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)

AND:

SASKATCHEWAN HUMAN RIGHTS COMMISSION,
ONTARIO HUMAN RIGHTS COMMISSION,
NOVA SCOTIA HUMAN RIGHTS COMMISSION,
MANITOBA HUMAN RIGHTS COMMISSION,
CANADIAN HUMAN RIGHTS COMMISSION,
COMMISSION DE DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE,
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PART 1

STATEMENT OF FACTS

1. This is an appeal from a decision of the British Columbia Court of Appeal staying the adjudication of two sexual harassment complaints against Mr. Robin Blencoe (the "Respondent Blencoe") on the ground that the time taken to process these human rights complaints infringed section 7 of the *Canadian Charter of Rights and Freedoms ("Charter")*.

2. The appeal raises issues both as to the scope of the protection provided by section 7 of the *Charter* in non-penal proceedings, and the interplay between the rights of a person against whom a sexual harassment claim is brought and the rights of complainants in a sexual harassment complaint.

Chronology of Events

3. In late March or early April, 1995, allegations of sexual misconduct were made against the Respondent Robin Blencoe, then a provincial Cabinet Minister, by a Ms. Fran Yanor, an assistant in his office. Amidst these allegations in April, 1995, the Respondent Blencoe was removed from Cabinet and later from the New Democratic Party caucus. These events attracted a great deal of media scrutiny directed towards the Respondent Blencoe.

4. In July and August, 1995, two different complainants, Irene Schell and Andrea Willis, filed complaints under the then *Human Rights Act*, S.B.C. 1984, c. 22, alleging that the Respondent Blencoe had sexually harassed them (the "Complaints"). Complaints were made by Willis and Schell against the Provincial Government in respect of the same events.

5. The Respondent Blencoe initially took the position that the Complaints had been filed out of time, and he declined to provide a response to them until these preliminary objections had been dealt with under the *Human Rights Act*. After taking submissions, the British Columbia Council of Human Rights (the "Council") determined that both Complaints had been filed within the statutory

period. After some further communications, the Respondent Blencoe provided his response to the Complaints in April 1996, seven months after the Complaints had been filed.

6. The Complaints were initially investigated pursuant to the process in place under the *Human Rights Act*, under which human rights complaints were handled by the Council. On January 1, 1997, British Columbia's human rights legislation was amended and the Council dissolved. Under this new legislative scheme, the *Human Rights Code*, R.S.B.C. 1996, c. 210 ("*Code*"), responsibility for investigating complaints was given to the Appellant Commissioner of Investigation and Mediation, one of three Commissioners of the newly-created British Columbia Human Rights Commission (the "Commission").[1]

7. Under the *Code*, the Commissioner of Investigation and Mediation has a dual role. In her investigatory capacity, the Commissioner must determine whether there is a reasonable basis to the complaint and whether the complaint should correspondingly be referred for hearing to the British Columbia Human Rights Tribunal (the "Tribunal"), a separate adjudicative body, or dismissed. In her facilitative capacity, the Commissioner of Investigation and Mediation may help the parties reach an agreed settlement by mediation or other means.

Human Rights Code, R.S.B.C. 1996, c. 210, Part 3, ss.21-30

8. The *Code* provides a number of options for the Commissioner of Investigation and Mediation on the filing of the complaint. She may make the determination to dismiss the complaint or refer it to the Tribunal without an investigation, may await the respondent's reply before making that determination, or may assign a human rights officer to the complaint for investigation. If the Commissioner does assign an officer to the complaint, the Commissioner must refer or dismiss the complaint on submission of that report unless further investigation is necessary.

Human Rights Code, R.S.B.C. 1996, c. 210, Part 3, ss.21-30

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[1] In this Statement of Facts, reference will be made to the scheme established under the *Code* after the 1997 amendments. The description of the process also applies to the scheme established under the antecedent *Human Rights Act*, except that under the former scheme the Council had both an investigatory role and an adjudicative role. The difference is not material for the case at bar, as the Complaints were still under investigation at the time the *Code* came into force.

9. On a referral for hearing, the complainant has carriage of the complaint before the Tribunal. The Tribunal has the sole power to determine whether the complaint is justified. Violation of the *Code* will not result in summary conviction.

Human Rights Code, R.S.B.C. 1996, c. 210, ss.37 and 48

10. After the amendments to the human rights legislation came into effect, the investigation of the Schell and Willis Complaints continued under the new *Code*. The investigator submitted her report to the Commissioner of Investigation and Mediation in May, 1997. On July 3, 1997, the Commissioner of Investigation and Mediation referred the Complaints against the Respondent Blencoe, and one of the Complaints against the Provincial Government, to the Tribunal for a hearing.

11. On September 10, 1997 the Tribunal gave notice that the Complaints would be heard in March, 1998.

12. The effect of this process was that the investigation of the Complaints took 22 months, a decision was made to refer the Complaints to the adjudicative body for hearing, and a hearing was scheduled to commence eight months after the date of referral. Of the 22 months, the evidence was that 17 months was taken up in a series of procedural determinations and the preparation of the investigator's report; five months of the time was unexplained.

Reasons for Judgment, Lowry J., paras. 39, 41-44

13. On November 27, 1998 the Respondent Blencoe filed a Petition in the Supreme Court of British Columbia seeking to quash the decision of the Commissioner of Investigation and Mediation referring the Complaints to the Tribunal, and prohibiting the Tribunal from hearing the Complaints because of a loss of jurisdiction due to administrative delay. The hearing of the Petition was heard by Lowry, J. on January 27 - 29, 1998.

Judgments Below

(a) British Columbia Supreme Court[2]

14. The position of the Respondent Blencoe was that the administrative delay from the filing of the Complaints to the hearing date had exposed both him and his family to a prolonged period of stigmatization and personal hardship, due principally to intense media scrutiny.

15. While pleaded in his Amended Petition, the Respondent Blencoe elected not to argue that administrative delay had infringed his rights under section 7 of the *Charter*, expressly reserving this argument in the event of an appeal. Accordingly, the arguments before Lowry, J. dealt principally with common law protection against undue delay.

16. Lowry, J. ruled that the time taken to process the Complaints had not violated common law principles of natural justice and procedural fairness and dismissed the Petition. He held that the test for staying administrative proceedings at common law is whether the Respondent is prevented from making a full answer and defence. The Respondent Blencoe's allegations of ongoing stigmatization and personal suffering were not relevant to the Commissioner of Investigation and Mediation's and Tribunal's jurisdiction.

Reasons for Judgment, Lowry, J., paras. 39, 47

17. In reviewing the communications between the parties, Mr. Justice Lowry reviewed the evidence in detail and concluded that there had not been unacceptable delay in the process overall. The time that had elapsed was not attributable to anything other than the time required to process complaints of this kind given the limitations imposed by the resources available.

Reasons for Judgment, Lowry, J., paras. 38-47

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[2]reported at (1998), 49 B.C.L.R. (3d) 201, 30 C.H.R.R. D/439, 35 C.C.E.L. (2d) 41, [1999] 1 W.W.R. 139 (S.C.)

(b) B.C. Court of Appeal[3]

18. At the Court of Appeal, the Respondent Blencoe advanced the *Charter* arguments he had reserved from the trial proceedings. A majority of the Court, Lambert J.A. dissenting, concluded that the delay in processing these complaints had violated the Respondent Blencoe's section 7 *Charter* rights, and ordered a stay of the proceedings before the Tribunal.

19. McEachern, C.J.B.C. considered "a delay of over 30 months from the date of the Complaints to a hearing on the merits [to be] far too long", and concluded that the time taken to process the Complaints had "both created a substantial stigma against the accused and exacerbated an existing state of affairs" so as to affect the Respondent Blencoe's "security of the person" protected by section 7 of the *Charter*.

