Court File No. 26789

IN THE SUPREME COURT OF CANADA
(Appeal from the Court of Appeal for the Province of British Columbia)

BETWEEN:

BRITISH COLUMBIA HUMAN RIGHTS COMMISSION,
COMMISSIONER OF INVESTIGATION AND MEDIATION,
THE BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL
and ANDREA WILLIS

Appellants
(Respondents)

AND:

ROBIN BLENCOE

Respondent
(Petitioner)

AND:

IRENE SCHELL

Intervener
(Respondent)

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PART 1

STATEMENT OF FACTS

GENERAL FACTS

1. This is an appeal of a decision of the British Columbia Court of Appeal staying the adjudication by the British Columbia Human Rights Tribunal (the "Tribunal") of a sexual harassment complaint brought by Ms. Andrea Willis (the "Complainant") against Mr. Robin Blencoe (the "Respondent Blencoe") on the ground that the time taken by the British Columbia Council of Human Rights (the "Council"), and its successors, to process this complaint, infringed section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

2. Andrea Willis is the Complainant in Human Rights Complaint File Nos. 951432 and 951433. These complaints were filed on August 1, 1995, against the Respondent Blencoe, and the related case against her Majesty the Queen in Right of the Province of British Columbia as represented by the Office of the Premier and Cabinet Office (the "Province").

AR, p. 410

3. The Complainant is an employee of the Government of British Columbia. In 1994 and 1995 she worked as an employee in the office of the Minister of Municipal Affairs, Recreation & Housing, the Respondent Blencoe. In 1995, she alleged that she was sexually harassed by the Respondent Blencoe while she worked in his office. She invoked her legal right to seek protection of the Human Rights Tribunal. She sought recognition of her legal rights and protection of the Human Rights Council as it then was, in August 1995. She complied with every request by the Council for information. She cooperated fully with the Council at every stage. The Respondent Blencoe fought every step. After a protracted investigation, the Commission as it then was, determined that there was sufficient merit to her case that she was given dates for the hearing of her complaint in March of 1998. Before that hearing could take place the Respondent Blencoe argued before the British Columbia Supreme Court and then the British Columbia Court of Appeal that his right to a speedy hearing had been denied and that therefore the Complainant should not have her case heard by the Tribunal. A majority of the Court of Appeal agreed and entered a stay.

GENERAL CHRONOLOGY OF EVENTS

4. In March of 1995, the Respondent Blencoe was a Cabinet Minister in the Provincial Government of British Columbia.

5. From May 3, 1993 until March 15, 1995, the Complainant worked as a clerk 4, and later clerk 5, in the Office of the Minister of Municipal Affairs, Recreation & Housing, the Respondent Blencoe.

AR, p. 430,438

10 6. In March of 1995, Ms. Yanor, an assistant in the offices of the Respondent Blencoe, brought allegations of sexual misconduct against him. The Respondent Blencoe advised the Premier after the Yanor allegation that there would be no more. Several more women came forward with allegations. Amidst these allegations, in April of 1995 the Respondent Blencoe was removed from Cabinet because, the Premier stated, Mr. Blencoe had misled him about the possibility of further allegations. He was later removed from the New Democratic Party caucus. These events attracted a great deal of media scrutiny directed toward the Respondent Blencoe.

Ar, 53 para.5, p.52 para.9, Reasons for Judgment, Lambert J.A., AR, p. 668 para.27.

7. On April 16, 1995, a Ms. Nancy Parker went public with complaints of sexual misconduct,
20 against the Respondent Blencoe whom she met in his capacity as a Member of the Legislative Assembly, when she sought his assistance in obtaining accommodation.

Affidavit of Robin Blencoe, AR, p. 61 para 40, p. 163, 164

8. Nancy Parker commenced a civil suit against the Respondent Blencoe alleging non-consensual sexual activity against her by the Respondent Blencoe.

AR, p. 163, Reasons for Judgment, Lambert J.A., AR, p.668 para.27

9. In July of 1995, Ms. Irene Schell, filed a complaint under the *Act*, also alleging that the Respondent Blencoe had sexually harassed her. Ms. Schell released, to the press, the details of her
30 complaint at that time.

10. In August 1995, the Complainant, filed a complaint under the then *Human Rights Act*, S.B.C. 1984 c. 22, (the "*Act*") alleging that the Respondent Blencoe had sexually harassed her. The Complainant, at the same time, filed a complaint against the provincial government with respect to the same events. The details of the Complainant's complaint have never been made public except through the documents filed in Court in these proceedings.

AR, p. 449.

11. Ms. Willis' complaint is separate from the complaint of Irene Schell, Human Rights Complaint File No. 951395, and is not related in any way to the complaint of Ms. Schell, save and except that the Respondent Blencoe named is the same and there is some similarity in characteristics in the facts of the allegations.

AR, p. 433

12. The complaints were filed and the processes of gathering information were commenced by the Council under the *Act*. That legislation was replaced, in January of 1997, by the *Human Rights Code*, R.S.B.C. 1996, c.210, Part 3, ss.21-20 (the "*Code")* under which the investigation was continued through the offices of the Commissioner of Investigation and Mediation, one of three Commissioners of the British Columbia Human Rights Commission (the "Commission"). The Commissioner of Investigation and Mediation must, after an investigation, either dismiss the complaint or refer the complaint, under the *Code*, for hearing to the Tribunal, an adjudicative body independent of the Commission. If the complaint is referred for hearing, presentation of the complaint before the Tribunal is conducted by the Complainant not the Commission.

13. The appointed investigator reported to the Commissioner of Investigation and Mediation in May of 1997. On July 3, 1997, that Commissioner referred the Complainant's complaint to the Tribunal for a hearing. On September 10, 1997, the Tribunal caused notice to be sent to the Complainant, that her hearing would be held on March 18, 19 and 20, 1998. From the date of the Complainant's complaint, on August 1, 1995, to the date on which the Commission determined to refer the matter to a hearing, July 1997, was approximately twenty-three months. The complaint was

approved for hearing and a date was set for the hearing to take place approximately eight months later.

AR, p. 403

14. Mediation was scheduled for the Complainant and the Respondent Blencoe and commenced on December 8, 1997.

PROCEEDINGS BELOW

15. On November 27, 1998, the Respondent filed a Petition in the Supreme Court of British Columbia seeking to quash the decision of the Commissioner of Investigation and Mediation to refer the complaint to the Tribunal, and prohibiting the hearing of the complaints because of a loss of jurisdiction due to administrative delay.

16. The Petition was heard by Mr. Justice Lowry, of the British Columbia Supreme Court, on January 27 through January 29, 1998. At the commencement of the hearing the Respondent Blencoe filed an amended Petition, adding the Tribunal as a party and pleading further that the administrative delay had infringed his constitutional rights under section 7 of the *Charter*. The Respondent Blencoe reserved his argument on the section 7 issue to the Court of Appeal. Hence, the arguments before Lowry J. did not deal with the *Charter*.

AR, p. 637.

17. Mr. Justice Lowry found that there had not been unacceptable delay in the human rights administrative processes overall, and dismissed the Petition. He also concluded that the Respondent Blencoe had not suffered prejudice from the time which elapsed in terms of his ability to respond to the complaints.

AR, p. 650.

