Court File No.: 26789

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

B E T W E E N:

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

Appellants
(Respondents)

- AND –

ROBIN BLENCOE

Respondent
(Petitioner)

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FACTUM OF THE INTERVENOR

THE ATTORNEY GENERAL OF ONTARIO

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1. The Intervenor accepts as correct the Statement of Facts in the Appellants' Factums.

PART II – POINTS IN ISSUE

2. The Intervenor will confine its submissions only to the first point in issue:

Whether the right to "liberty and security of the person" in section 7 of the *Charter* is infringed by unreasonable delay in processing a human rights complaint?

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PART III – ARGUMENT

I. Introduction – Overview of Intervenor's Position

3. The Attorney General of Ontario's position on this appeal can be summarized as follows. The Supreme Court of Canada plays a fundamentally important role in resolving and clarifying the law, particularly the law of the *Charter*. The Court considers "hard cases", where the existing law is not yet clear or certain and attempts to provide guidance and clarity in the law. This is best done by setting out clear legal tests which can be applied by lower courts and, as importantly, relied upon by counsel to provide, with a level of predictability, advice to government or private clients.

20

4. The British Columbia Court of Appeal's interpretation of liberty and security of the person as embracing an abstract and general "right to dignity" is antithetical to this approach; it provides an overly broad and abstract test and one which is directly contrary to this Court's ruling in *R. v. Beare*, [1988] 2 S.C.R. 387. Specifically, it permits a party to bootstrap an economic rights claim under the guise of stigma, stress, or loss of privacy. It provides neither certainty nor coherence.

5. Rather, the correct approach should have regard to the *nature* and *consequences* of the civil and administrative proceedings. The *nature* of the proceeding must involve matters

30 fundamental to personal identity or that directly engage the justice system and its administration (*New Brunswick Minister of Health v. G. (J.)* (September 10, 1999, Court File No. 26005) paragraphs 61 and 65). If the nature of the procedure essentially provides a vehicle for the redress of private rights, the regulation of a business, profession, or regulated activity, s. 7 should

not be engaged. In addition, if *the ultimate result* of those proceedings do not cause the person to be denied their liberty or to experience a significant interference with their physical or psychological integrity, s. 7 ought not to be triggered. Further, the person's particular psychological state during the proceeding itself, or in the period leading up to the hearing, should not be relevant to the *Charter* s. 7 determination.

II. The Need for Clarity and Predictability

6. This Court has a fundamentally important role to provide guidance and direction to lower courts, counsel, and the public at large, in both stating and settling the law. This role is particularly salient when the Court is required to interpret the abstract language of the *Charter*. The Supreme Court of Canada considers a narrow band of "hard cases" (such as this one where the country's appellate courts are starkly divided on their approach). Following the Court's decision, however, cases involving these issues should become easier such that lower courts can resolve disputes with greater precision and certainty. Accordingly, a clear test for determining when a liberty or security of the person interest has been violated is required to ensure predictability in the law of the *Charter*.

> See: Ronald Dworkin, *Taking Rights Seriously*, (Harvard University Press, Cambridge, Mass, 1977), Ch. 4 "Hard Cases" pp. 81 to 130
>
> Frederick Schauer, "Easy Cases", (1989) 58 S. Cal. L. Rev. 399 at 412-3

7. The importance of clarity and predictability has been stressed by members of this Court on a number of occasions, in the context of both constitutional and non-constitutional legal issues.

> One of the main goals of any conflicts rule is to create certainty in the law. . . .Clear application of the law promotes settlement. If one has to wait for litigation to see if complications of the kind I have just described arise, then settlement will be inhibited. *There is need for the law to be clear.*
>
> *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1061-62

> The function of this Court is precisely that, to *settle* questions of law of national importance *in the interests of promoting uniformity* in the application of the law across the country, especially with respect to matters of federal competence.

> *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 387 per Dickson J. (as he then was); *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 at 509-510 per Wilson J. See also: *Minister of Indian Affairs v. Ranville et al.*, [1982] 2 S.C.R. 518 at 527-528; *R. v. Bernard*, [1988] 2 S.C.R. 833 at 858
>
> Now, even more in its supervisory role that in its heretofore more traditional appellate role, the Supreme Court's main function is to oversee the development of the law in the courts of Canada, to give guidance in articulate reasons and, indeed, direction to the provincial courts and to the Federal Court of Canada on issues of national concern or of common concern to several provinces, issues that may obtrude even though arising under different legislative regimes in different provinces. This is surely the paramount obligation of an ultimate appellate court with national authority.
>
> Bora Laskin, "The Role and Function of Appellate Courts: The Supreme Court of Canada", [1975] 53 Can. Bar. Rev. 469 at 475
>
> There is no doubt a limit to the ability of the Supreme Court to "settle" the law. There is no escaping the fact that the same issues keep coming back before the Supreme Court year after year. It often seems that, by handing down a decision, the Court invites litigants to pursue further refinements of the issue and thus settles very little. As some of the decisions canvassed below will illustrate, this is sometimes the case because of a failure on the part of the Court *to give clear and full guidance to the lower courts* in the process of reviewing their judgments. Often, however, the Court can do nothing more than respond to increasingly imaginative or stubborn litigants.
>
> Louise Arbour, "Developments in Criminal Law and Procedure: The 1981-82 Term" (1983) 5 Supreme Court Law Review, 139 at 185; See also: Madam Justice Bertha Wilson, "Leave to Appeal to the Supreme Court of Canada" (1983) 4 Advocate's Quarterly 1 at 6; Barry J. Reiter, John Swan, "Developments in Contract Law: The 1980-81 Term" (1982) 3 Supreme Court Law Review 115 at 138.