20. Chief Justice McEachern also held that two competing streams of jurisprudence exist within this Court as to the scope of protection of section 7 "liberty" and "security of the person". First, he identified what he characterized as the "judicial domain" school, which extends protection to individuals principally in criminal proceedings. He contrasted this approach with what he described as a more expansive view that section 7 protects individuals' right to "human dignity" and "privacy" outside the arena of judicial proceedings. McEachern, C.J.B.C. adopted the second approach, which he characterized as the "emerging" and "preferred" line of jurisprudence, and ruled that the stigma and personal degradation which the Respondent Blencoe had suffered affected both his liberty and security of the person, and therefore engaged section 7 of the *Charter*. He ruled that any such deprivation was not in accordance with the principles of fundamental justice and therefore stayed the human rights proceedings. Prowse, J.A. agreed, and delivered brief concurring Reasons.

Reasons for Judgment of McEachern, C.J.B.C. (for the majority), paras. 60 - 101
Reasons for Judgment of Prowse, J.A. (concurring), paras. 108 - 111

21. Lambert, J.A. dissented. Assuming without deciding that section 7 was engaged, Lambert, J.A. concluded that there had not been a violation of the principles of fundamental justice. While the

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[3]reported at (1998), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 31 C.H.R.R. D/175, 53 C.R.R. (2d) 189, [1998] 9 W.W.R. 457 (C.A.)

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 violation of section 7 of the *Charter*.

22. As a consequence of the decision of the Court of Appeal, the two Complaints against the Respondent Blencoe have been stayed. The Complaint by Ms. Willis against the Provincial Government in relation to Mr. Blencoe's conduct remains outstanding.

PART 2
POINTS IN ISSUE

23. The position of these Appellants is that there are two points at issue in this appeal:

(i) Does unreasonable delay in processing a human rights complaint contravene the section 7 *Charter* rights of the person subject to that complaint?

(ii) If so, do the circumstances of the instant case justify the stay of proceedings imposed by the Court of Appeal?

24. The first issue is a legal issue requiring consideration of the scope of section 7 of the *Charter* and its relationship to human rights proceedings. It in turn raises two sub-issues:

(i) Do the rights of "liberty and security of the person" protected by section 7 include a generalized right to dignity, or more specifically a right to be free from stigmatization associated with a human rights complaint?

(ii) Is delay in the conduct of non-penal proceedings contrary to "principles of fundamental justice" within the meaning of section 7 of the *Charter*, where the delay does not interfere with the right to a fair hearing?

25. The second issue requires a consideration of the circumstances of the case at bar, to determine whether a stay of proceedings is appropriate whatever interpretation of section 7 is applied.

PART 3

ARGUMENT

The Contextual Setting of Human Rights Legislation

26. Human rights legislation has been described by this Court as "quasi-constitutional", "almost constitutional", and as "fundamental law". Human rights legislation is "of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the Courts to seek out its purpose and give it effect."

> *ICBC v. Heerspink* [1982] 2 S.C.R. 145, at 158c, per Lamer J
> *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at 1135-1136, per Dickson, C.J.C.
> *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, at 14, para. 20, per Major, J.
> *Ontario Human Rights Commission v. Simpson-Sears Limited*, [1985] 2 S.C.R. 536, at 547b, per McIntyre, J.
> *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at 92h, per La Forest, J.

27. The purposes of the *Human Rights Code* of British Columbia are set out in section 3 of the statute in these terms:

> "The purposes of this Code are as follows:
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
> *(c) to prevent discrimination prohibited by this Code*;
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
> *(e) to provide a means of redress for those persons who are discriminated against contrary to this Code*;
> (f) to monitor progress in achieving equality in British Columbia;
> (g) to create mechanisms for providing the information, education and advice necessary to achieve the purposes set out in paragraphs (a) to (f)."
>
> *Human Rights Code*, R.S.B.C. 1996, c.210, s. 3 (emphasis added)

28. These purposes are consistent with those of other human rights statutes, and consistent with the characterization of such statutes given by this Court:

"The *Code* aims at the 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."

Ontario Human Rights Commission v. Simpson-Sears Limited, [1985] 2 S.C.R. 536 at 547c, per McIntyre, J.

10 29. Elimination of discrimination has been described by this Court as the "overriding purpose of human rights legislation." This Court has consequently emphasized the need for "effective" remedies to deal with discriminatory acts.

Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre), [1996] 2 S.C.R. 3, at 15, para. 22, per Major, J.

20 30. Human rights legislation has also been characterized as giving rise "to individual rights of vital importance, capable of enforcement, in the final analysis, in a court of law".

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, at 1134a, per Dickson, C.J.C.

31. This Court has taken particular pains to resist a punitive characterization of human rights

30 legislation. Dickson, C.J.C. has expressed this important distinction in this way:

"It is the [discriminatory] practice itself which is sought to be precluded. *The purpose of the Act is not to punish wrongdoing but to prevent discrimination.*

The last point is an important one and deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness."

40 *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892, at 933a, per Dickson, C.J.C. (emphasis added), citing *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at 1134g, per Dickson, C.J.C.

32. This Court has equally emphasised that discrimination is not consistent with values underlying the *Charter*. It has described discrimination as the "antithesis of equality". More particularly, it has described sexual discrimination in the employment context in the following terms:

> When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.
>
> *Janzen v. Platy Enterprises Ltd* [1989] 1 S.C.R. 1252, at 1284e, per Dickson, C.J.C. See also *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at 536, para 69, per Cory, J.

33. The fundamental nature of human rights legislation directed against discrimination by reason of sex has achieved growing recognition in the international community. There are general anti-discrimination provisions in virtually all international conventions respecting human rights. In addition however, the *Convention on the Elimination of all forms of Discrimination Against Women*, ratified by Canada in 1981, is specifically directed to establishing public institutions to protect women against discriminatory acts:

> "Article 2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> ...
>
> (b) to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> (c) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; ..."
>
> See also Articles 5(a), 11.1, 15.1 and .2
>
> *Convention on the Elimination of all Forms of Discrimination Against Women*, U.N.T.S. No. 20378, vol. 1249 (1981)

34. Sexual harassment remains under-reported. Drawing from the information collated in recent Canadian and American surveys, Arjun Aggarwal has concluded that sexual harassment "is one of the most serious and widespread problems facing women in employment today".

> Arjun Aggarwal, *Sexual Harassment in the Workplace*, (2nd ed.), (Butterworths, Toronto, 1992) at 2

35. The foregoing factors are an important aspect of the necessarily contextual analysis of the case at bar. It is apparent from the reasons for decision of the majority of the Court of Appeal that insufficient consideration was given to the fundamental and quasi-constitutional nature of the rights of persons in the position of the complainants who were alleging discrimination contrary to the *Human Rights Code*. The majority's suggested hierarchy of rights compares what is described as the "legal right" of the respondent to a complaint to a hearing within a particular time to the "concerns" and "views" of the Complainants. This analysis not only disregards the fact that human rights legislation gives rise to enforceable rights, it inappropriately denigrates the importance of the rights at stake in a proceeding of this nature. This is illustrated by the following passage from the principal judgment of the majority:

> "Having said that, I wish to add that I have not overlooked the interests of the complainants. They, of course, are *anxious to have their complaints determined*. In such matters the law cannot accommodate everyone, and regrettable as it may be, the legal rights of a party must be given precedence over the *concerns of others*. This is not to say that the complainants are not entitled to every consideration. Unfortunate as it may be, however, their right to have their cases heard were not absolute rights, and were subject to the legal rights of the Appellant to have the case against him heard within a reasonable time. The conclusion I have reached regarding that question in no way reflects adversely upon the complainants nor does it represent any lack of concern for *their views* which, as I have said, must be *subject to legal rights created by the law*."
>
> Reasons for Judgment of the Court of Appeal, per McEachern C.J.B.C. at para 39 (emphasis added)

36. A contextual analysis must also have regard to the role played by the Commissioner of Investigation and Mediation in the processing of a human rights complaint. The *Code* provides a procedure whereby human rights complaints can be initiated and investigated. It creates an additional conciliatory role, through the powers of the Commissioner of Investigation and Mediation to encourage mediation. As this Court has noted in relation to the analogous provisions of the Canadian human rights legislation, the mere acceptance of a complaint can encourage respondents to amend their behaviour voluntarily. The Commissioner of Investigation and Mediation has the sole power to refer a complaint to the Tribunal for inquiry. In this respect, the Commissioner's central role is to assess whether there is sufficient evidence to refer the complaint to the Tribunal.

