Court File No. 26789

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR 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)

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INDEX

		PAGE
PART I	STATEMENT OF FACTS	2
PART II	POINTS IN ISSUE	3
PART III	ARGUMENT	4
PART IV	NATURE OF ORDER REQUESTED	17
PART V	TABLE OF AUTHORITIES	18

PART I

STATEMENT OF FACTS

1. The Intervener Manitoba Human Rights Commission ("MHRC") does not take issue with the facts as set out by the Appellants or the Respondent.

2. The MHRC is the statutory agency created by the *Manitoba Human Rights Code* (the "*Code*"), and vested with the administration and enforcement of that *Code*.

PART II

POINTS IN ISSUE

3. The MHRC intervenes for the purpose of addressing the following issues:

(a) are the administrative/investigatory functions of statutory human rights commissions subject to review pursuant to s.32 of the Canadian *Charter of Rights and Freedoms* (the "*Charter*")?

(b) if so, does the filing and investigation of a human rights complaint alleging sexual harassment (or indeed relating to any other form of human rights violation), engage "liberty and security of the person" so as to satisfy the threshold interest for a claim under s.7 of the *Charter*?

(c) if the threshold test is met, does delay alone in the investigation of a human rights complaint violate the principles of fundamental justice within the meaning of s. 7 of the *Charter*?

(d) to what extent, in assessing the principles of fundamental justice for the purposes of (c), must interests other than those of the respondent be taken into account?

(e) if, in the circumstances of the case under review, a s.7 violation is found to have occurred, what factors must be taken into account in arriving at a just and appropriate remedy under s.24(1) of the *Charter*?

PART III
ARGUMENT

Contextual Setting - Manitoba Human Rights Process

4. Manitoba's *Code* is broadly similar to human rights legislation in other jurisdictions, both in terms of its substantive content and its procedures. Like other jurisdictions, it emphasizes education, prevention, investigation, mediation in an attempt to secure consensual outcomes, and as a last resort, enforcement, almost exclusively through an adjudicative mechanism. The general principles infusing every aspect of the *Code* are set out in its preamble:

> WHEREAS Manitobans recognize the individual worth and dignity of every member of the human family, and this principle underlies the *Universal Declaration of Human Rights*, the *Canadian Charter of Rights and Freedoms*, and other solemn undertakings, international and domestic, that Canadians honour;
> AND WHEREAS Manitobans recognize that
> (a) implicit in the above principle is the right of all individuals to be treated in all matters solely on the basis of their personal merits, and to be accorded equality of opportunity with all other individuals;
> (b) to protect this right it is necessary to restrict unreasonable discrimination against individuals, including discrimination based on stereotypes or generalizations about groups with whom they are or are thought to be associated, and to ensure that reasonable accommodation is made for those with special needs;
> (c) in view of the fact that past discrimination against certain groups has resulted in serious disadvantage to members of those groups, and therefore it is important to provide for affirmative action programs and other special programs designed to overcome this historic disadvantage;
> (d) much discrimination is rooted in ignorance and education is essential to its eradication, and therefore it is important that human rights educational programs assist Manitobans to understand all their fundamental rights and freedoms, as well as their

> corresponding duties and responsibilities to others; and
> (e) these various protections for the human rights of Manitobans are of such fundamental importance that they merit paramount status over all other laws of the province;
>
> ***Human Rights Code* (Manitoba), C.C.S.M. Cap.H175, (Manitoba Book of Authorities, TAB 1)**

5. The MHRC itself consists of 10 members appointed by the Lieutenant Governor in Council. They are appointed for fixed terms, which can be terminated only for cause. The commissioners meet regularly (approximately 7 times per year) to provide policy direction to MHRC staff, and to review investigated complaints to determine whether there is a sufficient basis to dispose of the complaints pursuant to s.29, or whether additional investigation is required.

***Human Rights Code*, ss.2, 29**

6. The duties of MHRC staff are broadly similar to those outlined in paragraph 9 of the Factum of the Nova Scotia Human Rights Commission. In addition, the *Code* provides a unique mechanism whereby employers and service providers may obtain formal 'advisory opinions'; MHRC staff carry out the investigative work necessary to give effect to this power.

