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

Interested Party

AND:

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

FACTUM OF THE INTERVENER
CANADIAN HUMAN RIGHTS COMMISSION

FIONA KEITH
Legal Services
344 Slater Street, 9th Flr
Ottawa, Ontario K1A 1E1
Tel.: (613) 943-9159
Fax.: (613) 993-3089
Counsel for the Canadian Human
Rights Commission

ROBERT B. FARVOLDEN
Barrister & Solicitor
206 - 1006 Fort Street
Victoria, BC V8V 3K4
Tel.: (250) 361-3131
Fax.: (250) 361-9161

Counsel for the Appellant, Andrea Willis

BRIAN CRANE, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street, Box 466 Stn D
Ottawa, Ontario K1P 1C3
Tel.: (613) 233-1780
Fax.:(613) 563-9869

Ottawa Agent for the Appellant, Andrea Willis

JOHN J.L. HUNTER, Q.C.
Davis & Company
800 - 666 Burrard Street
Vancouver, BC V6C 2Z7
Tel.: (604) 643-2931
Fax.: (604) 643-1612

Counsel for the Appellants, BC Human Rights Commission and Commissioner of Investigation

GREG TEREPOSKY
Davis & Company
360 - 30 Metcalfe St.
Ottawa, Ontario K1P 5L4
Tel.: (613) 235-9444
Fax.: (613) 232-7525

Ottawa Agent for the Appellants, BC Human Rights Commission and Commissioner of Investigation

SUSAN ROSS
Morley & Ross
201 - 747 Fort Street
Victoria, BC V8W 3E9
Tel.: (250) 480-7477
Fax.: (240) 480-7488

Counsel for the Appellant, British Columbia Human Rights Tribunal

EUGENE MEEHAN
Lang Michener
300 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel.: (613) 232-7171
Fax.: (613) 231-3191

Ottawa Agent for the Appellant, British Columbia Human Rights Tribunal

JOSEPH ARVAY, Q.C.
Arvay, Finlay
400 - 888 Fort Street
Victoria, BC V8W 1H8
Tel.: (250) 388-6868
Fax.: (250) 388-4456

Counsel for the Respondent, Robin Blencoe

JENNIFER MACKINNON
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 0A2
Tel.: (613) 236-9665
Fax.: (613) 235-4430

Ottawa Agent for the Respondent, Robin Blencoe

MARK C. STACEY
Allard & Company
600 - 815 Hornby Street
Vancouver, BC V6Z 2E6
Tel.: (604) 689-3885
Fax.: (604) 687-0814

Counsel for the Intervener, Irene Schell

BRIAN CRANE, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street, Box 466 Stn D
Ottawa, Ontario K1P 1C3
Tel.: (613) 233-1780
Fax.:(613) 563-9869

Ottawa Agent for the Intervener, Irene Schell

CATHRYN PIKE
Barristers & Solicitors
Ontario Human Rights Commission
180 Dundas Street West 8th Flr
Toronto, Ontario M7A 2R9
Tel.: (416) 326-9871
Fax.: (416) 326-9867

Counsel for the Intervener, Ontario Human Rights Commission

HENRY BROWN,
Gowling, Strathy & Henderson
2600 - 160 Elgin Street, Box 466 Stn D
Ottawa, Ontario K1P 1C3
Tel.: (613) 233-1780
Fax.:(613) 563-9869

Ottawa Agent for the Intervener, Ontario Human Rights Commission

AARON L. BERG, General Counsel
DONNA M. SEALE, Crown Counsel
Civil Legal Services (S.O.A.)
Department of Justice
730 - 405 Broadway
Winnipeg, Manitoba R3C 3L6
Tel.: (204) 945-0185
Fax.: (204) 948-2826

Counsel for the Manitoba Human Rights Commission

BRIAN CRANE, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street, Box 466 Stn D
Ottawa, Ontario K1P 1C3
Tel.: (613) 233-1780
Fax.:(613) 563-9869