The Commissioner consequently acts as a screen or a "gate-keeper" to the adjudicative process, both at the initial intake stage and after the investigation process.

> *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892 at 963e, per McLachlin, J. (dissenting in part)
> *Cooper v. Canada (Human Rights Commission)* [1996] 3 S.C.R. 854, at 890-891, paras. 52-53, per La Forest, J.; and at 914, para 102, per McLachlin, J. (dissenting)
> *Canada (Attorney-General) v. Mossop* [1993] 1 S.C.R. 554, at 584i, per La Forest, J.
> *Human Rights Code, supra*, s.29

37. The Commissioner of Investigation and Mediation consequently has a protective role, with regard to a respondent, in so far as the initial screening of complaints helps reduce the likelihood that unfounded allegations of discrimination proceed to the stage of a public hearing.

Human Rights Legislation and the Criminal Law

38. The effect of the judgment of the Court of Appeal is to import a requirement for a hearing within a reasonable time into the processing of human rights complaints. Such a requirement exists in the criminal sphere by reason of section 11(b) of the *Charter*, which requires that "any person charged with an offence has the right ... to be tried within a reasonable time." No analogous provision explicitly applicable to administrative proceedings is found in section 7 or any of the *Charter's* "Legal Rights" sections.

> See *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771

39. While disclaiming a direct section 11(b) *Charter* application, the majority judgment is replete with references that appear to equate sexual harassment proceedings to criminal proceedings for sexual assault, where section 11(b) would clearly apply. For instance, the Court speaks of "this type of *sexual assault*" (para. 47); "stigma against the *accused*" (para. 56); "unproven *charges* of sexual harassment" (para. 57 and 74); "*prosecution* of these complaints" (para. 58): a "straightforward case of *sexual assault*" (para. 102); "the seriousness of the *charge*" (para. 105); and allegations which are "tantamount to allegations of *sexual assault*" (para. 108). [emphasis added]

40. Moreover, the majority's reasons conclude that the Respondent Blencoe has a section 7 *Charter* right to a human rights hearing "within a reasonable time" (paras. 39, 109), a right directly analogous to section 11(b) of the *Charter* which applies only to proceedings with penal consequences.

41. Human rights legislation and the criminal law are fundamentally different, both in purpose and procedure. The criminal process carries with it the possibility of conviction and imprisonment. The human rights process, by contrast, is geared towards remedial responses and compensation of the victim. This Court has observed that "the extent of opprobrium connected with the finding of discrimination is much diminished" by comparison with that attached to a criminal conviction. The human rights process is ultimately more likely to be reformatory, aimed at the prevention of future discrimination.

> *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892 at 932h, per Dickson, C.J.C.
> See also *R. v. Keegstra* [1990] 3 S.C.R. 697, at 784a, per Dickson, C.J.C.
> *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 91f, per La Forest, J.

42. Furthermore, in a criminal prosecution, the full force of the state's power is brought to bear against the accused. In a human rights complaint in British Columbia, however, the complainant has carriage of the complaint, much as in civil proceedings. It is open to the parties to a human rights complaint to settle - by mediation, voluntary concession or otherwise. Once the mechanism of the state is engaged against a particular accused, however, that person cannot halt the process.

43. In addition, intent is irrelevant to the question of whether a human rights violation occurred. As this Court has acknowledged, the analysis focusses instead upon the effect of the particular behaviour or practice on the victim. The criminal law, by contrast, focuses closely on the accused's intent.

> *Human Rights Code, supra*, s.2
> *Ontario Human Rights Commission v. Simpson-Sears Limited*, [1985] 2 S.C.R. 536 at 547d and at 549f-550a, per McIntyre, J.

44. Dickson, C.J.C. has articulated the differences between the objectives of human rights legislation and the *Criminal Code* in this way:

> "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. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes 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 917c, per Dickson, C.J.C.

45. For the foregoing reasons, the analogy between the human rights process and the criminal justice system does not hold, and cannot be used to justify an extension of section 11(b) of the *Charter* to human rights proceedings.

FIRST ISSUE: Whether section 7 of the *Charter* applies to delay in human rights proceedings

46. Section 7 of the *Canadian Charter of Rights and Freedoms* provides as follows:

> "Everyone 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."

47. McEachern, C.J.B.C., writing the principal judgment for the majority, concluded that the rights of liberty and security of the person protect both the privacy and dignity of citizens against the stigma of undue, prolonged humiliation and public degradation. He further held that undue delay in processing human rights complaints resulting in continued prejudice to privacy and human dignity could not be in accordance with the principles of fundamental justice.

48. The Court of Appeal relied on the judgment of *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.) to support the proposition that delay causing stigma violates the security of the person interest protected by section 7 of the *Charter*. However both the Manitoba Court of Appeal and the Federal Court of Appeal have declined to follow *Kodellas* on the basis that section 7 of the *Charter* has no application to the consequences of delay before human rights tribunals. The authority of *Kodellas* has also been questioned by Professor (now Dean) Hogg.

> *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 755e, per Scott, C.J.M. (Man. C.A.)
> *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [1996] 1 F.C. 638, at 640d, per Décary, J.A. (C.A.)
> Peter W. Hogg, *Constitutional Law of Canada* (Loose-Leaf ed.), (Toronto, Carswell, 1998), p. 44-13, footnote 64

49. The better view is that section 7 rights are not implicated by delays in processing complaints of discrimination under human rights legislation, and the *Charter* has no application to the consequences of delay in such non-penal proceedings. The Court of Appeal has given insufficient weight to the differences between criminal and human rights proceedings, and in particular to the interests of the Complainants in these proceedings.

50. In considering the application of section 7 to delays in human rights proceedings, two separate questions must be addressed:

(i) Do the rights of "liberty and security of the person" protected by section 7 include a generalized right to dignity, or more specifically a right to be free from stigmatization associated with a human rights complaint? and

(ii) Is delay in the conduct of non-penal proceedings contrary to "principles of fundamental justice" within the meaning of section 7 of the *Charter*, where the delay does not interfere with the right to a fair hearing?

51. The position of these Appellants is that the generalized dignity rights asserted by the Respondent Blencoe are not *Charter* rights within the meaning of section 7, and even if they were, impairment of such rights by administrative delay does not constitute the deprivation of a *Charter* right contrary to the principles of fundamental justice.

(i) Do the rights of "liberty and security of the person" protected by section 7 include a generalized right to dignity, or more specifically a right to be free from stigmatization associated with a human rights complaint?

52. Mr. Justice La Forest expressed the proper approach to the interpretation of section 7 rights in this way:

> "(Section) 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question."
>
> *R. v. Beare*, [1988] 2 S.C.R. 387 at 401i, per La Forest, J.

53. Neither the right to liberty nor the right to security of the person extend to a generalized right to dignity as held by the Court of Appeal in the case at bar.

(a) The right to liberty

54. This Court has recognized that the right to liberty protected by section 7 arises principally in the context of imprisonment, detention, or other forms of constraint or compulsion short of imprisonment imposed by the state as part of the criminal process.

