

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

AND:

ROBIN BLENCOE,

RESPONDENT

**FACTUM OF THE INTERVENER,
THE ONTARIO HUMAN RIGHTS COMMISSION**

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PART I - STATEMENT OF FACTS

1. The Ontario Human Rights Commission (the “Commission”) relies upon the facts set out in paragraphs 1 through 22 of the factum of the Appellants British Columbia Human Rights Commission and Commissioner of Investigation and Mediation.

PART II - STATEMENT OF ISSUES

2. This appeal raises the following issues:

(a) Can delay in the processing of a human rights complaint deprive a respondent of the right to security of the person as guaranteed by s. 7 of the *Charter*?

(b) If s. 7 can be engaged by state-caused delay in human rights proceedings, did the Court of Appeal err in concluding that Blencoe’s s. 7 rights had been infringed in a manner contrary to the requirements of fundamental justice?

(c) If Blencoe was deprived of his s. 7 rights, and if the deprivation was contrary to the requirements of fundamental justice, was a stay of the proceedings a just and appropriate remedy?

PART III - ARGUMENT

The Commission’s Position

3. The Commission respectfully submits that the extension of s. 7 rights to respondents to human rights proceedings in the context of delay is unsupported by the applicable *Charter* jurisprudence, inimical to the policy objectives of human rights legislation, unnecessary in

view of the availability of common law remedies and inconsistent with the doctrine of prematurity.

5 4. Neither the fact of having to respond to allegations of sexual harassment in human rights proceedings, nor delay by the state in processing such allegations is a deprivation of a s. 7 right of the respondent, who has neither a free-standing right to dignity and freedom from stigma, nor a Constitutional right to be “tried” within a reasonable time.

10 5. Rather, a respondent to a human rights proceeding has the protections offered by the administrative law doctrines of fairness (before the investigative body) and natural justice (before the adjudicative body), as well as the common law doctrine of abuse of process. Pursuant to this doctrine, and the provisions of the *Statutory Powers Procedure Act*, the tribunal hearing a complaint of discrimination has the jurisdiction to stay its proceedings where, as a
15 result of delay, a respondent is prejudiced in his ability to make full answer and defence.

20 6. It is submitted that to permit *Charter* challenges to the jurisdiction of human rights tribunals where undue delay is alleged would, in addition to frustrating the objectives of human rights legislation, fragment proceedings and itself cause significant delay. Barring extraordinary circumstances, administrative proceedings should not be interrupted by judicial intervention, nor should remedies be sought under the *Charter* where they are available at common law.

25 7. Alternatively, if delay in human rights proceedings can engage a security of the person interest on the part of the respondent, it is submitted that the “principles of fundamental justice” must be interpreted in accordance with the particular context of human rights proceedings, bearing in mind all of the interests at stake in those proceedings.

30 8. Finally, it is submitted that a stay is a drastic remedy, to be granted only as a last resort, and in the clearest of cases.

Issue 1: Can delay in the processing of a human rights complaint deprive a respondent of the right to security of the person as guaranteed by s. 7 of the *Charter*?

9. It is the Commission's position that delay in the processing of a human rights complaint does not give rise to a s. 7 interest on the part of the respondent, whether the right be characterized as freedom from stigmatization, loss of privacy, stress and anxiety, as in Blencoe's submissions, or freedom from the stigma of prolonged humiliation and public degradation, as was held by the Court of Appeal.

10. It is submitted that the Court of Appeal's conclusion that s. 7 can be engaged by state-caused delay in human rights proceedings rests upon two foundations, which are independently faulty, and remain so in combination: the creation of a free-standing right to dignity and freedom from stigma, and the application of the protections in the criminal sphere contained in s. 11(b) of the *Charter* to human rights proceedings.

A. The "Right to Dignity and Freedom from Stigma"

11. While the importance of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*, and indeed lies at the heart of the *Charter*, there is no independent right to dignity *per se*.

12. Section 15 of the *Charter*, in particular, provides a means of protecting dignity. The application of s. 15, however, is limited to individuals who are subject to disadvantage by virtue of their membership in certain groups. Its purpose is to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of

concern, respect and consideration”. In the instant case it applies - not to Blencoe - but to the complainants.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at 549, per Iacobucci J.