8. The importance of predictability and clarity in the law has also informed the Amercian commentary on the appropriate role for the United States Supreme Court. Antonin Scalia, in his oft-cited article "The Rule of Law as a Law of Rules", stressed the importance of predictability in judicial decision making. His Honour wrote:

> Even in simpler times uncertainty had been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability,

> or as Llewellyn put it, "reckonability", is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.
>
> Antonin Scalia, "The Rule of Law as a Law of Rules", [1989] Vol. 56 Univ. of Chicago Law Review 1175 at 1179 citing Karl N. Llewellyn, *The Common Law Tradition* 17 (Little, Brown, 1960). See also: *Baldwin v. State of Missouri*, 281 U.S. 586 at 595 per Holmes J. (1930)

10 > Judges, unlike the caliphs of old Baghdad, should apply principles, not unreviewable discretion. The Supreme Court thus searches for bright lines - or, at least, reasonably objective principles - to guide police, prosecutors, legislators, litigants, and lower courts. Unfortunately, more members of the Court are succumbing to the rule of the chancellor's foot. Rather than use cases to develop principles that limit the Supreme Court's discretion, the justices increasingly prefer to issue vague rulings that propose no standards.
>
> Ronald D. Rotunda, "Eschewing Bright Lines", December 1989, Trial, p.
20 > 52; See also: Henry M. Hart, Jr. "The Supreme Court 1958 Term", [1959] Harvard Law Review 84 at 96

III. The British Columbia Court of Appeal's Approach Provides Neither Clarity or Predictability

9. The first step under section 7 of the *Charter* is to determine whether a person's right to life, liberty or security of the person has been infringed.

> *R. v. Beare* [1988] 2 S.C.R. 387 at 401
> *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R.
30 > 869 at 881
> *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 339 and 432
> *Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425 at 459
> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1140

10. The British Columbia Court of Appeal's approach to the first step was to combine liberty and security of the person in order to create a general right to human dignity. This may be violated where an individual experiences stigmatization, stress, and loss of privacy *during the*
40 *process of* a civil or administrative proceedings, even where the potential consequence of an order is the payment of financial compensation. While this Court has recently indicated that interference with psychological integrity can infringe the right to security of the person in non-

criminal proceedings involving child apprehension, this case provides a clear opportunity for the Court to clarify, in a manner that can promote predictability, the extent to which this principle applies to ordinary civil and administrative proceedings.

> *Blencoe v. British Columbia (H.R.C.)* (1998), 160 D.L.R. (4th) 303 at 325 and 334 (B.C.C.A.)
>
> *New Brunswick Minister of Health v. G. (J.)* (September 10, 1999, Court File No. 26005) paragraphs 56 to 67

10 11. The British Columbia Court of Appeal's approach promotes neither clarity nor predictability. Tying a violation of liberty or security of the person to a general notion of dignity, applicable in proceedings designed to permit private citizens to pursue a claim of discrimination in which financial compensation is principally the potential consequence, overshoots the purpose of s. 7.

12. First, the Court of Appeal's approach is acontextual. The Court focussed on how a party feels when subject to the adjudicative process in an administrative proceeding, divorced from the nature of that proceeding or its potential consequences. Under that Court's approach, s. 7 can be triggered simply by the emotional and psychological condition of the participants even where the
20 ultimate consequences of the proceeding are purely civil and would not violate the rights enumerated in s. 7.

13. Second, such an approach permits a party to bootstrap an economic rights claim into s. 7 under the guise of stress, anxiety, stigmatization and loss of privacy. This Court has held that "economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee" (*Irwin Toy Ltd. v. Québec*, [1989] 1 S.C.R. 927 at 1003; See also *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407). On the basis of these holdings lower courts, and in particular Ontario courts, have repeatedly held that "liberty and security of the person" do not include the right to practice a profession, to earn rental income, to trade in securities, to obtain a
30 licence or to receive social assistance. As a result, s. 7 of the *Charter* has been held to have no application to disciplinary proceedings, rent review hearings, security commission matters, licence applications as well as a myriad of other programs.