> *Reference re s.94(2) of the Motor Vehicle Act (B.C.)*, ("the Motor Vehicle Reference"), [1985] 2 S.C.R. 486, at 524h - 525a, per Wilson, J.
> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* ("the Prostitution Reference"), [1990] 1 S.C.R. 1123, at 1217g, per Wilson, J. (dissenting on other grounds); see also at 1140d, per Dickson, C.J.C.; and at 1173h, per Lamer, J.
> *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at 148g - 150a, per McLachlin, J.
> *R. v. Beare*, [1988] 2 S.C.R. 387, at 402c, per La Forest, J.

55. Protection of "liberty" is not limited to the rights of the accused in the criminal process. This Court has also found deprivations of "liberty" with respect to third parties who have become enmeshed in the criminal or regulatory process, typically as witnesses. Thus a statutory provision compelling a person to give oral testimony may engage the right to liberty, as may the issuance of a subpoena which will result in the possible imprisonment of a person for disobedience. An order for the production of documents concerning the witness/complainant's therapeutic or medical treatment following a sexual assault may also engage the right to liberty.

> *Thomson Newspapers Ltd v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425, at 460i - 461d, per Wilson, J. (dissenting on another point); see also at 536a, per La Forest, J.
> *R. v. Primeau*, [1995] 2 S.C.R. 60, at 70-71, para. 19, per Sopinka and Iacobucci, JJ.
> *R. v. O'Connor*, [1995] 4 S.C.R. 411, at 483-486, paras. 113 -118, per L'Heureux-Dubé, J.

56. All of these cases involve constraints on the ability to choose a particular course of action in the context of a criminal or regulatory proceeding. As well, there are suggestions in this Court's jurisprudence of an expanded scope for the right to liberty outside the judicial process. This expanded definition has been characterized as a right to personal autonomy which allows individuals to make inherently private choices free from state interference. Thus the right to make fundamental choices about medical care for one's child, or the right to choose where to live, may implicate the right to liberty although physical constraints are not at issue.

> *B. (R.) v. Children's Aid Society*, [1995] 1 S.C.R. 315, at 368 - 371, paras. 80-83, per La Forest, J.
> *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at 893, para 66, per La Forest, J.

57. Neither a generalized right to dignity (as found by the Court of Appeal) nor a narrower right to a human rights hearing within a reasonable time can be supported by this jurisprudence.

58. A similar attempt to expand section 7 well beyond its contextual meaning was rejected in a judgment affirmed by this Court on the grounds that it "stretches s. 7 beyond its limits". There, the context of section 7 was said to be one of interaction with the justice system and its administration:

> "... Section 7 comes under the heading "Legal Rights" in the Charter along with ss. 8 to 14, all of which are mainly concerned with criminal and penal proceedings.... the restrictions on liberty that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration."
>
> *Walker v. Prince Edward Island* (1993), 107 D.L.R. (4th) 69, at 77h - 78b, per Mitchell, J.A. (P.E.I.C.A.), affirmed [1995] 2 S.C.R. 407

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(b) The right to security of the person

59. This Court has recently stated the test for whether security of the person is engaged by impacts upon a person's psychological integrity outside the criminal context. The test analyses the consequences of alleged infringement, and is formulated in these terms:

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.
>
> *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (September 10, 1999), File No. 26005 (S.C.C.) at para 60, per Lamer, C.J.C.
> See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 56b, per Dickson, C.J.C. and
> *R. v. O'Connor*, [1995] 4 S.C.R. 411 at 486, para. 118, per L'Heureux-Dubé, J.

60. This Court has also explained that while section 7 is not limited solely to purely criminal or penal matters, "the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration." In the *G. (J.)* judgment, this requirement was satisfied by pointing out that the relevant statute "provides that *a judicial hearing must be held* in order to determine whether a parent should be relieved of custody of his or her child."

> *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (September 10, 1999), File No. 26005 (S.C.C.) at para 65-66, per Lamer, C.J. (emphasis added)

61. The scope of the limitation that the restriction must result from interaction with the justice system and its administration has not been developed with precision. Even if it were concluded that

human rights proceedings fell within this range of governmental activity, it does not follow that delay in human rights proceedings engages the s. 7 right to security of the person. To determine that, it is necessary to assess whether delay in processing a human rights complaint, *measured objectively*, is the type of state interference that rises qualitatively to the level of an infringement of security of the person.

62. The significant qualification of this test is the requirement that the "effects of the state interference *must be assessed objectively*, with a view to their impact on the psychological integrity of a person of reasonable sensibility". This objective measurement is an important element of the test, because it ensures that s. 7 Charter rights are protected equally within the human rights context, without regard to the individualistic reactions of aggrieved persons.

> *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (September 10, 1999), File No. 26005 (S.C.C.) at para 60, per Lamer, C.J. (emphasis added)

63. The crux of Mr. Blencoe's complaint is that he suffered an impact greater than normal from the delay as a result of his high profile, and the media attention which he had to endure. McEachern, C.J.B.C. summarized the prejudice suffered by Mr. Blencoe in this way:

> "There can be no doubt that [Mr. Blencoe] was severely wounded by the publicity surrounding his dismissal from the Cabinet. Such is the price of public life. But for these proceedings, however, it might reasonably be expected that the overwhelming attention would have died away and [Mr. Blencoe] and his family could have attempted to reconstruct their lives.
>
> Instead, as the evidence shows, they have been subjected throughout this long ordeal of delay with constant, relentless publicity from which they have been unable to escape..."
>
> Reasons for Judgment of McEachern, C.J.B.C. , at para. 53-54

64. It is apparent that the effect of this time period has been significantly greater for Mr. Blencoe than would have been the case for a less well known respondent who was not engaged in public life, and would not likely be subjected to the "relentless publicity" of which the Chief Justice speaks. There is nothing about the time period that accounts for the difference in impact. This difference

arises entirely from the publicity related to the fact that Mr. Blencoe was a high profile Cabinet Minister at the time these matters arose. Such, as the Chief Justice points out, is the price of public life.

65. The broad interpretation favoured by the Court of Appeal provides *Charter* protection for those in the public eye, whose actions may be expected to be the subject of intense public scrutiny, while denying it to others who escape such scrutiny. If sanctioned by this Court, it would likely leave human rights commissions in the position of having to give higher priority to sexual harassment complaints made against certain prominent individuals than other allegations of discriminatory conduct. Such a two-tiered approach to section 7 is antithetical to fundamental *Charter* values of equality.

66. Lambert, J.A. pointed out the weakness of a legal theory that depended upon a comparison of relative suffering for the existence of constitutional rights:

> "The jurisdiction of the Human Rights Tribunal cannot be dependent 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 per Lambert, J.A. (dissenting), at para. 22

67. It is to avoid the uneven application of constitutional rights, contrary to the spirit of s.15 of the Charter, that the objective standard articulated by this Court in *G.(J.)* is appropriate.

cf. *R. v. Beare*, [1988] 2 S.C.R. 387 at 402 (avoiding a subjective approach to s.7)

68. A related question is whether the 'quality of the injury' to the Respondent is such as to merit the protection of s.7 of the *Charter*. In *G.(J.)*, this Court distinguished between an "injury" to a parent arising from a custody order, and "injury" to a parent arising from conscription of the child or the sentencing of that child to jail. This Court made the following observations with regard to the latter:

> "While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the

> 'injury' to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, *the state is not directly interfering with the psychological integrity of the parent qua parent.* The different effect on the psychological integrity of the parent in the above examples lead me to the conclusion that no constitutional rights of the parent are engaged."
>
> *New Brunswick (Minister of Health and Community Services) v. G.(J.), supra* at paras 63-64 (emphasis added)

69. While no doubt distressing, an allegation of sexual harassment in the typical case does not cause such profound mental anxiety as to attract the protection of security of the person. Delay in such complaints does not generally rise above the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action". Nor are the ultimate consequences of human rights proceedings sufficiently adverse as to attract constitutional protection. Also, unlike the criminal context, human rights complaints in British Columbia do not involve state prosecutions and "the state is not directly interfering with the psychological integrity of the (respondent)". That being the case, the human rights context, unlike the criminal, is not one in which the length of exposure to proceedings will be regarded as prejudicial to the individual respondent's psychological integrity.