***Human Rights Code*, s.21**

7. There is no requirement in the *Code* for a would-be complainant to first establish "reasonable cause". Any person may file a complaint alleging a contravention, even if he or she is not the alleged victim of that alleged contravention. Where there is a third party complainant, the MHRC may require the consent of the alleged victim before accepting the complaint.

***Human Rights Code*, s.22**

8. The *Code* provides for investigation of complaints by MHRC staff. There is no power for investigators to compel witnesses/parties to speak to them. The *Code* does make provision for compelling access to documents/premises, but requires a court order where a person refuses access. Complainants and respondents have a right to be informed of the investigation's findings, and to respond thereto.

***Human Rights Code*, ss.26-28**

9. The *Code* stipulates that when the MHRC does not dismiss a complaint as being frivolous or vexatious, or outside its jurisdiction, or simply as being supported by insufficient evidence, it may attempt to mediate the complaint. The *Code* encourages reasonable settlements as outcomes to complaints by specifically providing that the MHRC may dismiss a complaint where a respondent puts forward a reasonable offer of settlement, which is rejected by a complainant.

***Human Rights Code*, s.29(2)**

10. Although this seems to suggest that mediation occurs only after investigation, in practice the MHRC focuses much of its attention on attempts to work out remedial settlements. It offers an active form of voluntary pre-complaint resolution, designed to bring potential parties together on a without prejudice basis to resolve disputes before a complaint has been filed, and before adversarial stances have a chance to harden during the investigative process. Mediation can also occur at any time *during* the investigative stage, and even after a complaint is referred to adjudication, legal counsel for the MHRC makes further attempts to settle the complaint. Very few complaints in Manitoba proceed to formal Boards of Adjudication.

11. When the MHRC determines that a complaint should be sent to a Board of Adjudication, it sends a letter of request to the Minister of Justice. The *Code* creates a panel of at least 5 adjudicators, who hear cases on a rota basis. When the Minister receives a referral from the MHRC, he must appoint the next available adjudicator on that rota to hear and determine the complaint. The *Code* creates a public hearing process, and sets out the authority of the Board of Adjudication both with respect to certain issues of process and with respect to the medial powers afforded the adjudicator. The MHRC is a party to the Board of Adjudication, and has carriage of the complaint. Monetary aspects of an adjudicator's order may be filed with the Court of Queen's Bench and enforced as a judgment of that court. Non-monetary aspects of that order require application to the Court of Queen's Bench for a compliance order, which a Queen's Bench judge "may grant...on such terms and conditions as it considers appropriate".

***Human Rights Code*, ss. 32-50**

12. Because of the educational nature of an adjudication hearing, the *Code* requires public notice to be given. However, the *Code* contemplates that the human rights complaint process is, at least until a public board of adjudication has been commenced, largely confidential.

***Human Rights Code*, ss.36, 59. As well *The Freedom of Information and Protection of Privacy Act*, C.C.S.M. Cap.F175 places stringent limits on the release of third party personal information.**

Issue A: Are the administrative/investigatory functions of statutory human rights commissions subject to review pursuant to s. 32 of the Canadian *Charter of Rights and Freedoms*?

13. Although the MHRC does not take a position on whether or not it, and other statutory human rights commissions, fall within s.32 of the *Charter* as agents of government, it agrees with

the Intervener Attorney General of British Columbia that there is sufficient uncertainty in the existing case law to merit this Honourable Court addressing this issue. In decisions such as *McKinney*, *Godbout* and *Dolphin Delivery*, this Court has distinguished between 'governmental' bodies which are subject to the *Charter*, and other public bodies which are subject to administrative law, including judicial review, but are not subject of *Charter* scrutiny. As Mr. Justice La Forest stated in *Godbout*:

> "I pause here to reiterate an important observation made in the cases discussed earlier concerning how the notion of 'government' is to be understood. The mere fact that an entity performs what may loosely be termed a 'public function' will not by itself mean that the body under examination is 'governmental' in nature. Thus, with specific reference to the distinction between the applicability of the *Charter*, on the one hand and the susceptibility of public bodies due to judicial review, on the other, I stated as follows, as p. 268 of *McKinney*:
>
> > "It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, <u>but this does not in itself make them part of government within the meaning of s.32 of the *Charter*</u>...In a word, the basis of the exercise of supervisory jurisdiction of the courts is not that the universities are government, but that they are public decision-makers [emphasis added]."
>
> In order for the Canadian *Charter* to apply to institutions other than parliament, the provincial Legislatures and the federal and provincial governments, then, an entity must truly be acting in what can accurately be described as a 'governmental' - as opposed to a merely 'public' - capacity. The factors that might serve to ground a finding that an institution is performing 'governmental functions' do not readily admit to any *a priori* elucidation. Nevertheless, and as I stated further on in *McKinney* (at p. 269), '[a] public test is simply inadequate' and 'is simply not the test mandated by s.32'."
>
> ***Godbout* v. *Longueuil* (City), [1997] 3 S.C.R. 844 at 879-880 (Interveners' Joint Book of Authorities, v.II, TAB 27)**

14. In *McKinney*, La Forest J. went on to note:

> "Opening up private activities to judicial review could impose an impossible burden on the courts. Both government and the courts have recognized the need to limit judicial review by means, for example, of privative clauses and deference to specialized tribunals, techniques that would be unavailable in a *Charter* context. As well, as I noted earlier, government may, in many cases, establish more flexible means to deal with individual rights. Thus Human Rights Commissions have more flexible techniques for dealing with discriminatory practices without unduly constraining the exercise of other democratic rights that are extremely hard to balance; see McLellan and Elman, *ibid.*, and Tarnopolsky (now Mr. Justice Tarnopolsky), "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 *Can. Bar Rev.* 242, at p. 256."
>
> ***McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 263 (Manitoba Book of Authorities, TAB 2)**

15. At first blush, it may seem counterintuitive to suggest that human rights commissions may fall outside s.32 of the *Charter*, given this Court's decision in *Slaight Communications*, which found the *Charter* to apply to discretionary orders made by arbitrators appointed under the *Canada Labour Code*. It appears, however, that *Slaight* focuses upon: (a) the fact that the arbitrator was part of a specific labour dispute resolution mechanism at the disposal of the Minister of Labour; and perhaps (b) the role and function of such a decision-maker whose sole function was to exercise quasi-judicial powers, in the course of which he or she may be called upon to interpret legislation.

> **See La Forest J's reference to *Slaight* in *McKinney* v. *University of Guelph*, *supra*, at 265**

16. Do the same considerations apply to entities which exercise more private functions? If not, do they apply to a human rights commission which, although it drives its authority from a statute, is functioning as an *administrative* body in terms not only the performance of its

educational duties, but also in its investigative and mediation responsibilities? This Court has recognized that even in the performance of its duties as a 'gatekeeper', screening complaints to determine those which will go on to a quasi-judicial tribunal, human rights commissions are performing an administrative, as opposed to quasi-judicial, function. Moreover, it is performing this investigative/gatekeeping function at arm's length from governments. Not only are much of the Commission's efforts directed at the investigation and mediation of *private* disputes, but governments themselves are not infrequently the subject of complaints and the investigation process: see, for example, the *Vogel* case in Manitoba, with respect to the entitlement of civil servants in same-sex relationships to access spousal benefits. Can it be said, under such circumstances, that government controls the core functions of commissions to the point where they are government actors?

***Keenan* v. *Certified General Accountants' Association of British Columbia* (1999), 60 C.R.R. (2d) 244 (B.C.S.C.) (Manitoba Book of Authorities, TAB 3)**

***Cooper* v. *Canada (HRC)*, [1996] 3 S.C.R. 854 at 891 (Interveners' Joint Book of Authorities, v.I, TAB 16)**

***Vogel* v. *Manitoba* (No. 4) (1997), 31 C.H.R.R. D/89 (Manitoba Book of Authorities, TAB 4)**

17. As previously stated, this is not to suggest that human rights commissions are shielded from curial scrutiny and supervision. They clearly are public bodies whose activities are the subject of judicial review; and in the performance of their duties and in the exercise of their powers, they are subject to the rules of procedural fairness/natural justice.

Issue B: Does the filing and investigation of a human rights complaint alleging sexual harassment (or indeed relating to any other form of human rights violation) engage the "Liberty and Security of the Person" so as to satisfy the threshold interest for a claim under s.7 of the *Charter*?