> *Assn. of Professional Engineers of Ontario v.Karmash* (1998) 109 O.A.C. 334 (Div. Ct.); *A & L Investments Limited et al. v. The Queen* (1997), 36

O.R. (3d) 127 at pp. 135-136 (C.A.); *Markander v. Board of Ophthalmic* Dispensers (1994), 46 A.C.W.S. (3d) 775 (Ont. Ct. (Gen. Div.)); *Reclamations Systems Inc. v. Ontario (Premier)* (1996), 27 O.R. (3d) 419 at 435 to 439 (Gen. Div.); *Re Kopyto and Law Society of Upper Canada* (1993), 1 D.L.R. (4th) 259 (Div. Ct.); *Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641 (Gen. Div.); *Filip v. Waterloo (City)* (1992), 98 D.L.R. (4th) 534 (Ont. C.A.); *Biscotti v. Ontario Securities Commission* (1990), 74 O.R. (2d) 119 (Div. Ct.); *R. v. Miles of Music Ltd.* (1989), 74 O.R. (2d) 518 (C.A.); *Masse et al. v. Ontario (Ministry of Community and Social Services)* (1986), 89 O.A.C. 81 (Div. Ct.); *Cahill v. Provincial Medical Board of Nova Scotia* (1994), 31 N.S.R. (2d) 378 (S.C); *Wittman (Guardian Ad Lidem) v. Emmott* (1991), 77 D.L.R. (4th) 77 (B.C.C.A.)

14. However, the British Columbia Court of Appeal's approach permits a party to recast an economic rights claim as one relating to human dignity, thus permitting property rights to enter into s. 7 "though the back door". For example, a person who has trained to practice a profession or calling may argue that they experience stress and stigmatization when subjected to a disciplinary proceeding that could result in the loss of their licence or simply their "good will". By emphasizing the stress and anxiety caused by the uncertainty of the outcome, the legal costs incurred, and the stigmatization engendered, the person could assert that their liberty and security of the person is engaged by the disciplinary process in order to protect what is, in reality, an economic interest.

15. In fact, the Court of Appeal's approach in *Blencoe* was successfully relied upon to stay medical disciplinary proceedings (*Thomson v. College of Physicians and Surgeons of British Columbia* [1998] B.C.J. No. 1750 paras 42 to 51 (B.C.S.C.)) and in an administrative adjudication of liability for wrongful dismissal (*In re Westhawk Enterprises Inc.*, BC EST #D302/98, July 3, 1998 (Employment Standards Tribunal)). It has also been raised, albeit unsuccessfully, in proceedings before the Certified General Accountants Association of B.C., the Northwest Territories Workers' Compensation Board, the Ontario Freedom of Information Commissioner and the B.C. Securities Commission. In the latter case, the Court's reference to counsel's submissions show just how clearly economic rights can be bootstrapped into s. 7:

> Mr. Shapray says that because s. 7 embraces the essential right to dignity and privacy,
>
> > [t]here is no reason why the same cannot apply in the context of the proceedings of a securities commission whose own

> invasive process and unbridled discretion threatens a loss of status and statutory rights as well as the infliction of permanent damage to an individual's reputation and patrimony and the individual's sense of self-worth, dignity, professionalism and financial independence. (*Johnson v. British Columbia (Securities Commission)* [1999] B.C.J. No. 552 at para 71)
>
> *Keenan v. Certified General Accountants Assn. of B.C.* [1999] B.C.J. No. 351 at para 71
> *Clark v. Northwest Territories (W.C.B.)* [1998] N.W.T.J. No. 122 at para 64
> *Peter Grant v. HMQ in right of Ontario*, IPC Order PO-1706/August 24, 1999, Ont. Information and Privacy Commissioner at p. 10

16. Indeed it is telling that the Respondent, at paragraph 18 of his Factum filed in response to the B.C. H.R.C, directly attempts to tie "dignity" to the right to pursue a livelihood. This further reveals the extent to which the Court of Appeal's open ended and general "right to dignity" approach will be relied upon to protect what are, at bottom, property rights.

17. Third, there is nothing in the Court of Appeal's general "right to dignity" approach to s. 7 which would logically limit its application to stress and stigmatization caused by delay before human rights tribunals, or to cases only involving allegations of sexual harassment, or indeed to cases only involving delay. Any government conduct that caused stress or stigmatization in an administrative proceeding would suffice, regardless of the subject matter under consideration or the scope of remedies available to the tribunal. As well, once s. 7 is engaged at these administrative hearings the statutory framework governing the conduct of hearings before tribunals could itself be challenged on the ground that they do not provide enough protection for Respondents (ex., inspector's administrative powers to obtain documents in a regulated industry, or challenges to the composition of the tribunals themselves). The end result could be to judicialize, and make more adversarial, many administrative proceedings which are currently designed to be both more informal and often more inquisitorial than court proceedings.