18. The Respondent Blencoe appealed that decision. The appeal was heard on March 3, 1998. On May 11, 1998, the majority of the Court of Appeal allowed the appeal and stayed the adjudication of the Complainant's and Ms. Schell's complaints. The majority based its decision on the application of section 7 of the *Charter*. Mr. Justice Lambert, in dissent, would have dismissed the appeal.

AR, p. 656.

19. In the case at bar, Chief Justice McEachern stated:

> As there seem to be no binding authorities governing this decision, I feel constrained to follow what I regard as the emerging, preferred view in the Supreme Court of Canada that section 7, under the rubric of liberty and security of the person, operates to protect both the privacy and dignity of citizens against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by the Appellant here.
>
> AR, p. 702, para. 101

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20. Chief Justice McEachern concluded that s. 7 of the *Charter* was engaged by delay in administrative proceedings, and then applied s. 7 in this case to conclude that the concepts of liberty and security of the person protected the privacy and dignity of citizens against stigma. He found, in this case, that delay created stigma and exacerbated the existing state of affairs so as to negatively impact on the Respondent Blencoe's "security of the person".

AR, p. 702-703.

21. Lambert J.A. dissented. He concluded that there had not been a violation of the principles of fundamental justice. While the Respondent Blencoe had suffered personal hardship, Lambert J.A. found that none of the stigma had been "brought about" or "much exacerbated" by the human rights administrative processes (para 29). He therefore concluded that there had been no breach of the principles of fundamental justice. Because of that conclusion, he declined to consider whether or not section 7 of the *Charter* was applicable to the issue of delay in the context at bar.

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Reasons for Judgement, Lambert J.A. (dissenting), AR, P. 666-671,paras. 24-32.

FACTS RELATED TO PREJUDICE

22. The public perception in April 1995 when the Respondent Blencoe left the Cabinet, was that there had been an accusation of sexual harassment made against him; that the Premier has asked him if there were any other potential complaints and had been assured by the Respondent Blencoe that there could not be; that other complaints of sexual harassment were made against him within a few days; that the Premier said that the Respondent Blencoe no longer had his confidence; and that the

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Premier terminated the Cabinet appointment. The Respondent Blencoe was later expelled from the N.D.P. Caucus. There was much press coverage.

Reasons for Judgment, Lambert J.A. (dissenting), AR, p. 668, para. 27

23. Several other women came forward with complaints of sexual misconduct against the Respondent Blencoe. There was further press coverage.

24. On April 16, 1995, a Ms. Nancy Parker provided the press with details of sexual misconduct allegations, against the Respondent Blencoe whom she met in his capacity as a Member of the Legislative Assembly, when she sought his assistance in obtaining accommodation.

Affidavit of Robin Blencoe, AR p. 61 para 40, 163,164

25. In April of 1995, the Respondent Blencoe stated to the press that "I have serious doubts that anyone will bring any complaint to the Human Rights Council which means that I am without any process by which to demonstrate my innocence."

AR, p. 82

26. Nancy Parker commenced a civil suit against the Respondent Blencoe alleging non-consensual sexual activity against her by the Respondent Blencoe.

AR. p. 163

27. In July 1995, Irene Schell provided a complaint to the British Columbia Human Rights Commission.

AR, p. 428.

28. In July 1995, Irene Schell went public with details of her complaint against the Respondent Blencoe. There was again press coverage.

AR, p. 54 para. 16

29. On July 26, 1995, the Respondent Blencoe is quoted in the Victoria newspaper, The Times Colonist, as recognizing that the human rights processes take "three, four or five years."

AR, p. 128

30. On August 1, 1995, Andrea Willis filed her complaint with the Council alleging incidents that occurred in August 1994 and March 1995. She did not publicly reveal details of her complaint or even that she had filed one.

AR, p. 629, para. 3

31. On September 8, 1995, the Respondent Blencoe provided several statements to the press regarding the allegations.

AR, p. 120

10 32. On September 20, 1995, the Respondent Blencoe is quoted as saying that, with respect to Schell's complaint he will "fight the complaint "tooth and nail" and try to get Schell's suit thrown out before it gets to a full hearing."

AR, p. 129

33. In late October 1995, the fact that Ms. Willis had made a human rights complaint in August of 1995, for the first time, became public knowledge. The details of the complaint were not made public.

AR, p. 131

20 34. No apparent press coverage from February to April, 1996.

35. In April 1996, the Respondent Blencoe went public with an attack on the processes before the Commission and the Complainant's position with respect to her complaint in a public letter addressed to his constituents and reproduced in newspaper articles.

AR, p. 134, 135

36. The Blencoe family moved to Ontario. Victoria MacPherson Blencoe went to university. The Respondent Blencoe got a job as Town Administrator.

AR, p. 57, para. 22,26.

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37. Press coverage in Ontario. Focuses primarily on the reason he was removed from Cabinet. Brief mention of three outstanding cases in British Columbia.

AR, p. 154-159.

38. Victoria MacPherson Blencoe obtained a job in Victoria. Family returned to Victoria, British Columbia.

AR, p. 385, para.15

39. The first indication of a revival of media attention occurred on November 27, 1997, when the national news was advised before the complainants in the human rights complaints or their counsel, that an application for judicial review was pending in this matter.

AR, p. 394, 407, 410

FACTS RELATING TO PROCESS

40. Time line of Willis complaint;

August 1, 1995	Formal Complaint Filed: Identifies date of alleged conduct as 94/08/17 to 95/03/20 AR, p. 273
September 11, 1995	Complaint forwarded to Robin Blencoe by Human Rights Officer; response requested AR, p. 271
September 13, 1995	Mr. Blencoe's counsel, Mr. Joseph Arvay, wrote to Human Rights Officer claiming age of complaint "well over one year old", demanding section 13 (timeliness) investigation, although the complaint was filed on August 1, 1995, and the most recent incident giving rise to complaint was alleged to have occurred in March of 1995. AR, p. 278 *Human Rights Act* S.B.C. 1984, c. 22 section 22
September 14, 1995	Human Rights Officer letter to Arvay saying no section 13 issue because not filed late but rather filed approximately 5 months after the last incident of alleged sexual harassment. Response to allegations requested. AR, p. 279

September 15, 1995 Arvay letter to Human Rights Officer (not included in Smith Affidavit)referenced in September 21, 1995 letter from Human Rights Officer to Arvay.

AR, p. 280

September 21, 1995 Letter from Council to Arvay stating that because of his demand, an investigation further to Section 13 of the Human Rights Act will be pursued relating to timing of complaint: invites submission within 15 days

AR. p. 280

October 11, 1995 Arvay to Human Rights officer declines to respond to complaint until section 13 is addressed; includes section 13 submissions on delay.

AR, p. 281

October 16, 1995 Willis submissions on section 13 timeliness argument.

AR, p. 293

December 18, 1995 Council decision regarding section 13 argument: determination made to proceed to investigation.

AR, p. 297

January 11, 1996 Human Rights Officer letter to Arvay; requests reply to allegations in complaint.

AR, p. 296

January 24, 1996 Arvay letter to Council refusing to reply to complaint until Willis' produces documents in possession of Government.

AR, p. 299

January 29, 1996 Manager of Inquiries and Mediation letter to Arvay advises will not demand information from other people until investigator appointed, which won't happen until response to allegations is received.