> *New Brunswick (Minister of Health and Community Services) v. G.(J.), supra* at paras 59-60 and 64
> *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892 at 932h, per Dickson, C.J.C.

70. The danger in extending section 7 rights to encompass delays in human rights proceedings can be illustrated by this Court's comment about the risk of extending the right to "the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action":

> "If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected."

New Brunswick (Minister of Health and Community Services) v. G.(J.) (September 10, 1999), File No. 26005 (S.C.C.) at para 59, per Lamer, C.J.

71. For these reasons, it is the submission of these Appellants that the Court of Appeal erred in holding that section 7 provided the Respondent Blencoe with a constitutionally protected right to dignity, and specifically to a speedy human rights hearing which would minimize the assaults on his dignity.

(ii) Is delay in the conduct of non-penal proceedings contrary to "principles of fundamental justice" within the meaning of section 7 of the *Charter*, where the delay does not interfere with the right to a fair hearing?

72. If it were determined that the right not to be stigmatized was an aspect of liberty or security of the person, it would still be necessary to determine whether deprivation of that right through delays in the human rights process was contrary to the principles of fundamental justice.

73. McEachern, C.J.B.C. did not analyse this requirement separately, holding simply that "undue delay and the continued prejudice to privacy and human dignity already described cannot be in accordance with the principles of fundamental justice." The proposition appears to be that deprivation of privacy and human dignity through delay in proceeding with human rights complaints must be contrary to principles of fundamental justice. This analysis is circular, and rests on a characterisation of delay as the source of the impairment of liberty and security interests, and the occasion of the breach of fundamental justice. Such a proposition gives no weight to the competing societal interests in the resolution of human rights complaints, and in particular gives no weight whatsoever to the competing rights of the complainants.

Reasons for Decision of Court of Appeal, per McEachern, C.J.B.C., para. 104

74. The proposition that respect for human dignity is a principle of fundamental justice has been rejected by this Court. In writing for the majority in the *Rodriguez* case, Sopinka, J. put it this way:

> "While respect for human dignity is the genesis for many principles of fundamental justice, not every law that fails to accord such respect runs afoul of these principles.

> To state that 'respect for human dignity and autonomy' is a principle of fundamental justice, then, is essentially to state that the deprivation of the appellant's security of the person is contrary to principles of fundamental justice because it deprives her of security of the person. This interpretation would equate security of the person with a principle of fundamental justice and render the latter redundant."
>
> *Rodriguez v. British Columbia,* [1993] 3 S.C.R. 519 at 592g, per Sopinka, J.

10 75. In an early judgment of this Court under the *Charter*, the principles of fundamental justice were said to be "found in the basic tenets of the legal system" and were described as:

> "... principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law."
>
20 *Reference re s.94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 503b-e and 512g, per Lamer, J.; and see per Wilson, J. at 530i
> See also *R. v. Hebert* [1990] 2 S.C.R. 151, at 162d-164d, per McLachlin, J.

76. The position of these Appellants is that the principles of fundamental justice *do not* encompass a right not to have one's dignity impaired through delay in the investigation of a human rights complaint. Rather, the principles of fundamental justice relevant to the case at bar must be
30 related to the "basic tenets of the legal system" as articulated in common law principles, *Charter* values, and the expression of broad consensus found in international conventions.

77. None of these sources of law recognize the avoidance of stigmatization arising from administrative delay as a principle of fundamental justice. On the other hand, the avoidance of
40 discrimination, the very purpose of human rights legislation and its remedial proceedings, has been universally recognized as of a fundamental nature.

(a) Common Law Principles

78. There is no rule at common law that unreasonable delay in proceeding with non-penal administrative proceedings is contrary to justice and requires intervention by judicial stay. At

common law, courts have the power to stay administrative proceedings if delay has resulted in a denial of natural justice, contravention of the rules of procedural fairness, or an abuse of process.

Bennett v. British Columbia Securities Commission (1992), 94 D.L.R. (4th) 339, at 354h - 355a, per curiam (B.C.C.A.)
Nisbett v. Manitoba (Human Rights Commission) (1993), 101 D.L.R. (4th) 744, at 756a, per Scott, C.J.M. (Man. C.A.)
Misra v. College of Physicians and Surgeons of Saskatchewan (1988), 52 D.L.R. (4th) 477, at 490 and 496, per Scherstobitoff, J.A. (Sask. C.A.)

10

79. The test generally adopted at common law is whether the respondent to the administrative proceeding can demonstrate prejudice to his ability to have a full and fair hearing. In other words, as Lowry J. stated in the case at bar, the test is whether the respondent has been deprived of the "ability to respond to the complaint in an evidentiary sense."

20 *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, at 756b - 757b, per Scott, C.J.M. (Man. C.A.)
Canadian Airlines International Ltd. v. Canada (Human Rights Commission), [1996] 1 F.C. 638, at 640 - 641c, per Décary, J.A. (C.A.)
Ford Motor Co. of Canada v. Ontario (Human Rights Commission) (1995), 24 C.H.R.R. D/464, at D/466, per Steele, J. (Ont. Div. Ct.)
Reasons for Judgment, Lowry J., para. 37

30

80. It follows that at common law, allegations of prejudice flowing from stigmatization or personal hardship which attend the ordinary processing of a human rights complaint are not relevant to the determination of whether those proceedings should be stayed.

See Reasons for Judgment of Lowry, J. at para. 37.

40 81. The common law rule reflects two fundamental concerns: that the individual's ability to mount a case may have been prejudiced in an evidential sense, and that the integrity of the judicial system may be impaired by delay which affects the ability of the individual to receive a fair hearing. The common theme is that delay must not be permitted to prejudice the interests of justice.

82. The effect of the judgment of the majority below is to extend this common law rule to include circumstances where delay has no effect whatsoever on the ability of the individual to

respond, or on the ability of the institutional structure to act fairly. Such an extension would require a compelling rationale, particularly in light of the effect of such an extension on the protection of human rights which lies at the core of the *Code* and related human rights legislation.

83. Where the effect of the proposed extension of the common law is to create an added layer of judicial review of the workings of an administrative tribunal, judicial restraint is particularly appropriate. A leading academic commentator (now judge) has commented on the relationship in these terms:

> "It is appropriate to presume that procedural duties not imposed by the common law duty of fairness are not among the basic tenets of our legal system, and are thus not included in the principles of fundamental justice. ... (T)he reference point for defining the content of the principles of fundamental justice -- the basic tenets of our legal system -- includes a recognition that courts have a limited institutional competence to design procedural detail for the wide variety of administrative agencies that they supervise; that the content of fairness is the result of balancing often competing factors; and that the perspective of the agency can be as valuable to the elaboration of the requirements of fairness in specific contexts as that of a reviewing court."
>
> J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law", (1991) 29 Osgoode Hall L.J. 51, at 74-79
>
> See also Philip L. Bryden, "Fundamental Justice and Family Class Immigration: The Example of *Pangli v. Minister of Employment and Immigration*", (1991) 41 U.T.L.J. 484

(b) Related Charter Values

84. Reference to the related *Charter* rights on delay reinforces this conclusion. Section 11(b) provides that "(a)ny person charged with an offence has the right ... to be tried within a reasonable time". The qualifier to this right is that it applies to an individual who has been "charged with an offence". This heightened protection reflects a particular aspect of the principle specific to the criminal context where the presumption of innocence is constitutionally protected. As the former Chief Justice of Canada has concluded for this Court, these considerations do not apply in the human rights context.