18. Fourth, there would be no reason in logic why this broad approach could not be relied upon to seek a stay in an ordinary civil proceeding, such as a suit in tort for fraud, assault, including sexual assault, or other such human dignity concerns as defamation, wrongful dismissal, or even negligence leading to psychological harm. The civil pre-trial process may

itself take a considerable time, through discovery, settlement negotiations, and the wait for an available court date before the matter is finally tried. Where the plaintiff may be alleged to be a government actor, and the defendant can claim that they have suffered stigma or stress by the ongoing subjection to the allegations in the claim, the Court of Appeal's broad approach would trigger s. 7. This would result in a marked relaxation of the ordinary high civil standard for granting a stay in a civil proceeding for want of prosecution.

> *Irving v. Irving* (1982), 140 D.L.R. (3d) 157 at 162 (B.C.C.A.) citing *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229 at 268-9 per Salmon L.J. (C.A.)

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19. Fifth, the approach is inherently inequitable, as illustrated in the case at bar. The Respondent relies on the particular damage to his reputation as a former Cabinet Minister, the intense publicity that his position generated, and his financial consequences following the complaint. A respondent with less celebrity, attracting no publicity and who did not experience significant financial loss would, in contrast, suffer no infringement of s. 7 interests. A test for determining the infringement of a *Charter* right should not be based on the presence or absence of social status or such transitory factors.

> Respondent's Factum in response to B.C. H.R.C., paras 11, 18, 32 and 36 to 41
> Factum of the Appellants, B.C. H.R.C., at para 68

20

20. Sixth, the Court of Appeal's broad "right to dignity" approach is tantamount to finding a generic "right" to the protection of one's reputation in s. 7. Protection of one's reputation is currently a common law "interest" (but not a right) protected by the common law principles of natural justice and fairness. (Brown and Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing, Toronto, 1998) p. 7-37). However, the textual choice of the words "liberty and security of the person" in s. 7 of the *Charter* were intended to capture a narrower range of interests than those protected under the common law. Just as the deliberate exclusion of property interests demonstrates that such are not within the s. 7 guarantee, so too the

30 full panoply of interests protected under the principles of natural justice and procedural fairness should not receive constitutional protection. By including reputation as a stand alone s. 7 right, without also examining the nature and potential consequences of the administrative hearing in question, s. 7 is opened up to most adjudicative proceedings.

21. Finally, the Court of Appeal's broad "right to dignity" approach is directly contrary to this Court's decision in *R. v. Beare, supra*. The British Columbia Court of Appeal adopted the approach of Bayda C.J.S. in *Saskatchwan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.) and rejected that of the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.). In *Kodellas* at p. 154 Bayda C.J.S. relied on his earlier decision in *R. v. Beare* to buttress his position that "feelings of mental hurt or stigmatization" trigger s. 7. Chief Justice Bayda placed emphasis on the notion that a person is stigmatized by being subjected to a process in which he is treated as if he were a criminal, in *Beare* by fingerprinting, in *Kodellas* by the allegation of sexual misconduct. He added, at pp. 155 to 156 that this Court's decision reversing his holding in *Beare* did not affect the result in *Kodellas*.

22. With respect, the reasons of this Court in *Beare* do touch directly upon Bayda C.J.C.'s broad interpretation. As the Manitoba Court of Appeal points out in *Nisbett* at p. 751, this broad approach was specifically rejected by this Court. Justice La Forest, speaking for the Court, stated in *Beare* at 401-402:

> Like other provisions of the *Charter*, s. 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; see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p.344.
>
> The Court of Appeal, we saw, found that the impugned provisions constituted an infringement of the right guaranteed by the opening words of s. 7, the majority because fingerprinting offends the "dignity and self-respect" of at least those persons who because of their self-perception or the perception of the community would feel demeaned by being thus treated. In short, the majority thought that being subjected to fingerprinting was to be treated like a criminal. *This approach appears to be broad and indefinite and to introduce an undesirable notion of differentiation among those subjected to the procedure.* For my part, I prefer the more specific finding of Cameron J.A. that the impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply. [emphasis added.]
>
> See also: *Starr v. Holden*, [1990] 1 S.C.R. 1366 at 1442 where L'Heureux-Dubé J., dissenting (but writing alone on the issue of s. 7 stated): the argument that state-linked stress, anxiety, or threat to reputation alone

> cannot [sic] violate security of the person under s, 7 of the *Charter* when an individual is not charged or accused is an unwarranted extension of the rights set out in s. 7 of the *Charter*.

23. Accordingly, McEachern C.J.B.C. in the Court below was, it is submitted, wrong in stating that this Court's overturning of the Saskatchewan Court of Appeal's decision in *Beare* did not affect Bayda C.J.S.'s broad approach to security of the person.