5
13. While the concept of human dignity has infused this Court’s discussions of an expanded
s. 7 interest, in no case has a distinct right to dignity been created. Indeed, to recognize dignity
as an independent s. 7 right would render superfluous the specific protections of rights and
10 freedoms found in other sections of the *Charter*.

If liberty or security of the person under s. 7 of the *Charter* were defined in terms of
attributes such as dignity, self-worth and emotional well-being, it seems that liberty under
s. 7 would be all inclusive. In such a state of affairs there would be serious reason to
question the independent existence in the *Charter* of other rights and freedoms such as
15 freedom of religion and conscience or freedom of expression.

Reference Re Criminal Code, ss. 193 and 195.1(1)(c) (the Prostitution Reference), [1990]
1 S.C.R. 1123 at 1170, per Lamer J.

20
14. Although s. 7 interests have been extended beyond the criminal law context in recent years,
the recognition of such interests has occurred predominantly in the context of the rights of the
disenfranchised: the right of women to control their reproduction, the right of parents to legal
representation when responding to state wardship applications, and the right of complainants
25 to privacy over their confidential records in sexual assault proceedings.

New Brunswick (Minister of Health and Community Services) v. G.(J.) (10 September,
1999), Unreported Decision, File No. 26005 (S.C.C.)

30
R. v. O'Connor, [1995] 4 S.C.R. 411

B.(R.) v. The Children’s Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, per La
Forest J., and L’Heureux Dubé J.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, per Corey J., and McLachlin J.

R. v. Morgentaler, [1988] 1 S.C.R. 30

B. The application of s. 11(b) to human rights proceedings

15. In concluding that Blencoe's s. 7 rights had been infringed, the Court of Appeal applied the protections in the criminal sphere contained in s. 11(b) to human rights proceedings, drawing upon *Kodellas* to support its findings.

16. In *Kodellas*, the Saskatchewan Court of Appeal, relying upon Lamer J's discussion of 11(b) in his dissenting judgement in *Mills*, held that subjecting an individual to a formal inquiry into allegations of sexual harassment seriously affected that individual's security of the person, and that where the processing of the allegations was unduly delayed, the deprivation was contrary to the requirements of fundamental justice.

Saskatchewan Human Rights Commission v. Kodellas (1989), 60 D.L.R. (4th) 143 (Sask. C.A.) at 157-158.

R. v. Mills, [1986] 1 S.C.R. 863 at 918-920, per Lamar J.

17. It is submitted that the reasoning in *Kodellas* is erroneous, inasmuch as the Court applied Lamer J.'s observations about 11(b) of the *Charter* to human rights proceedings, not by virtue of any similarity in the consequences or nature of the proceedings, but as a result of the equivalence of the "accusations".

18. Furthermore, the conclusions reached in *Kodellas* are not reflective of comments made by Lamer J. elsewhere in his judgment in which he distinguished the purpose of s. 11(b), which protects the right to trial within a reasonable time, from the purpose of s. 7, which protects the right to a fair trial. Where delay is raised in the context of s. 7, the impact of the delay upon the

fairness of the proceedings must be assessed.

R. v. Mills, supra at 921-922 and 945, per Lamer J.

19. While the Court of Appeal in *Blencoe* made passing reference to the nature of the proceedings, it too failed to consider the differing nature of human rights and criminal proceedings, the right to security of the person in the criminal context and the differing purposes of ss. 11(b) and 7.

(1) *the differing nature of human rights and criminal proceedings*

20. As evidenced in the Preamble, the policy objectives underlying the Ontario *Human Rights Code* (the “Code”), which provides substantially the same protection as human rights legislation in the other jurisdictions, include the recognition of the dignity and worth of every person, the provision of equal rights and opportunities without discrimination, and the creation of a climate of understanding and mutual respect for the dignity and worth of each person. A liberal interpretation is to be applied to the provisions prohibiting discrimination so as to give the rights full recognition and effect, in keeping with the almost Constitutional nature of the legislation, and a narrow interpretation to the exceptions.