18. The onus is on the person claiming a violation to establish both that he meets the threshold requirement set out in s.7, and that there has been a contravention of the principles of fundamental justice with respect to that threshold interest.

10

19. The MHRC joins with the Appellants and other Interveners in submitting that the majority of the British Columbia Court of Appeal erred in finding that the filing and investigation (or delay in investigation) of a sexual harassment complaint affects a 'right to dignity' so as to engage the 'liberty and security of the person' component of s.7.

20. The provisions of the *Charter*, including s.7, must be applied contextually. Although the British Columbia Court of Appeal did create a context, it is submitted that it chose the wrong one. Like the Saskatchewan Court of Appeal in *Kodellas*, it was attracted to what are submitted to be superficial similarities between the types of conduct which can be at the
20 heart of *some* sexual harassment allegations, and sexual misconduct which attracts criminal sanction. The stress, stigmatization, etc., which the court considered to be attendant upon the latter were therefore assumed also to apply to respondents who are the subject of sexual harassment complaints. It is submitted, however, that this is a misunderstanding of the nature of the human rights process, and that the Manitoba Court of Appeal, faced with a similar argument in *Nisbett*, correctly concluded that a respondent to a sexual harassment complaint could not show the infringement of a liberty or security of the person interest merely because of delays in the investigative process.

30 ***Nisbett* v. *Manitoba Human Rights Commission* (1993), 101 DLR (4th) 744 at 755(e)-(g) (Interveners' Joint Book of Authorities, v. II, TAB 45) (leave to appeal to S.C.C. dismissed)**

21. In *R.* v. *Beare*, this Court overturned a decision on the Saskatchewan Court of Appeal with respect to the requirement to attend for fingerprinting pursuant to the *Identification of Criminals Act*. Two of the three appeal judges had based their finding of a *Charter* contravention on the fact that there was a stigma attached to the fingerprinting process, a stigma which affected the 'mental integrity' or the 'dignity and worth' of the individual. Although this Court was prepared to find that the fingerprinting process did engage a liberty interest (because of the coercive power to compel attendance on pain of imprisonment for failure to comply), it was not prepared to accept the contention that being fingerprinted amounted to being 'treated like a criminal'; that this undermined one's sense of dignity and self respect, and that this was in itself sufficient to meet the threshold test in s.7.

_R._ v. _Beare_, [1988] 2 S.C.R. 387 at 402 (Manitoba Book of Authorities, TAB 5)

22. Even when the concept of 'stigma' is recast as an undermining of the 'psychological integrity' of an individual, it is clear that not every state action which impacts in some way upon a person's psychological integrity or sense of dignity generates a 'liberty or security of the person' interest within the meaning of s.7. As was pointed out by this Court very recently in the *G(J)* decision, although s.7 does protect both the physical and psychological integrity of the individual in contexts other than the criminal law:

> "...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".

Efforts by the state to apprehend one's child quite clearly generated such a 'serious interference with psychological integrity' and mounted to a "gross intrusion into a private

or intimate sphere".

> ***New Brunswick (Minister of Health and Community Services)* v. *G(J)* (S.C.C. September 10, 1999), headnote p.5 (Interveners' Joint Book of Authorities, v.II, TAB 44)**

23. It is submitted, however, that a generally confidential process for receiving and investigating human rights complaints, even sexual harassment complaints, does not create such a sense of gross intrusion to a "person of reasonable sensibility", given the nature and purpose of human rights legislation, which has been articulated frequently by this Court. As Mr. Justice La Forest noted in *Robichaud*:

> "It is worth repeating that by its very words, the Act (s.2) seeks 'to give effect' to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre, J. put the same thought in these words in *O'Malley* at p.547:
>
> > '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. It is the result or the effect of the action complained of which is significant'.
>
> Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives for intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence...This legislation creates what are 'essentially civil remedies."

> ***Robichaud* v. *Treasury Board* [1987] 2 S.C.R. 84 at 90 (Interveners' Joint Book of Authorities, v.III, TAB 73).**

24. The MHRC agrees with the submission of the Attorney General of Ontario that care must be taken not to apply an overly broad test to the 'liberty' and 'security of the person' interests protected by s.7, lest those *Charter* values end up being trivialized.