Ottawa Agent for the Intervener, Manitoba Human Rights Commission

LARA J. MORRIS
P.O. Box 31008
Halifax, N.S. B3K 5T9
Tel.: (902) 422-4096
Fax.: (902) 422-4098

Counsel for the Intervener, Nova Scotia Human Rights Commission

PETER C. ENGELMAN
Caroline, Engelman, Gottheil
500 - 30 Metcalfe Street
Ottawa, Ontario K1P 5L4
Tel.: (613) 235-5327
Fax.: (613) 235-3041

Ottawa Agent for the Intervener Nova Scotia Human Rights Commission

Me HÉLÈNE TESSIER
Procureur de la requérante
Chef du contentieux
Commission des droits de la personne et des droits de la jeunesse
360, rue Saint-Jacques Ouest, 2e étage
Tel.: (514) 873-5146, poste 212
Fax.: (514) 864-7982

Counsel for the Intervener, Commission des droits de la personne et des droits de la jeunesse

Me RICHARD GAUDREAULT
Bergerons Gaudreault
167 rue Notre Dame
Hull, Quebec J8X 3T3
Tel.: (819) 770-7928
Fax.: (819) 770-1424

Ottawa Agent for the Intervener Commission des droits de la personne et des droits de la jeunesse

JENNIFER CONKIE
Conkie & Company
720 - 555 W. Georgia Street
Vancouver, BC V6B 1Z5
Tel.: (604) 662-7544
Fax.: (604) 662-7555

Counsel for the Intervener, Women's Legal Education and Action Fund (LEAF)

CAROL BROWN
Scott & Aylen
1000 - 60 Queen Street
Ottawa, Ontario K1P 5W7
Tel.: (613) 237-5160
Fax.: (613) 230-8842

Ottawa Agent for the Intervener, Women's Legal Education and Action Fund (LEAF)

HARVEY M. GROBERMAN
Ministry of Attorney General
Legal Services Branch
P.O.Box 9280, Stn Prov Govt
1001 Douglas Street - 6th floor
Victoria, BC V8W 9J7

Counsel for the Intervener, Attorney General of British Columbia

JENNIFER MACKINNON
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 0A2
Tel.: (613) 236-9665
Fax.: (613) 235-4430

Ottawa Agent for the Intervener, Attorney General of British Columbia

FRANCES KELLY
Barrister & Solicitor
Community Legal Assistance Society
1800 - 1281 W. Georgia Street
Vancouver, BC V6E 3J7
Tel.: (604) 685-3425
Fax.: (604) 685-7611

Counsel for the Intervener, British Columbia Human Rights Coalition

PAT WILSON
Osler, Hosking & Harcourt
50 - 1500 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel.: (613) 235-7234
Fax.: (613) 235-2867

Ottawa Agent for the Intervener, British Columbia Human Rights Coalition

DARIEN MOORE
Staff Lawyer
Saskatchewan Human Rights Commission
8th Flr, 122 - 3rd Avenue North
Saskatoon, SK S7K 2H6
Tel.: (306) 933-5952
Fax.: (306) 933-7863

Counsel for the Intervener, Saskatchewan Human Rights Commission

HENRY BROWN
Gowling, Strathy & Henderson
2600 - 160 Elgin Street, Box 466 Stn D
Ottawa, Ontario K1P 1C3
Tel.: (613) 233-1780
Fax.:(613) 563-9869

Ottawa Agent for the Intervener, Saskatchewan Human Rights Commission

INDEX

PART I

STATEMENT OF FACTS

1. The Intervener Canadian Human Rights Commission ("CHRC") agrees with the facts as stated by the Appellants.

PART II

POINTS IN ISSUE

10 2. The CHRC will address the following points at issue in this appeal:

i. Does a right to security of the person protected by section 7 of the *Charter of Rights and Freedoms* (the "*Charter*"), which includes an interest in being free from stigma, arise where there is delay in the human rights complaints handling process?

ii. If so, is this right infringed in a manner contrary to the principles of fundamental justice where the delay does not impair the right to a fair hearing?