AR, p. 257

January 29, 1996 Arvay letter to Manager of Inquiries advising client will waive the investigation process and asks that the matter be set down for a hearing.

AR, p. 301

February 22, 1996 Manager of Investigation to Arvay advising that statutory requirement to investigate before decision to refer to hearing, and says unable to make decision without client's response to allegations-if doesn't warrant further

investigation after receipt of client's response, will consider referral to hearing. Indicates that jurisprudence requires there be a basis in evidence to warrant referral to a hearing.

AR, p. 302

February 27, 1996 Human Rights Officer to Arvay; complaint as amended to more accurately reflect name of Government Respondent

AR, p. 305

February 29, 1996 Arvay to Council, not prepared to concede that there is a basis to go to hearing and states that if to go to expedited hearing must be on basis that there is no reasonable basis in evidence to warrant a hearing

AR, p. 304

March 20, 1996 Human Rights Officer to Arvay (not reproduced in materials but referred to in Arvay letter of April 10, 1995)

AR, p. 311

April 10, 1996 Arvay to Human Rights Officer; says treat our October 11, 1995 submission on delay, as response to complaint.

AR, p. 311

September 6, 1996 Council letter to Arvay advising of appointment of investigator.

AR, p. 314

November 8, 1996 Investigator to Arvay advising of results of interviews and requesting response.

AR, p. 315

December 23, 1996 Arvay to investigator; response to November 8, 1996 letter

AR, p. 319

March 3, 1997 Investigation report; sent to Arvay; requests response by April 8, 1997

AR, p. 323

March 27, 1997 Arvay letter to Investigator; reply to report

AR, p. 336

April 8 , 1997 Willis letter to Investigator, reply to report

AR, p. 342,495

April 15, 1997 Manager of Investigation to Arvay; provides other parties response to

investigation report; request any final submissions by May 15, 1997

AR, p. 341

May 14, 1997 Final submissions from Arvay

AR, p. 37

May 15, 1997 Final submissions from Willis

AR, p. 520

July 3, 1997 Commissioner for Investigation and Mediation refers matters to Tribunal for hearing

AR, p. 373

10 September 10, 1997 Hearing date set for March 18, 19 and 20, 1998 and pre-hearing conference date set for November 14, 1997. The parties were advised with respect to the pre-hearing conference that it would allow for joint consideration of many issues including confirmation of hearing dates, preliminary applications and schedule for submissions, outline of issues and anticipated evidence including witness lists, procedural issues, requests for a mediator and other issues.

AR, p. 374, 270, 403-404

October 6, 1997 Arvay unilaterally cancels pre-hearing conference

AR, p. 617, 618, 631, Reasons for Judgement, para. 8

20

October 9, 1997 Mediation date set for December 8, 1997

AR, p. 617,618

November 27, 1997 Arvay files judicial review petition setting returnable date December 15, 1997. The hearing dates were set unilaterally by Mr. Blencoe, without consultation in any form with any of the other participants to the human rights processes.

AR, p. 1, 393, 394

41. The period of time from the filing of the complaint by the Complainant to the hearing dates

30 as scheduled, is two years, seven months and approximately three weeks.

42. In British Columbia, the decision here under appeal has been applied to stay proceedings in other human rights cases, and stay an employee's claim for wages owing under the *Employment Standards Act*, R.S.B.C. 1996, c.113, as well as professional societies disciplinary proceedings.

> *In the matter of an appeal pursuant to section 112 of the Employment Standards Act and Westhawk Enterprises Inc.*, BC EST #D302/98, July 3, 1998 (Employment Standards Tribunal) at p.5
> *Thomson v. College of Physicians and Surgeons of British Columbia*, (1998), (unreported) (B.C.S.C.). at p. 16, para. 42 and p.18, para. 48.

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PART 2

POINTS IN ISSUE

43. The position of this Appellant is that there are four points in issue:

(i) Does section 7 of the *Charter* circumscribe the impact of delay in human rights administrative proceedings not involving penal sanctions.

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(ii) If section 7 does apply to circumscribe the impact of delay in human rights administrative proceedings not involving penal sanctions, to what extent does it apply to such proceedings in which a private person, not the state, conducts the presentation of the complaint.

(iii) To what extent do the principles developed in the criminal law context through the *Askov* and *Morin* line of cases apply to the issue of delay in the administrative law context.

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(iv) What is the balance between the rights of the Respondent Blencoe and the rights of the Complainant.

PART 3

ARGUMENT

FIRST ISSUE: **Does section 7 of the *Charter* circumscribe the impact of delay in human rights administrative proceedings not involving penal sanctions.**

44. This Appellant adopts and relies on the argument of the Appellant British Columbia Human Rights Commission that section 7 of the *Charter* does not engage to regulate delay in the conduct of non-penal human rights proceedings where the delay does not interfere with the right to a fair hearing.

SECOND ISSUE: **If section 7 does apply to circumscribe the impact of delay in human rights administrative proceedings not involving penal sanctions, to what extent does it apply to such proceedings in which a private person, not the state, conducts the presentation of the complaint.**

45. Traditionally, the argument of delay in government proceedings has arisen in the context where an institutional body has conduct of the presentation of the case and control over the resources and processes required to bring the case to presentation.

46. It may be true that some of the human rights legislative frameworks in Canada provide for that type of process.

47. In the case at bar, it is a private party, the Complainant who has conduct of the case, responsibility to present the case. However, it is the state which controls the processes and resources for the hearing of the matter.

48. This difference from the sort of process in which delay arguments have arisen in the past, is an important consideration in process.

49. The court has addressed the existence of different processes noting that the rules of fundamental justice, including procedural fairness and natural justice, will vary from context to context.

Pearlman v. Manitoba Law Society [1991] 2 S.C.R. 869 at 884 per Iacobucci JJ.

50. If the myriad of statutory tribunals that have traditionally been obliged to accord nothing more than procedural fairness were obliged to comply with the full gamut of principles of fundamental justice, the administrative landscape in this country would undergo a fundamental change.

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Mooring v Canada (National Parole Board), [1996] 1 S.C.R. 75 at 97-8.

51. It is clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked.

R. v. Lyons [1987] 2 S.C.R. 309 at 361, per La Forest, J.

52. It is instructive then to consider the processes at play here and to compare to other processes such as the criminal and the purely civil litigation to determine if the processes used in this human rights context are essentially fair to the Respondent Blencoe.

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CRIMINAL CONTEXT

53. A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public

R. v. Shubley [1990] 1 S.C.R. 3 at 19.

54. The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings itself.

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R. v. Shubley [1990] 1 S.C.R. 3 at 18-19.

55. In criminal matters, institutional delay lands at the feet of the Crown because it is the party that controls the resources. There are two parties: the accused is one, the Crown is the other. Mr. Justice Cory of this court, speaking for the majority in *Askov* stated:

> It must be remembered that it is the duty of the Crown to bring the accused to trial. It is the Crown which is responsible for the provision of facilities and staff to see that accused person are tried within a reasonable time.
>
> *R. v. Askov*, [1990] 2 S.C.R. 1199 at p. 1225f

56. The charge must be laid within six months if of lesser seriousness, but if of greater seriousness, the process of indictment does not have a time limit. The accused is required, under threat of arrest, to participate, at least to the extent of being present personally or by agent, and faces consequences that range from very slight in the case of a discharge, to mandatory life imprisonment in the case of conviction for murder. The potential consequences to the accused person are the most serious. The accused may be detained in custody pending trial, or released on restrictive conditions. The procedural protections would appropriately be the most stringent. As was stated by Dickson, C.J.C., in the criminal proceeding the state brings

> "... the full force of the state's power against a blameworthy individual for the purpose of imposing punishment."
>
> *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892 at 917h, per Dickson C.J.C.