25. Moreover, the approach taken first in *Kodellas*, and then in this case in the British Columbia Court of Appeal, as various adjudicators have pointed out:

> "...requires a Board of Inquiry to engage in the making of some rather unattractive distinctions. *Kodellas* distinguished between stressful complaints of the kind arising in that case (and to which s.7 therefore applies) and less stressful complaints (to which s.7 would not apply). It is suggested in *Lampman* that this would be a very difficult line to draw. It was said to be difficult to generalize about the amount of stress caused by a particular 'type' of complaint and indeed, to determine the amount of stress which would be sufficient to engage s.7. Further, many kinds of civil claims could give rise to similar levels of stress and anxiety. Nevertheless, it would be surprising if limitation statutes and other stautory rrules permitting delay in laucning or prosecuting such proceedings were found to constitute violations of s.7. Further, it was suggested that some difficulty might be encountered in determing the impact of delay in increasing normal levels of setress and anxiety arising from the complaint, thus rendering it idficult to determine when delay has caused sufficient prejudice of this kind. Finally, it was noted that the *Kodellas* line of authority draws an unattractive distinction between personal and corporate respondents. Section 7 protection is only available to the former. Thus, in a typical case, the proceeding could contiue against the corporate respondent. In many cases, this would dusrely mean that the continuation of the proceedings against the corporate entity would give rise to that very stigmatization, anxiety and stress that the...Court sought to ameliorate on the basis of s.7."
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> ***Crane* v. *McDonnell Douglas Canada Ltd.* (1993), 19 C.H.R.R. 422 (Ontario Board of Inquiry, Adjudicator McCanus), (Manitoba Book of Authorities, TAB 6)**

26. Although the Respondent suggests that the post *Blencoe* case law in British Columbia points to the "workability' of the Court of Appeal's approach, it is submitted the cases show, in

fact, that the fears expressed in *Crane* were not fanciful: see, e.g. *MacTavish* v. *Tennant.*

***MacTavish* v. *Tennant* (1998), 35 C.H.R.R. D/79 (Interveners' Joint Book of Authorities, v.II, TAB 39)**

Issue C: If the threshold test is met, does delay alone in the investigation of a human rights complaint violate the principles of fundamental justice within the meaning of s.7 of the *Charter*?

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27. Again, the MHRC urges this Court to accept the reasoning of the Manitoba Court of Appeal (amongst others) on this issue, and to find that in a human rights context, delay *per se* in a human rights investigation is not sufficient to amount to a breach of fundamental justice. Rather, the claimant must establish that the delay has significantly impaired his or her ability to obtain a fair hearing, or must otherwise amount to an abuse of process in some form.

Nisbett* v. *Manitoba Human Rights Commission, supra

Issue D: To what extent in assessing the principles of fundamental justice for the purposes of
20 **(C), must interests other than those of the respondent be taken into account?**

28. The MHRC agrees with the submissions of the Appellants and the Interveners to the effect that there is a balancing mechanism involved in determining whether the principles of fundamental justice have been adhered to, and that balancing process of necessity includes factoring in both the interests of complainants, and the public interest at large. Such a balancing, in the case at hand, must lead to a conclusion contrary to that of the majority of the British Columbia Court of Appeal.

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Issue E: If, in the circumstances of the case under review, a s.7 violation is found to have occurred, what factors ought to be taken into account in arriving at a just and appropriate remedy under s.24(1) of the *Charter*?

29. The MHRC again agrees with the contention of the Appellants and the various Interveners that the British Columbia Court of Appeal erred in failing to consider interests other than the respondent in its determination that a stay of proceedings was 'just and appropriate'. For the reasons advanced in those submissions, the MHRC agrees that the appropriate remedy, *in the event of a finding of a s.7 contravention in the facts before the Court*, would have been an order requiring an expedited hearing of the complaints.

PART IV
NATURE OF ORDER REQUESTED

30. The Intervener MHRC respectfully requests that the appeal be allowed and the order for a stay be quashed.

10 ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24 DAY OF DECEMBER, 1999.

Counsel for the Manitoba Human Rights Commission

PART V

TABLE OF AUTHORITIES

	PAGE(S)
Statutes	
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Canadian *Charter of Rights and Freedoms*, section 32	7, 8, 9, 10
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Robichaud v. *Treasury Board*, [1987] 2 S.C.R. 84 13

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