20

PART III

ARGUMENT

Introduction

3. This appeal raises the question of whether rights protected by section 7 of the *Charter* are engaged by delay in the complaints handling and processing system administered by the British Columbia Human Rights Commission (the "Commission") under the British Columbia *Human Rights Act* (the "*Code*"). A similar system is administered by the CHRC under the provisions of the *Canadian Human Rights Act* ("*CHRA*"). Where relevant differences exist between the two statutory schemes, the differences will be addressed in our submissions.

Human Rights Act,,S.B.C. 1984 c. 22.
CHRA, R.S., 1985, c. H-6, as am.

4. The alleged violation of section 7 in this appeal does not arise from the legislative provisions of the *Code* nor does it arise within the judicial context of a human rights tribunal. What is narrowly at issue is whether an unexplained delay of five months in the administrative process of the Commission violated the right to security of the person of the Respondent Blencoe ("Blencoe").

5. Judicial opinion with respect to the application of section 7 of the *Charter* in human rights proceedings is divided. Where courts have found that section 7 does not apply, they have so decided primarily on the basis that proceedings under human rights legislation are non-penal. Where section 7 has been applied in the human rights

context, it has been found to protect a right to privacy which is exemplified by an interest in being free from stigma.

> *Blencoe v. British Columbia Human Rights Commission et al.* (1998), 31 C.H.R.R. D/175 at ¶101 (B.C.C.A.).
> *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 at 755e-g (C.A.).
> *Sask. Human Rights Comm`n. v. Kodellas* (1989), 60 D.L.R. (4th) 143 at 152 (Q.B.).
> *Belloni v. Canadian Airlines International Ltd.*, [1996] 1 F.C. 638 at 640-41 (C.A.).
> see also: *Zundel v. Canada (A.G.)* (1998), F.C.J. No. 578 at ¶30 (T.D.).

6. In some limited circumstances related to the handling of human rights complaints, there may exist a right to security of the person which protects an interest related to privacy. Such a right, however, does not encompass a right to be free from stigma or its effects. In any event, such a right does not arise in the circumstances of this case.

7. If such a right does exist, it is not infringed by delay in the processing of a human rights complaint. The principles of fundamental justice which are at play in the human rights context differ from those in criminal law. This means that circumstances which may give rise to an infringement in the criminal context, do not in another. Lack of delay or a right to a trial within a reasonable time is not a principle of fundamental justice in the human rights context. Delay in the human rights context is only relevant where the delay causes actual harm which prejudices a respondent`s right to a fair hearing. This prejudice may include the destruction of documents or the death of witnesses.

Section 7 in the human rights context

8. This Court has identified a range of interests that are protected within the right to security of the person in the criminal law context. These interests include protection of the psychological integrity of the individual and protection against psychological trauma, including stigmatization of the accused. It was based on this line of cases, that McEachern C.J. held:

> ... s. 7, ... operates to protect both the privacy and dignity of citizens against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by the Appellant here.
>
> *Blencoe*, at ¶101.
> *R v. Morgentaler*, [1988] 1 S.C.R. 30 at 55.
> *R. v. O`Connor*, [1995] 4 S.C.R. 411 at 482-87.
> *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, S.C.C. No. 26005, at ¶ 58-60.

9. In considering what guidance may be imported from the criminal law jurisprudence to an administrative law setting, this Court has held that the content of the rights protected under section 7 of the *Charter* must be explored and uncovered in the context of the particular case in which such a right is asserted. The many differences between the human rights and criminal contexts which have been reviewed by the Appellants, underline the importance of discerning a principled basis for considering the possible application of section 7 of the *Charter* in the human rights context. Any analysis must be fully informed by those differences.

R. v. Morgentaler, at 51.
R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154 at 226.

10. A majority of this Court has characterized the complaints processing and handling system administered by statutory agencies in the following manner:

> The Commission is not an adjudicative body; that is, the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission`s role, then, is that of assessing the sufficiency of the evidence before it.
>
> *Cooper v. Canada (HRC)*, [1996] 3 S.C.R. 854 at 891.