VI. A Proposed Approach to Liberty and Security of the Person based upon the Nature and Consequences of the Proceeding

1) The decision in *New Brunswick Minister of Health v. G. (J.)*

24. In *New Brunswick Minister of Health v. G. (J.)* this Court has attempted to restrict the scope of the right to "security of the person" in s. 7 in three ways. First, this was done by imposing an objective test (paragraph 59). Second, this Court held that the nature of the proceeding needed to relate to matters "fundamental to personal identity" (paragraph 61). And third, this Court held that proceedings needed to constitute state action which directly engaged the justice system and its administration (paragraphs 65 and 66). While these three limitations will serve to restrict the scope of claims under s. 7, they will not preclude the injection of s. 7 into cases where the primary consequences involve economic rights.

25. With respect to the first restriction, the objective test, there is a need for greater clarity as the term "psychological integrity" is capable of a broad or narrow meaning. For example, a medical doctor subject to a discipline hearing before the College of Physicians and Surgeons may be subject to embarrassment, loss of reputation in the community, and significant stress due to the possibility of losing his or her medical licence. His or her psychological integrity may, objectively, be seriously affected by such a proceeding. A similar claim could be made by someone subject to a hearing before a Securities Commission or a respondent before a human rights tribunal.

> *Re Bennett and British Columbia Securities Commission* (1991), 82 D.L.R. (4th) 129 at 174 (B.C.S.C.)
>
> On behalf of William Bennett, it was argued that he is subjected to the stigmatization of yet again being accused, to an almost unprecedented loss of privacy, to significant stress and anxiety, including the disruption of his family, his social life, his work, and to significant additional legal cost.

26. Yet, the interests at stake in these proceedings are, principally, economic ones which concern the ability to practice a profession or pursue the gaining of a livelihood or involve the civil consequence of having to pay monetary compensation. These kinds of interests were intended to be excluded from s. 7 by the decision to deliberately exclude property rights. (See: Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, January 27, 1981, p. 46:30).

27. Similarly, as to the second restriction, a securities trader, a medical doctor, or a respondent before a human rights tribunal, could claim that their ability to practice their profession, or their reputation in the community, was fundamental to their personal identity. Here too, there is a need for clarity and predictability. Matters that are "fundamental" may be capable of a broad or narrow interpretation. Just as this Court concluded that "an individual's status as a parent is often fundamental to personal identity" some Canadian Courts have accepted the claim that a person's status as a professional is similarly fundamental to "one's dignity and sense of self-worth". If this broad approach is accepted, however, it becomes much easier to claim protection for what are, at bottom, economic interests.

See: *Wilson v. B.C. Medical Services Commission* (1989), 53 D.L.R. (4th) 171 at 187 (B.C.C.A.)

Criticism of *Wilson* is found in: M. David Lepofsky, *A Problematic Judicial Foray into Legislative Policy-Making: Wilson v. B.C. Medical Services Commission* (1989) 68 Can. Bar Rev. 615 at 619 to 624. But cf. Hart Schwartz, *Section 7 and Structural Due Process — In Defence of Wilson* (1990) 69 Can. Bar Rev. 162

See also the comments on *Wilson* by Lamer J., in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1170 to 1171

28. Finally, the third restriction imposed on the scope of psychological integrity in *G.(J.)* was the requirement that the proceeding constitute "state action which directly engages the justice system and its administration" (para 66). This Court was not called upon to further define the scope of this limitation. It is capable of both a broad and narrow understanding. Broadly, it may include any type of proceeding that seeks to produce a just result, such a civil litigation, regulatory and licensing hearings, or even the making of rules or policy by a government Minister or department. Narrowly, it would be limited to only those instances in which the State

directly engaged a particular individual or, to use this Court's words, albeit in a different context, "where the government is best characterized as the singular antagonist of the individual".

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 994

2) The Nature of the Proceeding - A narrow approach to the requirement of "state action which directly engages the justice system and its administration".

29. In order to ensure that economic and property rights are not smuggled into the s. 7 analysis, it is submitted that this Court ought to adopt a narrow approach to the third limitation in *G.(J.)*. Those judicial proceedings in which the state *qua* state seeks to use its coercive power to enforce compliance with its laws should be included, the most clear example being criminal proceedings. Similarly, the state also acts in its own right in civil committal proceeding that may hospitalize an individual against his or her will, and in Crown wardship proceedings which seek to physically remove a child from the custody and control of his or her parents.

30. In contrast, proceedings where the state acts in its capacity as arbiter for private parties seeking to resolve private disputes, would not be captured. Thus, excluded would be all forms of civil litigation, including civil litigation that might cause stress or stigmatization such as a suit for civil fraud, assault (including sexual assault), defamation and damage to reputation. Nor would proceedings before self-regulating bodies be included, such as the College of Physicians and Surgeons or a provincial Law Society, as these bodies do not act as the state *qua* state, but rather as a society of professionals seeking to control that profession in the public interest. Also excluded are cases where the government as a plaintiff to a civil proceeding acts, for example, qua contracting party or tort victim, rather than *qua* state.