R. v. Morin, [1992] 1 S.C.R. 771, at 786a-787c, per Sopinka, J.

R. v. Kalanj, [1989] 1 S.C.R. 1594, at 1608h, per McIntyre, J.
R. v. Potvin, [1993] 2 S.C.R. 880, at 910f-911f, per Sopinka, J.
Canada (Human Rights Commission) v. Taylor [1990] 3 S.C.R. 892, at 917h, per Dickson, C.J.C.

85. This analysis is further reinforced by reference to another related right, the section 15 right to "equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... sex". The proposition that the principles of fundamental justice encompasses a right "not to be subjected to unreasonable delay in the investigation of a human rights complaint" is not consistent with the rights guaranteed under section 15.

New Brunswick (Minister of Health and Community Services) v. G.(J.), supra at paras 112, 115 (L'Heureux-Dubé J., concurring) (s.15 equality values should inform interpretation of s.7)

86. This Court has recognised that the victims of sexual discrimination are predominantly female and the alleged discriminators are predominantly male, with women additionally suffering from a higher frequency of sexual discrimination in the workplace than men. As a consequence, the complainant in human rights proceedings will typically be female. Use of a standard which only accommodates the interests of the state and the respondent will therefore tend systematically to exclude the primarily female complainants from consideration. It further leads to an approach which characterizes a complainant as having no legal rights or legal rights of a lesser order. That is not consistent with a *Charter* analysis that recognises the values underlying section 15, nor is it consistent with this Court's acceptance of the quasi-constitutional character of the rights of the Complainants that were defeated by the judgment below.

Janzen v. Platy Enterprises Ltd [1989] 1 S.C.R. 1252, at 1284h-1285e, per Dickson, C.J.C.
See also Aggarwal, *Sexual Harassment in the Workplace* (2nd ed.), pp. 2-6

87. This Court has also recognised that persons at the lower end of the economic scale tend to suffer the most sexual harassment. Consequently, in addition to issues of gender, sexual harassment will also raise other issues of discrimination regarding group characteristics such as race, age,

disability and sexual orientation. In certain cases, the victim of sexual harassment will therefore be exposed to intersecting forms of discrimination.

Janzen v. Platy Enterprises Ltd [1989] 1 S.C.R. 1252, at 1285g-j, per Dickson, C.J.C.

88. A principle of fundamental justice built on the notion of "fairness" permits the court to assess the prejudicial effect of delay on the respondent with reference to the prejudicial effect on the particular complainant of an order for a *Charter* remedy. This Court has indicated on previous occasions that this is an appropriate approach rejecting, for example, the analysis that the rights of an accused can be determined without reference to the position of a witness.

R. v. Levogiannis, [1993] 4 S.C.R. 475, at 490j-493a, per L'Heureux-Dubé, J.
R. v. L. (D.O.), [1993] 4 S.C.R. 419, at 428i-429c, per Lamer, C.J.C.
R. v. O'Connor, [1995] 4 S.C.R. 411, at 491, para. 130, per L'Heureux-Dubé, J.

89. Such a principle is also consistent with the proposition that "section 7 entitles the appellant to a fair hearing. It does not entitle him to the most favourable procedures that can be imagined."

R. v. Lyons, [1987] 2 S.C.R. 309, at 362e, per La Forest, J.

90. It is for these reasons that these Appellants assert that the relevant principle of fundamental justice is the right to be free of delay that interferes with the interests of justice or is otherwise unfair to the ability of the individual to respond to the allegations, and that the deprivation of section 7 interests must be measured against that principle.

(c) International Conventions

91. The proposition that administrative delay which exacerbates stigmatization is fundamentally unjust has not "found expression in the international conventions on human rights", to adopt the language of Lamer, J. in the *Motor Vehicle Reference*.

Reference re s.94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486 at 503b, per Lamer, J.

92. To the contrary, the principle which is consistently expressed as fundamental in international conventions is the principle of non-discrimination.

93. The clearest articulation of the fundamental nature of the principle of non-discrimination against women is found in the *Convention on the Elimination of all Forms of Discrimination Against Women*, which Canada ratified in 1981. Human rights legislation may be seen as directly responsive to the national and international consensus against discriminatory behaviour reflected in this *Convention*.

> *Convention on the Elimination of all Forms of Discrimination Against Women*, U.N.T.S. No. 20378, vol. 1249 (1981)

(d) Balancing Societal and Individual Interests

94. Finally, in assessing the principles of fundamental justice that apply to the circumstance at bar, it is appropriate to balance the interests of the Respondent Blencoe against the societal interest reflected in the human rights legislation that is the foundation of this proceeding, and particularly by reference to the rights of the Complainants.

95. In the case at bar, Lambert, J.A. was cognizant of the need to balance the rights of the Respondent Blencoe with those of the Complainants:

> "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 Decision, Lambert J.A. (dissenting), para. 31

96. The majority however did not appear to accept that the Complainants had rights which required recognition in the assessment of fundamental justice, commenting simply that "the legal rights of a party must be given precedence over the concerns of others."

> Reasons for Decision, per McEachern, C.J.B.C., para. 39

97. This Court has recognized that in determining whether a particular deprivation contravenes principles of fundamental justice, "a balancing of the interest of the state and the individual is required." The principles of fundamental justice have been said to "necessarily reflect a balancing of societal and individual interests."

Rodriguez v. British Columbia, [1993] 3 S.C.R. 519, at 592j-593a, per Sopinka, J.
See also *Thomson Newspapers Ltd v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425, at 539b-541b, per La Forest, J.
R. v. O'Connor, [1995] 4 S.C.R. 411, at 458-459, para. 65, per L'Heureux-Dubé, J.

98. The balancing factor has been expressed as the protection of society in these terms by McLachlin, J.:

> "The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally."

Cunningham v. Canada, [1993] 2 S.C.R. 143, at 151j-152a, per McLachlin, J.

99. In the human rights context, the competing interests will be both societal, in the furtherance of the objectives of the *Human Rights Code*, and individual, in respect for the rights of the Complainants. The judgment of the Court of Appeal gives no weight to either of these important values, and in particular leaves the Complainants without a remedy.

100. A proper balancing of these interests leads to the conclusion that any alleged deprivation of the Respondent Blencoe's rights occurred as part of a process integral to the resolution of human rights complaints, and not in a manner inconsistent with principles of fundamental justice.

SECOND ISSUE: Whether the circumstances at bar support a stay in these human rights proceedings

101. If the legal theory of the majority of the Court of Appeal is unsound, the stay imposed should be set aside. However even if the legal theory of the majority were upheld, it would still be necessary to review the circumstances at bar to determine whether in this case, a *Charter* violation had occurred. The position of these Appellants is that there has not been unreasonable delay leading to stigmatization in this case, and thus the Complaints should be permitted to proceed to the Tribunal for hearing.

102. Acceptance of the legal theory propounded by the majority in the Court of Appeal still leaves difficult questions of application, including the following:

(i) Is delay in the processing of human rights complaints to be measured from the date the complaints were made or the date the complaints were referred for hearing?

(ii) Where stigma is relied upon to constitute prejudice, what degree of causation must be established before staying proceedings?

(iii) Was the delay in the case at bar unreasonable?

(iv) Is a judicial stay the appropriate remedy?

(i) Delay in the Investigatory Stage

103. If the section 11(b) analogue is to be used in a non-penal setting, and in particular if section 7 is viewed as requiring a hearing within a reasonable time, it is necessary to consider the point at which the time begins to run. In a criminal setting, the time begins to run when the charge is laid. It is from that point on that the accused person is in jeopardy. Sopinka, J. expressed this proposition in the following way:

> "As I have indicated, this factor [the length of the delay] requires the Court to examine the period from the charge to the end of the trial. Charge means the date on which an information is sworn or an indictment is preferred (see *Kalanj*, *supra.*, at p. 1607). *Pre-charge delay* may in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable but of itself it *is not counted in determining the length of the delay*."
>
> *R. v. Morin*, [1992] 1 S.C.R. 771 at 789d, per Sopinka, J. (emphasis added)

104. In *Kalanj*, the judgment referred to by Sopinka J., this Court by a majority held that pre-charge delay was not to be counted, even when the accused persons had been arrested eight months before the charge was laid, and even when the arrests were said to have received "wide publicity" and caused "serious trauma and public embarrassment" to the persons prior to the charges being laid. Speaking for the majority, McIntyre J. rejected the argument that delay should be measured from the time of arrest, and made the following comments about the investigatory period:

> "Pre-information delay will not be a factor.... The length of the pre-information or investigatory period is wholly unpredictable. No reasonable assessment of what is, or is not, a reasonable time can be readily made."