11. In contrast to the powers of the B.C. Commission which were relied upon by McEachern C.J. in his judgement, the CHRC does not have the power to subpoena witnesses, to take evidence under oath, or to commit for contempt. With respect to its investigative functions, the CHRC has only those search powers which through a warrant issued by the Federal Court, may be exercised under section 43(2.2) of the *CHRA*.

> *Blencoe*, at ¶63.
> *CHRA, supra*, ss 43(2.2).

12. The issue of privacy in relation to the complaints handling and processing functions of the CHRC is generally addressed through the relevant provisions of the *Privacy Act* and the *Access to Information Act*. In the discharge of its duty to screen and handle

complaints, the CHRC is considered to be an "investigative body" for the purposes of section 22(1)(b) of the *Privacy Act*. This section provides that the CHRC has a discretion over the disclosure of information "... relating to the existence or nature of a particular investigation". By virtue of this legislation and its own internal policy, the CHRC typically does not disclose the existence of a complaint until an administrative decision has been made to refer the case to a full hearing before the Tribunal under sections 44 or 49 of the *CHRA*. A decision under sections 44 or 49 does not decide the merits of a complaint but instead determines on the "sufficiency" of the evidence whether a complaint should be referred for conciliation or for a full hearing before the Tribunal, or dismissed. All of these legislative facts are consistent with the facts giving rise to this appeal, in particular, the fact that no steps were taken by the B.C. Commission to disclose the existence of the complaints against Blencoe until long after both the complainants and Blencoe had chosen to contact the media.

Privacy Act. 1980-81-82-83, c. 111.
Access to Information Act. 1980-81-82-83, c. 111.

13. In considering whether Blencoe had a privacy right that was not recognized or protected by the existing strictures on privacy, it is important to note that the primary interest identified by McEachern, C.J. as meriting constitutional protection under section 7 was freedom from stigma. In creating constitutional protection for this interest, McEachern, C.J. relied on cases dealing with the role of stigma in criminal law, without examining what this Court has had to say about the role of stigma in the context of a human rights proceeding.

14. In the *Taylor* case, this Court commented directly on the diminished role of stigma in the human rights context:

> ... but it is well to remember that the present appeal concerns an infringement of s. 2(b) in the context of a human rights statute. The chill upon open expression in such context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim or remedial measures is more upon compensation and protection of the victim.
>
> *Canadian Human Rights Commission v. Taylor*, [1990] 3 S.C.R. 892 at 932-33.

15. An appreciation of the different role of stigma in the criminal context is highlighted by the fact that it is against stigma that the requirement for *mens rea* is balanced. For example, it is because the stigma against murder is universal and so significant, that a high degree of intent or *mens rea* must be found. In contrast, however, intent or *mens rea* has no role to play in the context of human rights proceedings. It was on the basis of this distinction that this Court found in the *Taylor* case that section 13(1) of the *CHRA* did not violate section 2(b) of the *Charter*, on the other hand, in the *Keegstra* case the Court held that section 319 of the *Criminal Code* did not violate section 2(b) because the strict requirement for *mens rea* limited the operation of section 319.

> *Taylor, supra* at 933.
> *R. v. Keegstra,* [1990] 3 S.C.R.697 at 786.
> *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 90.

16. While at first glance the absence of a *mens rea* element may appear to justify a greater protection against stigma in the human rights context, the underlying statutory context

makes it clear that protection against stigma is not one of the bundle of interests protected by section 7 in the human rights context. Under the *Criminal Code*, Parliament has provided guidance as to what level of *mens rea* is required with respect to certain offences. In the criminal context an identifiable continuum of stigma exists which reflects the fact that Parliament has created a range of crimes and varying degrees of sanctions. In contrast, under the *CHRA*, Parliament has enacted a remedial scheme, the purpose of which is to redress discrimination without regard for intent or moral blameworthiness. The focus is on remedying the effects of discriminatory practices and policies, including those that are unintended.