31. The Attorney General submits that under this approach a proceeding before a human rights tribunal would properly be excluded from the application of s. 7 of the Charter.

32. At the outset, it must be remembered that there is no common law tort of "discrimination" which would allow an individual to recover damages in a civil court for a violation of the human rights enshrined in the provincial and federal Human Rights Codes. The only method by which a private individual can seek redress for such a violation is to file a complaint and employ the administrative procedure set up under these statutes.

Board of Governors of Seneca College v. Bhaduria, [1981] 2 S.C.R. 181

33. The filing of a complaint with a human rights commission is analogous to the filing of a Statement of Claim with a civil court. It is not at all similar to a police officer laying an information to commence a criminal proceeding.

> Unlike a criminal charge which is laid only after a police investigation, a human rights complaint may be filed as of right. While the Commission attempts to settle disputes informally prior to the filing of a formal complaint, it is only after a formal complaint has been filed that an investigation takes place. The investigation is non-partisan and aimed at identifying what took place and ultimately endeavouring to settle the matter in a non-adversarial manner. Unlike the laying of a criminal charge, the filing of a human rights complaint implies no suspicion on the part of a public body, of wrongdoing.
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> *Anita Hall v. A-1 Collision and Auto Service and Mohammed Latif*, (1992), 17 C.H.R.R. D/204 at D/210 (Bd. of Inquiry)

34. Human rights commissions then perform a review function, as an additional safeguard, to ensure that a legitimate complaint is made out. It is only at this stage, if a tribunal is appointed, that adjudicative proceedings commence. A hearing before the tribunal is clearly a civil proceeding. The tribunal's function is substantially similar to that of a court hearing an action for damages. The burden of proof standard is that of a balance of probabilities and rests upon the party seeking to prove the complaint. Indeed, in *OHRC and O'Malley v. Simpsons Sears,* [1985] 2 S.C.R. 536 at 549, McIntyre J., described the civil nature of these proceedings:

> . . . [W]e are dealing here with consequences of conduct rather than with punishment for misbehaviour. *In other words, we are considering what are essentially civil remedies.* The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human right legislation aimed at the elimination of discrimination. [emphasis added]

35. Similarly, in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 91 this Court held that the purpose of human rights proceedings is not to punish those who discriminate, but rather to eradicate anti-social conditions without regard to the motives or intention of those who cause them. On this basis, this Court rejected reference to doctrines of law concerning employer liability developed in the context of criminal or *quasi*-criminal conduct, since these were "completely beside the point as being fault oriented". (See also, on the civil nature of these proceedings, *Re Commodore Business Machines* (1984) 14 D.L.R. (4th) 118 at 123 (Ont. Div. Ct.)).

36. Finally, there is no finding of "guilt" and no penalty or fine is imposed. A human rights tribunal has no power to fine, or incarcerate respondents. Tribunal orders are compensatory in nature, rather than punitive.

37. Accordingly, proceedings under human rights codes cannot be said to constitute "state action which directly engage the justice system and its administration". The state is not the singular antagonist of the individual, nor does it directly seek to force compliance with the law through these proceedings. These codes effectively provide for a private claim, akin to a tort claim before a court. While a human rights commission may be a co-applicant with the complainant, the proceeding is designed to vindicate private rights and obtain damages or compensation to redress the grievance, if it is made out. The commission is not itself "the government" and indeed the government itself may be a respondent in opposition to the complainant and the commission: see: *Grismer v. British Columbia Superintendent of Motor Vehicles*, December 16, 1999, Court File No. 26481.

3) A Second Additional Element to the Test - Direct Interference in Profound and Personal Choices

38. In *G.(J.)* this Court suggested that further clarity may be provided by attempting to evaluate qualitative differences as between different types of proceedings (paragraph 64). In order to evaluate such qualitative differences this Court ought to adopt an approach that will provide a bright line for lower courts and lawyers.

39. In this regard, only those administrative proceedings that involve direct interference by the state in profoundly intimate and personal choices should be included. These could include a woman's decision to make a profound personal choice concerning abortion without the threat of criminal sanction (*R. v. Morgentaler* [1988] 1 S.C.R. 30 at 56 per Dickson C.J.C. and at 90 per Beetz J.), an individual's right to make choices concerning one's own body (*Rodriguez v. A.G. (B.C.)*, [1993] 3 S.C.R. 519 at 588 per Sopinka J.), a decision to refuse medical treatment (*Fleming v. Reid* (1991), 4 O.R. (3d) 74 at 85-85 (C.A.)) and a parent's right to live with their child *(G. (J.)), supra.* Those administrative and civil proceedings that deal with the ordinary regulation of a profession, business, trade or industry, or that are designed to assess civil quantum of compensation for a civil wrong, would not.

