospectus requirement. As recounted in the Merits Decision, at least 16 investors paid approximately \$200,000 to Cerato based on his "extravagant promises of spectacular returns", and that these investors were "precisely the type of people who needed the protection of prospectus-like disclosure for the securities offered by Cerato" but his contravention denied them the ability to make an informed investment decision based on full, true and plain disclosure of material information (Merits Decision at para. 285-287). In the end, it appears that these investors lost significant portions of their investment funds. Misconduct such as this have been found in

analogous situations to have "jeopardize[d] the integrity of and confidence in our capital market" (*Re 1205676 Alberta Ltd.*, 2010 ABASC 544 at para. 20). Taking into account these findings, in the context of the overall circumstances, we consider the harm to the public interest in halting the enforcement of Alberta securities laws would be greater than the damage to the public interest in the fairness of ASC proceedings by permitting the proceeding to continue to the sanction phase.

D. Rule 15-501

[93] Cerato's application alleged a contravention of ASC Rule 15-501 as one of three potential grounds for a stay of proceeding. Accordingly, we address his submission as a separate ground, although he seemingly relied on the alleged contravention in support of his contention that administrative delay would bring the ASC into disrepute.

[94] Cerato submitted that ASC panels must follow s. 2.2 of Rule 15-501, which provides:

The purpose of these Rules is to assist a panel in securing an efficient, cost-effective and timely determination of the issues raised in a proceeding. These Rules apply to any proceeding before a panel and shall be interpreted in accordance with the requirements of natural justice. A panel may exercise any of its powers on its own initiative or at the request of a party to a proceeding.

[95] The definition of a "proceeding" in Rule 15-501 includes a request by Staff for an order from the ASC under Part 16 of the Act. Accordingly, Rule 15-501 comes into play upon the issuance of a notice of hearing, but arguably does not apply to the investigation stage of a matter.

[96] Cerato asserted that ASC panels must follow their own rules, that the failure to address misconduct allegations expeditiously may undermine public confidence in the securities regulatory system (*Re Lutheran Church-Canada, the Alberta-British Columbia District*, 2019 ABASC 43 at para. 96), and that proceeding in the face of non-compliance with s. 2.2 of Rule 15-501 would cause the public to lose respect for the ASC. He submitted that adjournment applications are commonly denied by ASC panels based on concerns for the timely resolution of ASC proceedings, and that the ASC should not "talk the talk unless it walks the walk". Staff did not specifically address the issue in their written submissions, but commented in oral submissions that the provision speaks to an "efficient and timely" determination, and that taking into account the contextual circumstances (including those relative to the analysis for an abuse of process), the ASC's determination of the issues has not been untimely.

[97] According to s. 2.2 of Rule 15-501, the purpose of Rule 15-501 is to assist panels in making a determination of the issues raised in a proceeding in an efficient, cost-effective and timely way. However, the provision does not provide a specific standard, which begs the question of what is considered "an efficient, cost-effective and timely determination of the issue". Given the various types of proceedings in which s. 2.2 might apply, the answer to that will be context-driven and presumably involves consideration of similar factors assessed earlier in our analysis of whether administrative delay results in an abuse of process. In light of our earlier determination that Cerato has not established undue delay in setting the matter down for a hearing, or in the hearing panel's deliberation time, we are unable to determine that the ASC contravened s. 2.2 of Rule 15-501.

[98] In making our assessment, we observed that the expectation of a timely and efficient hearing process was advanced by certain prehearing decisions, including:

- the decision to proceed with the merits hearing despite the onset of the COVID-19 pandemic, albeit in a modified format that permitted participants to participate remotely as necessary; and
- the denial of Cerato's request for an adjournment so that he could pursue his constitutional questions with the Court of Queen's Bench – a process that resulted in a delay of more than 13 months in a similar circumstance (see *Re Kilimanjaro Capital Ltd.*, 2021 ABASC 14 at paras. 4-5).

VI. CONCLUSION

[99] For the reasons provided above, we denied Cerato's request for a stay of proceeding on April 27, 2022.

May 17, 2022

For the Commission:

"original signed by"
Maryse Saint-Laurent

"original signed by"
Trudy Curran