R. v. Kalanj, [1989] 1 S.C.R. 1594, at 1608c and at 1609f, per McIntyre, J.

105. In the case at bar, the initial intake and investigatory period took 22 months. If the section 11(b) model is to be used, this period is analogous to the pre-charge period in the criminal process. In this context, the decision to refer the Complaints to the Tribunal for hearing is analogous to the laying of a charge in the criminal process. The time period for measuring the delay on this analysis does not begin to run until after the Commissioner for Investigation and Mediation has completed her role in the process.

106. This analysis is consistent with the human rights process as a whole. When a complaint is made under the *Code*, there are three possible outcomes. The Commissioner of Investigation and Mediation may dismiss the complaint, either for procedural grounds (e.g. it is out of time) or because after investigation it is determined that there is no reasonable basis to refer it to the Tribunal for a hearing. The Commissioner may seek to mediate the complaint and resolve it short of a hearing. Finally, the Commissioner for Investigation and Mediation may, if the investigation indicates a reasonable basis for the complaint, refer it to the Tribunal for adjudication. It is only the last outcome that leads to a form of jeopardy to the person who is the object of the complaint, and then only after the decision to refer has been made. It is only after referral to the Tribunal that complaints become part of the public record.

107. On this analysis, the Court of Appeal erred by including the whole of the investigatory period as part of the time period relevant for the delay analysis. Whatever the relationship between section 7 and section 11(b), it cannot be that a person accused of a criminal offence has a weaker claim for a trial within a reasonable time (because the investigatory delay is not considered) than does the subject of a human rights complaint. In this respect it is section 11(b) that conveys the broader right, and section 7 the narrower more restrictive right.

See for example *R. v. Potvin*, [1993] 2 S.C.R. 880 particularly per McLachlin, J. (dissenting) at 892g-894g

(ii) Cause of Stigma

108. The theory of the majority below is that the Respondent Blencoe was "deprived" of his section 7 rights of liberty and security of the person by the delay in making the decision to refer these Complaints for hearing. The argument is that the Respondent Blencoe was stigmatized by the allegations, and the stigma was "exacerbated" by the delay, amounting to a deprivation of the section 7 right.

Reasons for Decision, per McEachern, C.J.B.C., at para. 56

109. These Appellants do not dispute that the Respondent Blencoe has suffered significant hardship as a result of media scrutiny concerning the allegations of sexual harassment, but the nexus between this hardship and the processing of the two complaints at issue is extremely remote.

110. To found a *Charter* remedy, there must at a minimum be a real and substantial connection between the state action or inaction at issue (here, the length of time before referring the complaints for adjudication) and the *Charter* right said to be impaired (here, the impact on dignity of stigmatization relating to the allegations). The record does not disclose such a real and substantial connection in the case at bar.

111. The central event leading to intense media scrutiny was the dismissal of the Respondent Blencoe from Cabinet and the N.D.P. caucus in April 1995 by Premier Harcourt after allegations of sexual harassment by the Respondent Blencoe's former executive assistant and two other women. The Complaints at bar were not filed until the beginning of August 1995. By that time, as the majority acknowledged,

> "... the [Respondent] was already encountering very serious adverse publicity because of his previous dismissal from the provincial Cabinet by the Premier."

Reasons for Decision, per McEachern, C.J.B.C., at para. 43

112. In addition to the extraordinary dismissal from Cabinet and caucus after allegations of sexual harassment, and the two human rights Complaints brought by Ms. Willis and Ms. Schell under the *Code*, another woman brought a civil action against the Respondent Blencoe alleging sexual harassment. All of these allegations arose from events when the Respondent Blencoe was a Minister of the Crown.

113. In these circumstances, there can be no basis to attribute the stigmatization which has occurred to the Respondent Blencoe to the time taken by the Commissioner for Investigation and Mediation (and the Council) to investigate the two specific Complaints and make a determination that they should proceed to a hearing.

114. This point can be illustrated by examining the evidence of the publication of a story about the Respondent Blencoe's problems in a regional Ontario newspaper ten days after starting his new job as Administrator to the Amherstburg Chamber of Commerce. The Respondent Blencoe refers to the "extensive coverage given to the matter by the local media" as causing embarrassment and damage to his dignity and self-respect (Affidavit of Robin Blencoe, para. 26-29), and McEachern, C.J.B.C. refers to this coverage as part of the "relentless publicity from which they have been unable to escape" (Reasons, para. 54). An examination of this coverage however indicates that the focus is on his dismissal from Cabinet after allegations of sexual harassment, with the unresolved human rights Complaints placed alongside the unresolved civil action.

115. For example, in what appears to be the lead story in the Amherstburg paper, the Respondent Blencoe is described as being "... at the heart of a controversy involving allegations of sexual assault and harassment that forced him from cabinet and the New Democratic Party caucus in 1995." The story continues:

> "Blencoe, a Victoria MLA, was fired as government services minister by then-Premier Mike Harcourt after several women complained he sexually harassed them.
>
> Two B.C. women have filed complaints against Blencoe with the province's council of human rights. The council is investigating the allegations.

A third woman, who alleged Blencoe sexually assaulted her in 1989 and 1994, launched a lawsuit against him and the province in May 1996 in B.C. Supreme Court. The case is still before the court."

Ex. K to Affidavit of Robin Blencoe, Record, p.152

116. In another of the local stories, the Respondent Blencoe was quoted as explaining his absence from a luncheon held in his honour in this way:

"Blencoe said he was unable to attend because he was busy dealing with the fallout from a *Star* story that disclosed his firing from cabinet because of allegations of sexual harassment. The allegations forced him out of the New Democratic Party caucus in 1995."

Ex. K to Affidavit of Robin Blencoe, Record p. 154

117. Even if the Respondent Blencoe's dignity were characterized as a *Charter* right protected by section 7, in order for section 7 to have any application it would be necessary to demonstrate that the Respondent Blencoe was deprived of his dignity by some action (or perhaps inaction) on the part of the Commissioner for Investigation and Mediation. The record does not support such a conclusion. The embarrassment to the Respondent Blencoe was caused by intense media scrutiny, and the focus of that scrutiny was the Respondent Blencoe's dismissal from Cabinet and caucus amid allegations of sexual harassment which were made months before the Complaints at bar were filed.

118. The simple fact is that intense media scrutiny, particularly in relation to any allegations of sexual impropriety, is an element of political life which goes with the position. The United States Supreme Court put it in this way:

"An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case."

Gertz v. Robert Welsh, 418 U.S. 323, at 808, per Powell, J.

119. In the case at bar, the majority of the Court of Appeal erred in attributing the stigma to the unresolved human rights Complaints, as opposed to the unresolved civil action or the real focus of media interest, the circumstances surrounding the dismissal of the Respondent Blencoe from Cabinet and caucus.

(iii) Was the delay unreasonable?

120. Even if the section 11(b) analogue is to be applied to human rights proceedings, the jurisprudence relating to section 11(b) ought to provide the upper end of the standard against which delay in the human rights process is to be measured.

121. Under section 11(b), it would be necessary to assess both the length of the delay and the reasons for the delay in determining whether the delay is unreasonable. When considering reasons for the delay, four categories of time must be considered: inherent time requirements necessary to process a case (not counted as part of the delay), delay attributable to the actions of the accused (also not counted), delay attributable to the Crown (counted as delay) and systemic delay (counted if it is unreasonable; not counted if it is reasonable).