4) A Third Additional Element to the Test - Ultimate Consequences of the Proceeding

40. In addition to the restrictions set out in *G. (J.)*. the Attorney General submits that the Court should focus on the ultimate consequences of the civil or administrative proceeding. Where the final consequence of an administrative or civil proceeding is principally economic, the rights to liberty and security of the person should not be engaged.

41. A person civilly committed to a mental institution faces not only a loss of liberty, but also a denial of the ability to make essential life choices such as where to eat, sleep, travel and reside. Similarly, a person subject to a Board's order that they undergo treatment without their consent, experiences a direct medical invasion of their person. A parent whose child has been apprehended by the state is deprived of a most intimate association. However, a person who loses a job, or the right to practice a profession, or who is required to pay a civil compensation award, retains the ability to make essential life choices and to associate with their most intimate family members. The principal consequence of these proceedings are, at bottom, economic.

42. This proposed test can provide clarity and predictability to this area of the law. It will ensure that this Court's decision in *G. (J.)* is not given a broad, acontextual, interpretation which will overshoot the purpose of s. 7 of the *Charter*. It will help to remedy the shortcomings of the approach adopted by the British Columbia Court of Appeal in the instant case, as identified at paragraphs 11 to 23 of this factum. It will provide clear direction to lower courts, tribunals, and the legal profession as to the scope and limits of judicial review under s. 7 of the *Charter*. It will also, as Lamer J. stated in the *Prostitution Reference,* allow the Court to avoid the controversy that plagued the U.S. Supreme Court during the infamous *Lochner* era and to avoid deciding matters of general public policy.

> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, supra* at 1163-1166 and 1176 - 1177

43. Although the principal consequences of a civil or administrative proceedings are economic, it is conceded that a secondary consequence may involve a psychological impact. This Court has recognized that "[d]elineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science" but concluded that the line must be above "the *ordinary* stresses and anxieties that a person of reasonable sensibility would

suffer as a result of government action" (*G.(J.)*, para 59). In this regard Canadian courts have rejected an interpretation of security of the person as embracing a stand alone right to reputation or one's good name, without more, although this Court has recognized reputation [while, it is submitted, not a right] is "*a concept* which underlies all the *Charter* rights" (*Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at 1179.

> *MacBain v. Canadian Human Rights Commission* (1984), 11 D.L.R. (4th) 202 at 212 (F.C.T.D.), rev'd on other grounds (1985), 22 D.L.R. (4th) 119 (Fed. C.A.) fllwd in *Mehta v. MacKinnon et al.* (1985), 67 N.S.R. (2d) 112 at 124 (S.C.) aff'd on other grounds 19 D.L.R. (4th) 148 (N.S.C.A.)
>
> See also: *R. v. X* (1983), 3 D.L.R. (4th) 243 at 257 (Ont. H.C.); *Downes v. Minister of Employment and Immigration* (1986), 4 F.T.R. 215 at 220 (F.C.T.D.)

44. For many, interaction with government can be inherently stressful and in some cases stigmatizing. For instance, when a party's tax return is audited or business license is revoked, there will almost always be stress and sometimes a stigma attached. This, however, is a part of ordinary life in civil society, even though not experienced by all. The "ordinary stresses" of life should not be understated in the Court's analysis. Loss of employment, embarrassment, financial misfortune and personal unhappiness are experienced by most people at one point or another in life. While these are not positive experiences, neither are they uncommon. Where a tribunal makes a final finding, after hearing evidence, that a person has discriminated and is required to provide compensation the secondary consequences of stress and stigma experienced by the respondent cannot objectively be considered extraordinary. As stated by Bayda C.J.S.:

> To construe a compensatory order (based upon a finding of discrimination) designed to relieve a victim of the effects of discrimination as seriously hurting the body or mind of the discriminator would be to stretch the boundaries of the concept of "life, liberty and security of the person" well beyond the breaking point.
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> *Re Pasqua Hospital and Harmatiuk* (1987), 42 D.L.R. (4th) 134 at 149 (Sask. C.A.)

5) Procedural Experiences

45. This proposed "ultimate consequences" approach would remove from the analysis how a person feels during an administrative proceeding (or "procedural experiences"), where the ultimate consequence of that proceeding are principally economic. In short, procedural

experiences would not be included in the s. 7 calculus, except in the rarest of circumstances. There are two strong reasons for this.

46. First, the initial step in a s. 7 inquiry is whether the right to "life, liberty or security of the person" is infringed. How one may feel in the course of a subsequent proceeding does not, and cannot, inform whether or not these rights have been triggered in the first place. Procedural experiences, whether caused by the tribunal's conduct at the proceeding or the delay in holding the proceeding itself, are properly considered under the second step for s. 7, i.e., whether the principles of fundamental justice have been met. The Court below injected into the first step of the s. 7 inquiry a concern that ought not to arise until the second step. By conflating the two distinct steps of the analysis, the Court erred.