17. McEachern C.J.`s analysis of stigma is further weakened by the fact that he expressly equates the notion of stigma with the notion of reputation. He does so in order to distinguish a decision of the Federal Court of Appeal. That decision held that section 7 of the *Charter* has no application to human rights proceedings: "... the *Belloni* case deals with a corporation, not an individual whose reputation is fundamental to personal integrity and self-identity". Other courts, however, including the Federal Court of Appeal, have held that section 7 of the *Charter* cannot be invoked as a source of protection for reputation, good name or integrity.

Blencoe, supra at ¶94.
MacBain v. Canadian Human Rights Comm., [1984] 1 F.C. 696 at 710d.
Elliott et al. v. Canadian Broadcasting Corp. et a. (1993), 16 O.R. (3d) 677 at 698 (Ont. C.A.). Leave to appeal to S.C.C. refused March 7, 1996.
Boyle v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia), [1997] F.C.J. No. 942 at ¶20. (T.D.)
Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the

Blood System), [1996] 3 F.C. 259 at 311 (T.D.).

18. Importing a constitutional protection against stigma into the human rights context has significant implications, both practical and legal. Firstly, McEachern, C.J. premises his analysis and his conclusion on the proposition that sexual harassment complaints result in a "high" degree of stigma. He does so by likening a complaint of sexual harassment to a charge of sexual assault. In the absence of a legislated degree of intent within the instant legislation, however, it is difficult to discern how stigma should be assessed and by whom in the human rights context. The concept of stigma is an elastic one. It may vary according to a number of factors including social mores and individual subjectivity, both of which are changing and difficult to apply in the human rights context. Given these variables, it cannot be assumed that the disapprobation of sexual harassment is as universal as that which attaches to sexual assault.

19. McEachern C.J.`s judgement also raises the question of whether a right to be free from stigma exists in respect of complaints made on other grounds which, for the most part, cannot be analogized to criminal offences. Such a question is misplaced in the context of human rights legislation, the intent of which is to promote equality on the basis of <u>all</u> prohibited grounds. Moreover, it places courts and tribunals in the role of assessing which forms of discrimination may attract more or less social censure. Such an approach has the potential to create a hierarchy of human rights which is inherently at odds with their quasi-constitutional nature. It is an approach that has been rejected in those cases where a

hierarchy of *Charter* rights has been urged upon this Court.

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at 877.

20. The facts giving rise to this appeal highlight other concerns which arise when protection against stigma is elevated to the level of a constitutional right. Firstly, the stigma suffered by Blencoe was arguably heightened by his decision to address the media on more than one occasion. Many of the newspaper articles in the record before this Court record statements made by him to the media. Whether applicable or not to this case, the question arises as to whether it is in a respondent`s interest to publicize a complaint, if such publication will assist in generating the stigma sufficient to engage a *Charter* right.

21. Secondly, there is no doubt that Blencoe`s public profile aggravated the stigma that he suffered. If this is taken as relevant to the constitutional analysis, it means that complaints of sexual harassment against well-known persons or persons more susceptible to stigma may be dismissed earlier than complaints about similar behaviour against persons having a lower public profile. In considering whether a human rights commission should address this concern by "fast-tracking" some complaints, one is led again to a concern that one category of complaints will be held above or treated differently than another. Moreover, a complainant who chooses to invite or generate publicity may act thus to place a complaint in one track or the other. Will the universal nature of human rights legislation be eroded if sexual harassment complaints naming

well-known individuals are fast-tracked, while other complaints are kept waiting?

22. The analysis of stigma by McEachern C.J. is premised on the proposition that all human rights complaint result in some stigma for a respondent. This proposition highlights a further concern with his analysis. Section 7 of the *Charter* does not protect a right to be free or secure from the effects of government action. Specifically, individuals do not have a constitutionally protected right to be free from complaints of discrimination and the stigma which may result. If it is otherwise, every complaint filed will *prima facie* infringe a respondent`s constitutional right thereby shifting the focus of the complaints handling process to the prevention of stigma in a manner which can only trivialize and obscure the rights of complainants and the legislative purpose

> *B.(R.) v. Children`s Aid*, [1995] 1 S.C.R. 315 at 368.
> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47 at ¶ 59.