57. It is appropriate that when the Court determines the issues relating to institutional delay the court holds the Crown liable *because it is the party to the proceedings that controls the resources. It is the party that has the resources to determine which cases get priority and which don't. It is the party that brings a person before "the full force of the state's power."*

HUMAN RIGHTS

58. By contrast, the human rights processes before the court place the Respondent Blencoe at very little comparative risk. The legislation is remedial not punitive. There is no capacity to punish in this environment.

59. It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. ...

> Instead provisions found in human rights statues generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.
>
> *Canada (Human Rights commission) v. Taylor* [1990] 3 S.C.R. 892 at 917h, per Dickson C.J.C.

60. The *Code* aims at removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.

61. And later

> ... We are dealing here with the consequences of conduct rather than with punishment for misbehavior. In other words, we are considering what are essentially civil remedies.
>
> *Re Ontario Human Rights Commission and Simspons-Sears Ltd.* (1985) 23 D.L.R. (4th) 321, [1985] 2 S.C.R. 536 at 546b and 549i.

62. Also, compared to the rights of the Complainants in criminal matter, rights set out in human rights legislation are identified as "almost constitutional" or, of greater strength than other legal rights.

> *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84
> *Re Ontario Human Rights Commission and Simspons-Sears Ltd.* (1985) 23 D.L.R. (4th) 321, [1985] 2 S.C.R. 536 at 546b and 549i.

63. The purposes of the legislation in the case at bar are set out in Section 3 of the *Code*. The purposes of the *Code* are largely those of identifying and preventing discrimination prohibited by the *Code*, and promoting a climate of understanding and mutual respect where all are equal in dignity and right, and to provide persons who are discriminated against, a means of redress.

> *Human Rights Code*, R.S.B.C. 1996, c. 210 as amended, s.3.

64. The *Code* sets out the procedure for a person to pursue protection of their rights. A complaint must be filed within one year or the complaint may not be accepted. The Commission then deals with preliminary matters with respect to issues of delay in filing, bad faith, and other issues. Once these matters are dealt with, the Council can determine whether or not to proceed to investigation. After investigation the matter cannot be referred to a hearing until there is a

determination as to whether or not there is a reasonable basis in the evidence compiled by the investigator to refer the matter to a hearing.

65. During this process, the Complainant retains ownership of the complaint, and can withdraw the complaint at any time. The complainant must make a prima facie case. While the Respondent is invited to respond to the allegations, he does not need to participate in order to have a complaint dismissed at this stage: the complainant is required to establish that there is a reasonable basis in the evidence to refer the matter to a hearing.

AR, p. 302, Human Rights Code, R.S.B.C. 1996, c.210,s.27.

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66. If the matter is referred to a hearing, the Tribunal sets the hearing date and the hearing is conducted.

Human Rights Code, R.S.B.C. 1996, c. 210 as amended, ss. 35 and 36.

67. The persons who are entitled to appear at the hearing are the complainant, or the person that filed the complaint on behalf of the complainant, the person who is alleged to have contravened the legislation, and any other person whom the Board of Inquiry considers would be directly affected by an order made by it. In this respect, proceedings before the Tribunal resemble a civil proceeding. However, the Commission may require that it be made a party to the hearing.

20 *Human Rights Code*, R.S.B.C. 1996, c. 210 as amended, s. 36

68. The Respondent is not at risk for costs as a matter of course, but only if the Respondent's conduct in the proceedings is improper. The Respondent is not liable for punitive or aggravated damages.

Human Rights Code, R.S.B.C. 1996, c. 210 as amended, s.37(4).

69. In the case at bar, however, although there are two parties to the complaint, there is a third entity involved in the process. That entity is neutral to the complaint but it controls the processes without which the complaint cannot proceed.

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70. The remedies available to a complainant are compensatory, with general damages limited by decision to the $6,500.00 that appears to be the maximum that has been awarded by the B.C. Human Rights Tribunal or the $5,000.00 that is otherwise the most awarded for high end cases.

Dupuis v. British Columbia (Ministry of Forests) (1993), 20 C.H.R.R. D/87 (B.C.C.H.R.) at D/92.
Guzman v. T., (1997), 27 C.H.R.R. D/349 (B.C.C.H.R.) at D365.

71. Through this process, however, the complainant, a party with conduct of the case does not control the investigative procedures, is not able to spend resources to have the process moved more quickly, nor to have a hearing conducted more quickly. In this regard as well, the process in British Columbia differs from that in the Criminal justice system.

72. The potential impact of this process on the Respondent is certainly less than that of the criminal justice system and in some respects even less than that of the civil process system.

73. Furthermore, the powers of the tribunal other than the limited and purely compensatory remedies for the complainant, allows for case by case direction for preventative purposes, to guide the entity that is found to have violated another's rights, in a manner that will assist them not to violate in the future. No aspect of this process itself is punitive. It is conciliatory and meditative with respect to a claim by a party that her rights have been violated.

Human Rights Code, R.S.B.C. 1996, c.210,s.37.

74. Hence the processes of the British Columbia Human Rights Code have little in common with the process that structure the criminal justice system in terms of purpose, design, and powers.

CIVIL

75. For further comparison, one might consider the process in civil litigation, where it is submitted the defendant may very easily be at risk of greater consequences than in the human rights context. A complainant is not normally limitted to a one year time frame. The registry makes no investigation of the case to decide preliminary issues: any such process must be brought by the respondent requiring the Respondent to make an appearance and then to make application to dismiss.

76. In the civil matter, if the Respondent doesn't participate, the Plaintiff could apply for default judgement, or have the matter before an adjudicator without any prior screening process. The Respondent is at risk for costs, and in some cases, punitive and aggravated damages. The general damages available to a complainant could very well be much greater than the $6,500.00 that appears to be the maximum that has been awarded by the B.C. Human Rights Tribunal.

77. In conclusion then, it is submitted that the court must look at the characteristics of the context in order to determine the issues relating to delay in the case before the court. In our respectful submission, the processes involved in the Human Rights complaint are closer to those of a civil litigation claim than a criminal proceeding. In such a situation the Commission acting under the *Code* is similar to a registry in the civil litigation process, albeit a registry that proactively screens complaints to the complainants benefit. In such a case, the party with carriage of the complaint is a private party. In our submission it would be inappropriate to apply the *Charter* to circumscribe delay in the process by which the neutral registry screens complaints before the matter can be sent to a hearing.

THIRD ISSUE: To what extent do the principles developed in the criminal law context through the Askov and Morin line of cases apply to the issue of delay in the administrative law context.

78. The law with respect to "delay" under the charter has been developed almost entirely in the context of the criminal justice system through the analysis of the application of s. 11 of the Charter to delay in criminal proceedings.

79. In the criminal justice system, only if a delay is unreasonable, taking into account certain considerations, does the court move to determine if there should be legal consequences because of the delay.