R. v. MacDougall, (1998), 165 D.L.R. (4th) 193, at 210-214, paras. 41-56, per McLachlin, J. (S.C.C.)

122. It is not sufficient to simply tabulate the expired time, as the majority in the Court of Appeal did, and make an assessment as to whether it is excessive for the type of complaint. A time period may be excessive without being unreasonable. In *MacDougall, supra,* this Court held that a delay of just under 22 months was excessive, but concluded on analysing the reasons for the delay that it was not unreasonable.

123. In the case at bar, the judge of first instance, Lowry J. undertook such an analysis, and concluded as follows:

(i) The first period, from August 1995 to April 1996, could not be relied upon by the Respondent Blencoe. Particulars of the Complaints had been given to the Respondent Blencoe in August 1995, but he took the position that he need not

respond until the Council addressed the timeliness of the Complaints, and did not in fact provide his response until April 1996.

(ii) The next period, from April to September 1996 constitute unexplained delay by the Commission.

(iii) In September 1996, an investigator was appointed to investigate the Complaints. The period from September 1996 to July 1997 was comprised of the investigation process, completion of the investigator's report, obtaining comments on the report by the parties, forwarding of the report to the Commissioner of Investigation and Mediation and the decision to refer the Complaints against the Respondent Blencoe (but not one of the complaints against the Government) to the Tribunal for a hearing.

Reasons for Judgment, Lowry, J.

124. Lowry, J. concluded that there had not been unreasonable delay:

> "... 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."

Reasons for Judgment, Lowry, J., para. 47

125. As pointed out by Lambert, J.A., the finding that there had been no unreasonable delay was a finding of fact.

Reasons for Judgment, Lambert, J.A., para. 21

126. Thus even on an *Askov/Morin* type analysis, only five months of the delay would be characterized as unreasonable. The balance is either attributable to the Respondent Blencoe's own actions in challenging the timeliness of the Complaints and delaying his response to them, or was taken up by the investigation and communications between the Respondent Blencoe, the Complainants and the Commissioner of Investigation and Mediation (earlier the Council). On the *Askov/Morin* type analysis, this latter may be regarded as part of the inherent time requirements necessary for a case such as this.

127. Lowry, J. did not consider the Commission at fault for the procedure adopted, describing it, instead, in the following terms:

> "... the evidence reflects communication that has been ongoing throughout between the Commission, the solicitors that have represented Mr. Blencoe from the outset, and the complainants. It has not been a process in which Mr. Blencoe has been ignored. Rather it is one where there has been a dialogue that has been quasi-adversarial in nature as one would expect between an investigator and the solicitors representing a person who is the subject of the complaints being investigated.
>
> ...
>
> ... 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..."
>
> Reasons for Judgment, Lowry, J., paras 39 and 47.

128. The majority of the Court of Appeal failed to give sufficient weight to the requirements of natural justice as played out in the context of a human rights complaint in concluding that "the investigation [of the Complaints] was necessarily one-dimensional as there were no eyewitnesses, and a week at the outside would have sufficed".

Reasons for Decision, per McEachern, C.J.B.C., para. 51

129. The total systemic delay in the case at bar was held by Lowry J. to be 5 months. This Court has held that a systemic delay of five months in a criminal setting is not unreasonable.

R. v. Slaney, [1993] 2 S.C.R. 228, at 229, per Sopinka, J.

130. Taking the Respondent Blencoe's case at its highest, assuming delay in human rights proceedings is to be treated on a par with delay in criminal proceedings, but including delay at the investigatory stage, the delay in the case at bar was not unreasonable.

(iv) Is a judicial stay the appropriate remedy?

131. Finally, even if a remedy for the process were considered to be appropriate, the stay of proceedings was an unnecessarily draconian remedy to impose. The effect was to negate the rights of the Complainants as well as to thwart the important purposes of the human rights proceeding.

132. At common law, a stay of proceedings may be imposed for pre-charge delay amounting to abuse of process, but the power to stay proceedings "can be exercised only in the clearest of cases".

> *R. v. Jewitt* [1985] 2 S.C.R. 128, at 137a, per Dickson, C.J.C.
> *R. v. Young* (1984), 13 C.C.C. (3d) 1, at 31, per Dubin J.A., (Ont. C.A.)
> *Bennett v. British Columbia (Securities Commission)* (1991), 82 D.L.R. (4th) 129, at183g-184, per Melnick, J. (B.C.S.C.), appeal dismissed (1992) 94 D.L.R. (4th) 339 (B.C.C.A.)

10

133. The limited role of the judicial stay as a *Charter* remedy was addressed in the *O'Connor* case in these terms:

> "It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a
> 20 violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the "clearest of cases".
>
> Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated.
>
> 30 *R. v. O'Connor*, [1995] 4 S.C.R. 411, at 460-461, paras. 68-69, per L'Heureux-Dubé, J.

134. Bayda, C.J.S. came to the same conclusion in rejecting a judicial stay as the appropriate remedy for delay in processing human rights complaints:

> 40 "It is axiomatic that a remedy which has the effect of frustrating the clear purpose of a remedial proceeding will directly affect the complainants for whose direct benefit the proceeding was initiated and maintained.... An order preventing the inquiry leaves the complainants entirely out in the cold despite their innocence. The remedy from their standpoint creates a stark, implacable injustice."
>
> *Saskatchewan Human Rights Commission v. Kodellas*, (1989), 60 D.L.R. (4th) 143, at 165-166 (Sask. C.A.), per Bayda, C.J.S. (dissenting on this point)

135. Commentators have agreed that "the primary form of judicial relief against denial of a speedy trial should be to expedite the trial, not to abort it."

> Peter W. Hogg, *Constitutional Law of Canada* (Loose-Leaf ed.), (Toronto, Carswell, 1998), p. 49-12, citing A. Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975) 27 *Stanford Law Rev.* 525 at 535

136. It is noteworthy that in a recent decision concerning a challenge by a complainant to delays in the processing of a human rights complaint, the British Columbia Court of Appeal has held that the appropriate remedy was for the complainant "to expedite this matter through seeking mandamus."

> *Morgan v. The Queen*, December 1, 1998, File No. CA V02797, Victoria Registry (B.C.C.A.), at para. 23, per Lambert, J.A. (concurred in by McEachern, C.J.B.C. and Huddart, J.A.)

137. Expedition of the proceedings through judicial review is a remedy available to respondents as well as complainants.

138. This Court has rejected a judicial stay in circumstances where it was not likely that the matters giving rise to the application would be continued into the future, and where a lesser remedy would address the issue adequately.

> *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at 430-431, paras. 94-97, per curiam

139. In the case at bar, even if it were held that the Respondent Blencoe's section 7 rights had been implicated by the time that had elapsed, a more appropriate remedy under s. 24(1) would be an order expediting the proceedings. The consequence of the Respondent Blencoe's efforts, successful in the Court of Appeal, to obtain a judicial stay has been to further extend the delay of which he complains.

140. For these reasons, these Appellants submit that the appeal be allowed and the Complaints be permitted to proceed to the B.C. Human Rights Tribunal for disposition.

PART 4

NATURE OF ORDER SOUGHT

141. These Appellants submit that:

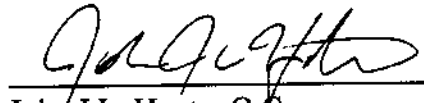
(i) the appeal be allowed,

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

(iii) the Petition of the Respondent Blencoe be dismissed, and

(iv) the complaints of Andrea Willis and Irene Schell be remitted to the B.C. Human Rights Tribunal for hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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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.

PART 5
TABLE OF AUTHORITIES

Pages in Argument Where Cited

Cases

Statutes and Conventions

Authors Cited