23. If protection against stigma is not an aspect of the right to security of the person in the human rights law context, there remains the question of whether a right to security of the person exists, and what interests it may protect. On the threshold issue of whether a right to security of the person exists, there is no doubt that a human rights investigation may deal with "... information which tends to reveal intimate details of the lifestyle and personal choices of the individual", as Madame Justice L`Heureux Dubé characterized the privacy interest in respect of a complainant`s psychotherapeutic records in the criminal law context. Sensitive information of this

nature in a human rights investigation may relate to either a complainant, a respondent, or a third-party witness. There may be situations where, for example, the disclosure of the sexual orientation of a witness without consent will result in the invasion of one of the most private aspects of her/her person. These consideration do not arise, however, in the circumstances of this case.

O`Connor, supra, at 486.

Can delay infringe a section 7 right in the human rights context?

10

24. If a right to security of the person does exist in the human rights context, it is well-established that the burden of demonstrating an infringement is borne by the person asserting the breach. This involves a consideration of two threshold issues: what is the alleged harm for which the state is responsible and what is the necessary relationship between the harm alleged and the impugned state action?

25. On the issue of what nexus or connection must exist between the alleged harm and the impugned state action in order for the *Charter* to apply, McEachern C.J. relied on his interpretation of the decision of Mr. Justice Sopinka in the *Rodriguez* case, in holding

20 that it is sufficient if the state actor "exacerbates the existing state of affairs".

Blencoe, supra, at ¶56.

26. McEachern C.J.`s interpretation does not give effect to the fact that Mr. Justice Sopinka`s comments were made in response to the argument of the Crown in defence of the impugned legislative provision. The Crown had wrongly characterized the origin of the problems complained of by Ms Rodriguez as her physical disabilities, rather than the barrier created by the prohibition against assisted suicide. This argument was decisively rejected by Mr. Justice Sopinka: "... I do not accept the submissions that the appellant`s problems are due to her physical disabilities caused by her terminal illness, and not by government action." Quite clearly, Mr. Justice Sopinka saw a close connection or nexus between the government action and the harm complained. It is respectfully submitted that the *Rodriguez* case has not changed the need to establish a significant degree of relationship between the harm complained of and the state action.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at 584f.

27. The "existing state of affairs" or the harm complained of in the present case is the stigma and its effects suffered by Blencoe. The origins and causes of the stigma, however, pre-date the human rights complaints. In order to demonstrate that a right protected by section 7 has been infringed in these circumstances, a respondent must demonstrate that the stigma increased after the complaints were filed, and that this increase was a result of the delay for which the state actor is directly responsible.

28. Delay in the handling and processing of the complaints cannot, in and of itself, establish a violation of section 7. As this Court has noted, to do so would necessarily require the courts to establish the time frames within which investigations should

conclude. These time frames will be difficult to assess *a priori* where allegations are complex or where it is not known whether witnesses will be difficult for an investigator to locate. The proper infringement analysis requires looking beyond the mere fact of delay. Other factors relevant to the analysis may include the reasons for the delay, the evidence of harm caused by the delay, the conduct of the respondent, and the particular circumstances of the respondent which includes susceptibility to stigma.

R. v. L.(W.K.), [1991] 1 S.C.R. 1091 at 1099.

29. Moreover, to accept that delay alone will amount to an infringement means that every action by the state which results in any delay will trigger a violation. Such a rule is misplaced in a system which is not governed by limitation periods and which is administered pursuant to the wide discretion of a statutory agency. For all these reasons, the better view is that a respondent must show evidence of actual harm as a result of state-caused delay which impairs the right to a fair hearing.

Nisbett, supra at 757.