80. The leading cases for the principles to be applied are the *Askov* and *Morin* decisions.

R. v. Askov, [1990] 2 S.C.R. 1199 at p. 1225f
R. v. Morin [1992] 1 S.C.R. 771, at 787

81. In the *Morin* decision the court sets out the considerations that must be taken into account in determining how the court should deal with delay in any particular criminal case. Those considerations are:

1. Length of delay;
2. Waiver of time periods;
3. The reasons for the delay, including
   (a) inherent time requirements of the case,
   (b) actions of the accused,
   (c) actions of the Crown
   (d) limits on institutional resources, and
   (e) other reasons for the delay and
4. Prejudice to the accused

R. v. Morin [1992] 1 S.C.R. 771, at 787

82. There are essentially three considerations: what is the delay, who is responsible for the delay, and what is the prejudice to the accused resulting from the delay.

83. The attribution of fault for the delay is a core and central issue in these test. The party responsible for the delay, if there is prejudice to the accused, bears the consequences of the delay. If the accused is responsible, the accused has to live with the prejudice that arises from the delay. If the state, the other party, is responsible, then that party has to abide by the consequences, which may be that the state's case is precluded from proceeding. Institutional delay is attributed to the state and rightly attributed to that party because, as this Court has said:

> "It must be remembered that it is the duty of the Crown to bring the accused to trial. It is the Crown which is responsible for the provision of facilities and staff to see that accused person are tried within a reasonable time."

R. v. Askov, [1990] 2 S.C.R. 1199 at p. 1225f

84. The result is that then the consequence of the fault attributable to a party to the case, a party pursuing its rights, is borne by that party.

85. In the case at bar, the result of the majority of the Court of Appeal's decision has been to visit the consequence of any delay that has occurred on a party that is faultless *vis a vis* the delay. There

is no attribution of cause of delay to Ms. Willis by the majority in the court of appeal, or by Lowry J. At first instance. Mr. Justice Lambert, dissenting in the court of appeal, stated:

> In short, there has been some delay: some of it attributable to the Human Rights Commission and perhaps to the Human Rights Tribunal; some of it attributable to Mr. Blencoe; very little of it attributable to Ms. Schell or Ms. Willis, the two complainants.
>
> Reason for Judgment, Lambert J, AR, 669, para. 29

86. The attribution of the cause of delay does not exist in a vacuum. The assessment in criminal proceedings of fault and the consequences of delay are assessed as means of, if not punishment, then of relief from the fault of others. Thus if the delay is attributable to the Crown, a way of protecting the interests of the accused is to provide that person relief from the threat of further prosecution by the state. If the delay is attributable to the defence, then a way of protecting state interests is to, no matter what the consequences of delay to the accused, proceed with the case. One of the parties comes to the application with cleaner hands than the other. Therefore, it is just and fair that the consequences of the delay lay at the feet of the party to whom the delay is attributable.

87. In light of the fact that the state is not a party to the human rights complaint, the parties resemble those in a case of civil litigation. In this Human Rights context, however, the Commission functions like a proactive registry, but doesn't, of itself, have any power to commence or carry forward conduct of a case.

88. To the extent that this case reflects similarity to the process of civil litigation, it may be of assistance to consider the decision of the British Columbia Court of Appeal in 1982, in the case of *Irving v. Irving* (1983) 140 D.L.R. (3rd) 157.

89. In that case, ten year delay followed Examinations for Discovery before any further step was taken. The delay was intentional on part of the Plaintiff who had deliberately refrained from taking any step, hoping for favourable developments in the case law relating to the property rights of spouses. There was serious prejudice to the Defendant in that several of the Defendant's material witnesses, had died during the period of inaction. The court concluded that the Plaintiff had "deliberately delayed in order to gain advantage and therefore had to bear the consequences." In

considering this case, Mr. Justice Seaton had reference to other decisions which indicate that cases in which there had been long delays had still been allowed to go ahead for two reasons:

> ..."first, the Plaintiffs had good cases from the beginning, and second the Plaintiffs did not authorize the delay as a tactic but rather it was the result of negligence on the part of others."
>
> *Irving v. Irving* (1983) 140 D.L.R. (3rd) 157.

90. After concluding that the delay of ten years from the date of discoveries, was inordinate, the court determined whether the delay was excusable or not. Mr. Justice Seaton stated:

> "but the question here is not whether the reason is good or bad, or wise or unwise; it is whether the delay was excusable of inexcusable. A delay as a means of gaining tactical advantage is not to be compared to a delay forced on the Plaintiff by negligent solicitors, impecuniosity or illness."
>
> *Irving v. Irving* (1983) 140 D.L.R. (3rd) 157.

91. What is common in the reasoning of Justice Seaton, and the reasoning of the cases that he referred to, is that, a complainant/plaintiff, who has not contributed to delay but has found the delay caused by the negligence of others, (including, even her own solicitors) should not have her case thrown out simply on the grounds of delay. That is to say that the non-blameworthy complainant, should not herself be prejudiced by delays that have been occasioned by elements beyond her control, or even if within her control (such as her solicitor), of which she was unaware and not responsible.

92. While the court in *Irving* dismissed that case because the Plaintiff had been blameworthy, Ms. Willis is not blameworthy in any fashion. There is no allegation that she has not met her responsibilities, or filed submissions on time, as requested, or in any way contributed to the amount of time it has taken for this matter to get to hearing.

93. Who is responsible for the time it has taken from the date of complaint to the hearing date?

94. Mr. Justice Lambert of the Court of Appeal stated:

"Mr. Blencoe has not chosen to deal with this matter in the most expeditious way. He has fought every step, as was his right. But a fair amount of the time that has passed must be attributable to the positions he has taken."

Reasons for Judgment, Lambert J.A., AR, p. 669, para. 29

95. Particulars of the complaints were given to the Respondent Blencoe in August 1995, but he declined to provide his response until April 1996.

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Reasons for Judgment, Lowry J., AR, p. 646, para.42

96. The Respondent Blencoe at first refused to respond to the allegations claiming that they were out of time even though advised by the Commission that the most recent complaint was within the then 6 months time limitation and that therefore there was no timeliness issue. In response to the Respondent Blencoe's demand that timeliness be considered, the Commission entered into that enquiry. The Respondent Blencoe continued to refuse to respond to the allegations. This request for response was entirely for Mr. Blencoe's benefit so that the Commission could determine if there was a reasonable basis for proceeding with an investigation of the allegations. The Commission made its decision with respect to timeliness and decided to continue, requesting the Respondent Blencoe's response to the allegations. Mr. Blencoe then refused to respond until Ms. Willis produced documents that she didn't even have. The Commission advised the Respondent Blencoe that such documents couldn't be provided at least until the investigation started and the investigation couldn't start until the Respondent Blencoe provided a response to the allegations. He then argued that the matter should skip the investigation stage and go directly to a hearing but only on the basis that there was no evidentiary basis for the matter to be referred to a hearing. It was explained to him that this was not possible, and a further request to respond to the allegations was made. The Respondent Blencoe then stated that his submission 6 months earlier on the timeliness issue, could be considered to be his response to the allegations.

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AR, p.271 ,273 , 278-281, 293, 296, 297, 299, 301, 302, 304, 305, 311

97. While the majority in the Court of Appeal ruled that the Respondent Blencoe was under no obligation to respond to complaints that were out of time, two observations may be made. Mr.