47. Indeed, excessive delay in hearings before human rights tribunals have always been considered under the principles of natural justice. In order to protect against procedural unfairness a tribunal can control in its own process. The Charter has not been needed to ensure fairness where a party respondent is actually prejudiced by excessive delay. Rather, the issue of delay is considered when the tribunal determines "what process is due" to an individual.

Re Commercial Union Assurance et al. and Ontario Human Rights Commission et al. (1988), 63 O.R. (2d) 112 at 114 (C.A.)
Nisbett v. Manitoba (Human Rights Commission) supra at 756
Motorways Direct Transport Ltd. v. Canada (Human Rights Comm.) (1991), 43 F.T.R. 211 at 220 (T.D.)
Irene Gohm v. Domtar Inc. et al. (1988), 10 C.H.R.R. D/5968 at D/5969
Hyman v. Southam Murray Printing Ltd. (1981), 3 C.H.R.R. D/617 at p. D/621
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Ghosh v. Domglass Inc., and others (1991) 16 C.H.R.R. D/16 at D/20 (Ont. Bd. Inq.)
Gale v. Miracle Food Mart (1992), 17 C.H.R.R. D/495 at D/500 (Ont. Bd. Inq.)

48. Even in the criminal law context this Court recognized that the issue of delay properly fell for consideration under s. 11 (b), which is itself "an aspect of fundamental justice guaranteed

by s. 7 of the Charter". In *R. v. Askov*, Cory J., speaking of the delay that arises in criminal proceedings was of the view that the societal interest in issue "should be considered in conjunction with the main and primary concept of the protection of the individual's right to fundamental justice". (*R.* v. *Askov* [1990] 2 S.C.R. 1199 at pp. 1219, 1222).

49. Second, it would only be in the rarest of cases that procedural experiences might engage security of the person where the ultimate consequences of the proceeding do not. A clear example of such a violative "procedural experience" would be a process that employed physical torture to test credibility. Such an egregious measure would not escape s. 7 *Charter* scrutiny simply because it has been labeled part of the process rather than the ultimate result. This kind of procedural experience, of course, is unheard of in Canada.

50. Deliberate psychological torture being equally irrelevant, the stress and stigma involved in the slowest administrative proceeding will still necessarily be less than would stem from that proceeding's ultimate consequences, which do not themselves engage s. 7. By nature stress from procedural experiences, short or long, will end when the proceeding ends, whereas an ultimate consequence is a permanent and so greater source of stress. Further, the stigma from, for instance, being *alleged* to have discriminated is necessarily less than the stigma from an ultimate finding that a person *has* in fact discriminated.

51. It is conceded that stress may be caused by uncertainty about a proceeding's ultimate consequences. Not all stresses are equal, however. For example, uncertainty regarding promotion is less stressful than uncertainty regarding employment, which in turn is less stressful by far than uncertainty regarding criminal conviction. For a person of reasonable sensibilities, the importance of the ultimate consequence in question determines how stressful uncertainty about it will be. Because of this relationship, it is submitted that where the ultimate consequences of a proceeding do not engage s. 7 (because, for example they are principally economic) stress about those consequences cannot engage s.7.

52. In this Court's recent decision in *R. v. Mills*, (November 25, 1999, Court File No. 26358, para 85) disclosure of private therapeutic records was held to implicate security of the person.

Such a disclosure, while occurring within *the accused's* criminal trial, is properly characterized as an ultimate consequence, in its own right, for *the complainant*.

53. To permit the stresses and anxiety occasioned by delay to trigger liberty and security of the person, where the ultimate consequences of the proceeding do not, would permit how a respondent feels about being subjected to a hearing to prevail over the true consequences. The British Columbia Supreme Court aptly identified the error in this approach:

> [I]n a case such as this, where the consequences of the process are purely economic, such that s. 7 does not apply, then the Court must be cautious about going a step further in saying that, *notwithstanding the nature of the consequences of the administrative proceeding,* s. 7 applies to the tribunal's process in any event because of the nature of the proceeding itself.
>
> In summary, the purpose of s. 7 is not meant to protect the rights of these petitioners who are involved in a regulatory, inquisitorial process, the consequences of which are economic and do not impact on their physical liberty and security of the person. [emphasis added]
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> *Re Bennett and British Columbia Securities Commission, supra* at 182-183

Part IV - NATURE OF THE ORDER SOUGHT

54. The Attorney General of Ontario respectfully requests that this Honourable Court find that s. 7 of the Charter is not engaged by proceedings before a human rights tribunal.

All of which is respectfully submitted this 16th day of December, 1999.

Hart Schwartz

Hart Schwartz, Counsel for the Intervenor, Attorney General of Ontario

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