30. In order to properly assess the effect of delay, it is necessary to define what period of time should be examined. In identifying the period of delay as running from the date that the complaints were filed, McEachern C.J. failed to give proper effect to section 32 of the *Charter* which limits the delay for which an account must be given to that which results from state action or inaction. Delay created by non-state actors, including Blencoe, cannot be relied upon to assert a violation of a right protected by section 7, even where that delay results from the pursuit of an avenue to which a non-state actor is

legally entitled. The *Charter* is not intended to offer redress by which a complainant is threatened with an increased risk of having her complaint stayed when an investigation is delayed for reasons that do not result from state action or inaction. To the extent that a state actor has a duty to conduct its administrative functions efficiently, it is only its delay that may contribute to an infringement.

Schreiber v. Canada (Attorney General), [1998] 1 S.C.R. 841 at ¶31-33.

31. The application of this analysis to the facts giving rise to this appeal identifies a five-month period of time attributable to the Commission which is not attributable to the discharge of its statutory duty to accept, process, investigate and adjudicate complaints in a manner that complied with the requirements of procedural fairness. Nor is this period of time attributable to Blencoe. The issue of whether a period of unexplained delay is reasonable must be considered on the facts of each case. The reasonableness of a five-month delay was not considered by McEachern C.J. because he identified the period of impugned delay as two years. It is unlikely that even in a criminal context a five month delay would be considered unreasonable. In an administrative context, particularly one intended to be remedial, a delay of this magnitude is not unreasonable.

32. Some period of systemic delay due to resource limitations has been accepted even within the criminal law context, albeit subject to limitations by administrative guidelines. In that context, this Court has acknowledged that heavy case loads may justify slightly longer delays and that the length of tolerable delay may also reflect regional differences. In the absence of clear evidence on all of these issues, it would be

inappropriate on the facts of this case to consider the application of such an analysis.

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

Does the infringement comport with the principles of fundamental justice?

33. If it is determined that a right protected by section 7 is infringed, the analysis must then consider whether such an infringement is consistent with the principles of fundamental justice. A contextual analysis is required in order to identify the principles of fundamental justice that are applicable in a given case. A number of factors will enter into this analysis including the requirements of procedural fairness and natural justice, a balancing of the individual and societal interests at stake, the impact of related *Charter* values, and a consideration of whether the impugned limitation or abridgement of the right is arbitrary or unfair.

Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869 at 884.
Rodrigues, *supra* at 590-94.

34. Absence of delay is not a principle of fundamental justice in the human rights context. As noted above, delay, by itself, does not engage rights protected by section 7 of the *Charter*. This is consistent with the various legislative schemes which confer broad discretionary powers over the complaints-handling process on human rights agencies. The exercise of this discretion is not subject to or modified by prescribed limitation periods. For example, the Federal Court Trial Division held that the CHRC properly

exercised its discretion when it decided to delay sending a complaint on for a hearing, where the Commission considered that the results of a pending decision might affect the ultimate outcome.

35. An analysis of fundamental justice must consider that the interests at stake in the human rights context are of a different nature and bear a different relationship to each other than in the criminal law context. This Court has noted that within the criminal law system, prejudice to the accused and prejudice to the system often overlap. In contrast, it is easier to separate the public interest in non-discrimination within the human rights context from the individual interests of a person alleged to have discriminated. The distinct nature and importance of the public interest is exemplified in the *CHRA* which contemplates the participation of at least three parties to the proceedings before the Tribunal: the CHRC, the complainant and the respondent. Moreover, the legislation expressly provides that the CHRC is to represent the public interest in appearing at a hearing.

36. The public interest in non-discrimination is a sufficiently "substantial and compelling collective interest" to require that in cases involving delay, the public interest must be balanced against the individual rights protected by section 7. This "balancing test" has been used by this Court to assess whether some degree of infringement may accord with fundamental justice. The result of this analysis in the human rights context is that even where a commission tasked with the implementation of the public policy of non-

discrimination is responsible for delay that minimally infringes a right protected by section 7, such an infringement will comport with the principles of fundamental justice in most cases.

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844 at ¶76- 78.
Rodrigues, supra at 592j-594a.
Cunningham v. Canada, [1993] 2S.C.R. 143 at 152.