Blencoe filed, in the timeliness proceedings, a document which he subsequently relied on 6 months later as his response to the complaint. Three months elapsed from when the Respondent Blencoe was told that the timeliness issue had been ruled on and the investigation would proceed, to the time when he allowed that document to be relied on. During this three months he refused to comply on the basis of arguments which an objective observer could only describe as specious i.e., that the matter should be referred to a hearing on the basis that there was no basis that the matter should be referred to a hearing, and that he wanted Ms. Willis to provide documents that belonged to another party and that were in the possession of that other party.

AR, p. 281, 246, 304, 311

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98. These stances were taken at the commencement of process and contributed to the 8 month delay before Mr. Blencoe provided his response and allowed the investigation to proceed. There is no suggestion by anyone that during this time the Complainant Willis did anything to contribute to any delay.

99. The matter was then referred to investigation and there was a period of time before the investigation commenced. Again, this is not attributable to Ms. Willis. The rest of the time was involved in investigation and determination of merits until referral to the hearing process in July of 1997.

20 AR, p. 314 and following.

100.. Mr. Justice Lowry concluded with respect to that process in this case, input from Mr. Blencoe, through his solicitors, was sought and obtained at each phase of the process.

> ...I do not consider that, as constituted, the Commission is to be criticized for the process employed in respect of the complaints made by Ms. Schell and Ms. Willis. It has, in large measure, been an open process which has required time to pursue with the parties participating and being heard as they wished throughout. Clearly there has been some unexplained delay, particularly with respect to the five month hiatus when there appears to
> 30 be no activity in relation to the complaints. But on balance I do not consider that it can be said that there has been an unacceptable delay in the process overall. The time that has elapsed has not been shown to have been attributable to anything other than the time required to process complaints of this kind given the limitations imposed by the resources available.

Reason for Judgment, Lowry J., AR, p. 649, para. 4

SOURCE OF PREJUDICE

101. The majority of the Court of Appeal concluded that excessive delay both created a substantial stigma against the accused and exacerbated an existing state of affairs to the extent that the consequent deprivation must be in accordance with fundamental justice.

102. The majority court relies on the statements of Lowry J., in the court below that:

> There can, however, be no doubt about the extent to which allegations of sexual harassment have affected Mr. Blencoe's life and that of his wife and three young children, although it is difficult to say to what extent such can be fairly attributed to the time it has taken to bring the complaints made by Ms. Schell and Ms. Willis to hearings.
>
> The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship the Respondent Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focussed on him and his family, and the hardship has, in the result, been protracted and severe.
>
> Reasons for Judgment, McEachern, C.J.B.C., AR, p. 681
> Reasons for Judgment, Prowse, J.A., AR, p.207.

103. It is appropriate to consider the cause of the prejudice, because of course it prejudice can only fairly be cause for complaint if the Respondent Blencoe is not responsible himself for the prejudice.

104. The largest measure of prejudice is attributed to the publicity surrounding these matters but it is the argument of this Appellant that the Respondent Blencoe himself can only be heard to complain if he himself has not sought to fight his case in the public domain. And if prejudice has occurred then it must be demonstrated that this Appellant's case has been the cause of that prejudice. It must be recalled that her complaint is one of three processes against the Respondent Blencoe. The other two are a civil case brought by Ms. Parker and another human rights case brought by Ms. Schell.

105. Facts previously identified show that Ms. Willis has never discussed her case in public.

PUBLICITY

106. The court ties much of the prejudice to the publicity attendant upon the sexual harassment allegations. However, it is important to consider reasons for that publicity.

107. It is our submission that the Respondent Blencoe himself contributed to the publicity by publicly engaging in the dispute and taking maintaining the matter in the public eye.

AR, p. 58, 82, 120, 128, 129, 134, 135, 410

108. First it must be suggested that the fact of the Respondent Blencoe's public office was the source of some of the attention. A person in such a public office must expect greater public scrutiny of allegations against them than a relatively anonymous person would.

10 109. This is a recognized principle in our laws relating to defamation:

> Persons in the public eye are appropriate targets for severe criticism, and must be prepared to "put up with laughing, caricaturing and sneering."

Brown (1987), The Law of Defamation in Canada (Carswell)p. 718

110. This is acknowledged in the Supreme Court of British Columbia decision in the *Bennett* case wherein the court states in reference to the evidence of publicity before the court relating to charges against the appellants:

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> "...it would appear from the evidence of publicity before me that the interest of the media appears to be in direct proportion to the public, or former public, nature of the individuals involved. Mr. Butler's client, William Bennett, as former premier of the Province of British Columbia for many years, will be no stranger to the watchful eye of the media. ... I say this not because everyone should not be entitled to wish for and have, their privacy, but rather because the evidence of media scrutiny before me, as I have stated, appears to be focussed on those individuals best able to, by experience, withstand the rigours of that scrutiny."

Bennett v. British Columbia (Securities Commission) (1991), 82 D.L.R. (4th) 129
30 (B.C.S.C.)195-196.

111. The Judges in the lower courts in this case recognized that.

Reasons for Judgment, Lowry J., AR, p. 634, para.13
Reasons for Judgment, McEachern C.J.B.C., AR, p. 680, para.53

112. This expectation, that a person in the public eye must expect more extensive scrutiny than may otherwise be expected, is even more so the case where the individual has pursued the issues in the forum of public debate.

> "A person may also become the object of public interest by seeking out an attaining public notoriety."
>
> *Brown*, The Law of Defamation in Canada p. 718

10 113. The Complainant in this case has done that. The Respondent Blencoe has not chosen to deal with this in the quietest fashion. He has engaged the public battle and by doing so maintained the issue in the public eye at a high level of interest by challenging complainants to go to the Human Rights Council, by publicly stating his strategy to have the case thrown out..

114. The Respondent Blencoe...

> "was forced out of Cabinet and out of his party's caucus in April 1995 amidst allegations of sexual misconduct made by one of his assistants, Fran Yanor...".
>
> AR, p. 629, para. 3

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115. Several other women came forward with complaints of sexual misconduct against the Respondent Blencoe.

> AR, p. 129.

116. On April 6 of 1995, the Respondent Blencoe effectively challenged complainants to come forward by issuing a public statement including the comment:

> "I have serious doubts that anyone will bring any complaint to the Human Rights Council which means that I am without any process by which to demonstrate my innocence."

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> AR, p. 82

117. On April 16, 1995, a Ms. Nancy Parker provided the press with details of sexual misconduct allegations, against the Respondent Blencoe who she met in his capacity as a Member of the Legislative Assembly, when she sought his assistance in obtaining accommodation.

> Affidavit of Robin Blencoe, AR, p. 61 para 40, 163, 164

118. He called an open line radio show to discuss the issues.

AR, p. 424

119. Nancy Parker commenced a civil suit against the Respondent Blencoe alleging non-consensual sexual activity against her by the Respondent Blencoe.

AR, p. 163

120. In July 1995, Irene Schell provided a complaint to the Commission.

10 AR, p. 184.

121. In July 1995, Irene Schell went public with details of her complaint against the Respondent Blencoe.

AR, p. 54, para. 16

122. On July 26, 1995, Mr. Blencoe talks to the press about the human rights processes taking "three, four or five years."