37. Non-discrimination or equality is the purpose of human rights legislation and is, itself, a constitutional right protected by section 15 of the *Charter*. This Court has also held that equality is a value that is reflected throughout the *Charter*. Equality considerations are therefore highly relevant to the analysis of fundamental justice in the context of human rights proceedings. The goal of equality is more than a "concern"; the right to non-discrimination created by human rights legislation is quasi-constitutional. For this reason alone, delay in the complaints handling and processing system should generally be found to comport with the principles of fundamental justice so long as the requirements of procedural fairness are observed and the delay does not infringe the respondent`s right to a fair hearing.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 164, 170 and 172-76.
B. (R) v. Children`s Aid, supra, at ¶ 88.

38. Equality considerations are also implicated by the social realities in which incidents of sexual harassment occur Sexual harassment often reflects a power imbalance between the genders and where sexual harassment occurs within the employment context, it is often about the power that a man may have over the future of a woman`s ongoing

employment or career advancement. These equality considerations highlight the fact that it is in the public interest that sexual harassment complaints are permitted to go forward so long as a respondent`s right to a fair hearing is not compromised.

39. The significance of a complainant`s interest in seeing her complaint proceed are highlighted by the fact that human rights legislation typically creates the only mechanism through which a complainant may pursue redress. Civil actions for sexual harassment are limited or nonexistent. The equality concerns that this situation generates are highlighted by importing the comments of Madame Justice MacLachlin in a civil case dealing with the disclosure of therapeutic records: are victims of sexual harassment to be placed in a different position than victims of other kinds of discrimination? Will victims of sexual harassment obtain the equal benefit of human rights legislation or will women be doubly victimized - first by the alleged sexual harassment and, where there is delay, by a stay of proceedings?

> *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 at 194-95.
> *M.(A.) v. Ryan* cited in *R. v. Mills,* [1999] S.C.J. No. 68 at ¶ 91.

40. An analysis of the principles of fundamental justice cannot ignore the rights of the respondent, but these rights should not be considered in isolation from his conduct. Did he exacerbate the "existing state of affairs" by contributing to the delay? Did he advise the statutory agency at the earliest possible opportunity of the effect of the delay on him? Did he request the statutory agency to proceed without delay due to the effects

upon him? Where a respondent`s behaviour contributes to or exacerbates the "existing state of affairs" or causes delay itself, this must be balanced against the other interests at stake.

41. This analysis also does not ignore the fact that there is a public interest in seeing that an administrative agency discharges its statutory functions in a timely fashion. In considering the impact of delay in this regard, however, it is important to distinguish between delay which amounts to an abuse of process and delay which is unreasonable only. Where delay clearly infringes the right to a fair hearing, it will violate the common law rule against abuse of process which is itself a principle of fundamental justice. In such cases, the evidence of actual prejudice must be of a "high degree of magnitude" which significantly impairs the fairness of the process.

> *Belloni v. Canadian Airlines International Ltd., supra* at 640-41.
> *R. v. Potvin,* [1993] 2 S.C.R. 880 at 915.

42. It is respectfully submitted that when all of these interests and values are weighed and balanced, any infringement of Blencoe`s right to security of the person was in accord with the applicable principles of fundamental justice.

PART IV

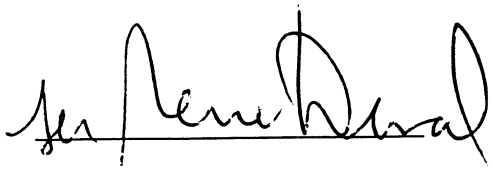
NATURE OF ORDER SOUGHT

THIS HONOURABLE COURT OUGHT TO GRANT THE APPEAL.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated at Ottawa, the 20h day of December, 1999.

10



Fiona Keith
Legal Counsel
Canadian Human Rights Commission
344 Slater Street
Ottawa, Ontario
K1A 1E1
Tel.: (613) 943-9159
Fax: (613) 993-3089

20

Statutes