AR, p. 128

20 123. On August 1, 1995, the Complainant filed her complaint with the Council alleging incidents that occurred in August 1994 and March 1995. The Complainant did not reveal publicly details of her complaint or even that she has filed one.

AR, 629 para. 3

124. On September 8, 1995, the Respondent Blencoe provided several statements to the press regarding the allegations.

AR, p. 120

125. The Respondent Blencoe gave interviews to the press in September of 1995 in which he

30 indicated that he would be bringing the Premiere and others to the Tribunal to answer questions under oath.

AR, p. 426, 427

126. In the press the Respondent Blencoe attacked his dismissal from cabinet as being "because of the rabid doctrinaire... Of extremists that have got a foothold in this party amid are running much of this party... The leadership has allowed itself to be captured by special interests."

AR, p. 427

127. The Respondent Blencoe indicated that he may stay in politics saying that "The bottom line is people are just fed up to the back teeth with political correctness and the questioning of traditional values."

AR, p. 427

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128. On September 20, 1995, the Respondent Blencoe went to the press to announce his strategy of preventing allegations from getting to a hearing. The Respondent Blencoe is quoted as saying that, with respect to Schell's complaint he will "fight the complaint "tooth and nail" and try to get Schell's suit thrown out before it gets to a full hearing."

AR, p. 129

129. In April of 1996, when the Respondent Blencoe was not satisfied with progress in private efforts at resolution, he released a public statement attacking Ms. Willis and the other Complainant Ms. Schell in public with details of those private efforts. The last prior apparent publicity had been at least two months earlier.

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AR, p. 134, 135, 150

130. Publicity arose in Ontario where the family had moved so that Victoria MacPherson Blencoe could pursue her education.

AR, p. 57-58, 384

131. In October of 1997 the family moved back to Victoria, amidst no publicity, when Victoria MacPherson Blencoe obtained employment in Victoria, B.C. after completing her education in Ontario.

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AR, p. 58, para.30

132. In November of 1997, when the last apparent publicity had occurred approximately eight months previously, the Respondent Blencoe announced through national media his plan to seek judicial review to have the hearings stayed. The Complainant and her counsel and the other complainant, Ms. Schell and her counsel, and the Human Rights Commission all found out from the media that the Respondent Blencoe intended to seek judicial review to prevent the hearings from taking place.

AR, p. 161, 394 para. 4

133. As Mr. Justice Lambert noted in the Court of Appeal

10 "...All the publicity and media attention since November, 1997 has been focussed on these proceedings seeking to have the Human Rights process stopped."

AR, p. 90 para 29

134. The references in the materials filed by the Respondent Blencoe, and Victoria Blencoe, to an inability to find work, and comments made by a community members, are more easily attributable to the publicity surrounding the original allegations made by Ms. Fran Yanor, Ms. Irene Schell, and Ms. Nancy Parker, than they are attributable to the issues surrounding the complaint of Ms. Willis, the details of which were not publicly set out, or discussed.

Reasons for Judgment, Lowry J., AR, p. 627
20 AR, p.131

135. While the decision of the courts below refers to Mr. Blencoe's family suffering as a result of the unfortunate experiences endured by their children are not identified by date. There is little evidence as to when these events occurred or to what they are related. Many events may have occurred before the Complainant even made her complaint. There was much publicity with respect to the Yanor allegation and the Schell and Parker allegations, before the Complainant even filed her complaint with the Council.

AR, p. 53, AR, p. 633 (Lowry J., p.1, paras.11&12)
30 AR, p. 681 (McEachern C.J.B.C. p.25-26, paras. 53-55)

136. In our respectful submission the court must keep in mind that there were two human rights complaints that the Respondent Blencoe artificially put together for the purposes of a judicial review application to prevent hearings into allegations of sexual harassment against the Respondent

Blencoe. These were separate complaints, filed at separate times by separate complainants, in relation to separate events and separate experiences. The investigation of the Complainant's complaint followed a slightly different time line than did Ms. Schell's. The two separate matters were set for hearing at different times and in different cities.

AR, p. 403, 428

137. The original complaints were made by a Ms. Fran Yanor, in February of 1995. In addition, a civil case was commenced by a third person against the Respondent Blencoe. Those complaints commenced this scenario. Ms. Willis' complaint was not known to the public until October of 1995: many months after the public became aware of the details of the Yanor, Parker and Schell allegations. To this day, the public has not been made aware of the details of the Complainant's complaint, except to the extent that such detail was revealed in the materials filed by the Respondent Blencoe when he commenced this case, and as referred to in the decisions of the courts below otherwise all that was known about Ms. Willis' complaint is that she filed one: this was not known until the fall of 1995.

138. In my respectful submission, any allegation that delay in processing Ms. Willis' complaint to hearing prejudiced the Respondent Blencoe, must be able to attribute that prejudice to delay in the Complainant case *per se*, and not prejudice that arose because of initial complaints, publicity around his being fired from Cabinet or other outstanding complaints. It appears that a total of six women had complaints against the Respondent Blencoe.

AR, p. 113, 426

139. The Respondent Blencoe fought allegations in the press but he chose not to do his fighting before the Tribunal.

140. However, the majority decision of the Court of Appeal does not address the publicity caused by Mr. Blencoe himself or distinguish between prejudice caused by the relative publicity relating to Ms. Parker's and Ms. Schell's complaint as opposed to Ms. Willis' complaint. Is Ms. Willis to be penalized because of prejudice caused to the Respondent Blencoe because of his delay, the Commissions delay, the publicity caused by the coverage given to the allegations Ms. Yanor, Ms. Schell and Ms. Parker and the Respondent's dismissal from cabinet and from the caucus, all of

which happened before it was even reported that Ms. Willis had a complaint? Mr. Blencoe exacerbated publicity by his public request for an opportunity to appear before a Human Rights Tribunal, his subsequent public statement of strategy to avoid a hearing, the public letter to constituents from the Respondent Blencoe and the publicity around the Respondent Blencoe's announcement through the public press that he was going to commence the judicial processes that have led to this point.

141. In conclusion, much of the publicity and consequent impact and much of the delay and consequent impact, must lie at the feet of Mr. Blencoe. None of the delay and very little of the publicity can be faulted to Ms. Willis.

FOURTH ISSUE: What is the balance between the rights of the Respondent and the rights of the complainant

142. Mr. Justice Lambert of the Court of Appeal stated, in dissent,

> It should not be forgotten that the question of fundamental justice requires a balancing of Mr. Blencoe's rights and expectations against the rights and expectations of the two complainants, all in the context of the public interest in upholding an effective human rights process.
>
> Reasons for Judgment, Lambert J.A., AR, p.670-1, para.3.

143. This language recognizes, appropriately, that the Complainant and the Respondent are both important parties to this process. However the language of the majority in the British Columbia Court of Appeal suggests that, in the circumstances of this case, the complaint has no rights but only interests or concerns and that the important rights belong to the Respondent Blencoe.

144. Although the decision of McEachern C.J.B.C., makes one reference to the complainant's "rights" to a hearing, the balance of the language clearly distinguishes between the Respondent Blencoe's "rights" or "legal rights" and the complainants "views" "concerns" and "interests." The only party recognized as having rights is Mr. Blencoe. In the one location where the language of "rights" was used with respect to the complainants, it was countered by, and subjected to, the "legal rights" of the Respondent Blencoe. The additional modifier clearly indicates that the rights of the

Respondent Blencoe were superior to the rights, views, interests or concerns of the complainants. Is this correct? In our respectful submission this downplays the rights of the Appellant Ms. Willis, whose rights under the *Human Rights Code* are quasi-constitutional.

Reasons for Judgment, McEachern, C.J.B.C., AR, p. 673

145. In a recent decision of this court, Madame Justice L'Heureux-Dubé noted that:

> Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. As Cory J. wrote in Osolin, supra, at p. 669, sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women." These human rights are protected by ss. 7 and 15 of the Canadian Charter of Rights and Freedoms and their violation constitutes an offence under the assault provisions of s. 265 and under the more specific sexual assault provisions of ss. 271, 272 and 273 of the Criminal Code, R.S.C., 1985, c.

R. v. Ewanchuk (1999) (unreported) (S.C.C.) at 10.

146. The matters before the Tribunal are not of a criminal, but are rather of a human rights nature. As such, the language of equality is important here, and in our respectful submission appropriate.

147. In our submission, it is important also to recognize the *Charter* rights of the complainant in a human rights case, not to have her case for sexual harassment subjected to stricter guidelines than another person's complaint on the basis of race, country of origin, colour, religion or sexual preference.

148. Ms. Willis' rights under the Human Rights legislation can be no greater or lesser than those of any other human rights complainant. The rights of the Respondent can be no greater or lesser than those of any other human rights respondent. Yet, the decision of the Court of Appeal suggests that the characteristics of the Respondent to a certain type of human rights allegation, should impact on the processes, and the rights of the Complainant. This suggests that, for complaints of discrimination that are not similar to criminal charges, Respondents, and therefore Complainants, have a different balance of rights than those whose allegations relate to discriminations that are similar to criminal charges.

149. There however is merit in the language of Mr. Justice Lambert who says:

> The jurisdiction of the Human Rights Tribunal cannot be dependant on the degree of suffering endured by those against whom complaints are made, or on a balance between the suffering endured by them and the suffering of the persons who made the complaints."

Reasons for Judgment, Lambert J. AR, p. 665, para. 22

150. In our respectful submission, the entitlements of Complainants, and Respondents, under human rights legislation, cannot be increased or reduced depending on the characteristics of the particular individuals involved, and whether or not the allegations relate to conduct that a court may or may not characterized as similar to allegations in criminal matters. For example, a person claiming discrimination on the basis of country of origin cannot be expected to tolerate her case being put on the back burner while allegations based on sexual harassment are fast tracked through a process as a result of the nature of the allegation, and the characteristics of the Respondent. Such a Complainant may rightfully be critical, and see inequality in a process which gives priority to allegations in which the Respondent is a high profile public person, or is the object of sexual harassment allegations, or both. In such a situation, a person who claims that she has been discriminated against on the basis of her country of origin, may rightly feel that she is being discriminated against again, by the human rights processes, which give preferential treatment to Complainants and Respondents in allegations of sexual discrimination arising out of sexual harassment. This sort of consideration raises issues antithetical to the concepts of human rights that attach because we are equal to each other, not because we are particular types of persons who occupy particular social strata.

151. Mr. Blencoe, as a Respondent, is subject to exactly the same processes as any other respondent in a human rights complaint. Unlike the criminal accused or purely civil litigation respondent, he is not subject to greater or lesser type of remedial orders for different types of allegations. There are no possibilities of jail, fine, or probation. There are no punitive damages. All Respondents in human rights complaints are provided with the same process, and in fact it is one in which the Respondent is not obligated to participate. (although it might not be advisable not to respond). Even without participation of the Respondent, the complainant must establish some merit to her claim for her complaint to even be investigated.

152. The processes the Respondent Blencoe was involved in were fair. There is no suggestion from any source that the Respondent Blencoe wasn't given a full opportunity to participate, and there is no suggestion that the process did not accommodate his requests for procedural considerations when made them. He insisted on a determination with respect to timeliness even though he was advised that timeliness was not an issue. That demand was accommodated.

153. A good portion of the amount of time that this process took was largely a function of efforts at conveniencing the Respondent Blencoe. In this case of course, there is no suggestion that the Commission, or anyone else displayed *mala fides*. Indeed it is the efforts of the Commission to get the Respondent Blencoe to respond to the allegations, that gave rise to the first 8 months of the time that it took to process his complaint. Then it was the process of interviewing witnesses and obtaining responses from the Respondent Blencoe, and the complainant, that gave rise to another 8 months of the process.

CONCLUSION

154. It is this appellant's respectful submission that section 7 of the *Charter* does not apply to circumscribe delay in administrative proceedings under human rights legislation in the absence of the possibility of penal sanctions.

155. Should the court determine that the *Charter* may apply in such circumstances, then it is submitted that it should not apply in this case in which a private party has carriage of the case and in which the state provides a registry function and screening function only and does not bring the case forward.

156. Should this Honourable Court determine that section 7 may still apply in the foregoing circumstances, then it is argued that the court must assess the cause of delay, and any prejudice caused by the delay and attribute same. It is our respectful submission that the result of the attribution of the delay and prejudice thereby caused does not lie at the feet of Ms. Willis. She is innocent of fault and she should not bear the penalties imposed in consequence. Finally, it is submitted that a balancing of the rights and interests of the parties should result in a recognition that all parties have been treated fairly by the processes in place and that every accomodation has been

made to ensure that fariness and natural justice have been complied with. The proper balancing of the parties' rights would mandate the matters proceed to hearing before the Human Rights Tribunal.

157. Mr. Blencoe has not chosen to deal with these matters in the most expeditous fashion. This Complainant is concerned that such efforts on the part of the Respondent Blencoe appear in retrospect to be designed to achieve the delay that materialized. He stated in September of 1995 that he would fight tooth and nail to have the complaint thrown out before it got to court. He has fought this matter througth the Council, Commission and Tribunal phases, he has fought in the courts and he has fought in the press. This Appellant has maintained a low profile, not contributed to delay and not sought to prejudice anyone through publicity . It is our respectful submission that the matter should now proceed to a hearing before the Tribunal.

PART 4

NATURE OF ORDER SOUGHT

158. This Appellant submits that :

(i) the appeal should be allowed;

(ii) the stay of proceedings imposed by the Court of Appeal be set aside;

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(iii) the petition of the Respondent Blencoe be dismissed;

(iv) the complaint of Andrea Willis be remitted to the B.C. Human Rights Tribunal for hearing; and

(v) the appellant should be awarded her costs here and in the courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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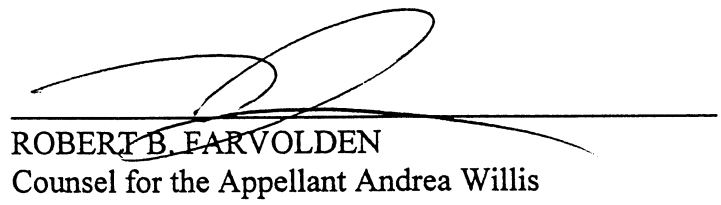

ROBERT B. FARVOLDEN
Counsel for the Appellant Andrea Willis

"NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the Rules of the Supreme Court of Canada, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be."

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PART 5

TABLE OF AUTHORITIES

Pages in Argument Where Cited

Cases

Statutes and Conventions

10 **Authors Cited**