Human Rights Code, R.S.O. 1990, c. H.19, as amended, Preamble

Ontario Human Rights Commission and O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536 at 547, per McIntyre J.

Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321 at 339, per Sopinka J.

21. Under the *Code*, a complainant may file a complaint as a matter of right; the Commission has no discretion to refuse it at the initial stage. Thus the commencement of human rights proceedings implies no suspicion of wrong-doing on the part of the state, but only a

belief, reasonable or otherwise, on the part of an individual that a right has been infringed. Indeed, the initiation of a complaint has been held to not even be the equivalent of the commencement of an action but to be rather, the “opening of a file in the office of the Commission”. By contrast, criminal proceedings are commenced when a person is charged, which indicates that there are grounds to believe that an individual has committed an offence.

Human Rights Code, supra, s. 32

West End Construction Ltd. v. Ontario (Ministry of Labour) (1989), 62 D.L.R. (4th) 329 (Ont. C.A.) at 339

22. It is only if and when the Commission requests the referral of a complaint to the Board of Inquiry, a quasi-judicial tribunal that determines whether a right under the *Code* has been infringed, that it may be said that a public authority has assessed the evidence at all. Even at that stage, the Commission does no more than decide whether the evidence “warrants” a referral to the tribunal that will determine, upon the civil standard of proof, whether an individual’s rights under the *Code* has been infringed.

Human Rights Code, supra, ss. 35, 36

23. The Commission does not “prosecute” the respondent. Officers have an investigative and conciliatory role until the time comes to make a recommendation to the Commission as to whether the complaint should be referred to the Board of Inquiry.

24. The Commission is bound by protection of privacy legislation, which prevents it from disclosing the identity of complainants and respondents, subject to certain exceptions such as the need to co-operate with law-enforcement agencies. It is only after the complaint is referred to the Board of Inquiry that it becomes a matter of public record. In contrast, an accused person’s identity is not protected, as it is believed that society has an interest in knowing who has been charged.

R. v. Mills, supra at 920, per Lamer J.

Freedom of Information and Protection of Privacy Act R.S.O. 1990, c. F.31, ss. 41-42

5 25. An accused may suffer disruption of family life resulting from pre-trial custody and stringent bail conditions while awaiting trial. The Commission has no power to issue interim orders or otherwise affect the behaviour of the respondent pending a determination of the matter by the Board of Inquiry.

10 *Human Rights Code*, ss. 32 - 45

15 26. Commission decisions are subject to a duty of fairness to the parties. Thus before the Commission may decide to refer a complaint to the Board of Inquiry, it must afford the respondent (and complainant) an opportunity to make submissions as to whether the matter should proceed. An accused person, by contrast, is not offered an opportunity to comment on the adequacy of the police investigation, or sufficiency of the evidence, prior to the decision to lay charges.

20 *Re Federation of Women Teachers' Association of Ontario and O.H.R.C.* (1988), 67 O.R. (2d) 492 (Ont. Div Ct.) at 503-505

25 27. Consistent with the remedial purposes of the *Code*, the complainant has the status of a party before the Board of Inquiry, with the same rights as the Commission and respondent to lead evidence and make submissions. A complainant and respondent may choose to resolve the differences between them, and proceed to do so without the participation of the Commission in the settlement. Under such circumstances and indeed, at any time in the course of the investigation, a complainant may withdraw her complaint. While the victim in criminal
30 proceedings may retract a statement, she cannot herself withdraw the charges.

Human Rights Code, supra, s. 39

28. The Board of Inquiry does not rule on the “guilt” of the party, nor has it the power to fine or incarcerate. Board of Inquiry orders are compensatory.

Human Rights Code, supra, ss. 11, 41

5 29. Accordingly, it is evident that criminal and human rights proceedings differ significantly with respect to the status and objectives of the legislation, the consequences and nature of the proceedings, the procedural protections afforded to the defendant in the course of the proceedings, and the party status of the victim/complainant. The filing of a complaint - the
10 issuing by the Commission of the document that lists the complainant’s allegations - is not comparable to the laying of a charge in criminal proceedings.

(2) *the right to security of the person in the criminal context*

15 30. In the criminal context, the fact alone of the accusation may engage a security of the person interest because of the grave social and personal consequences to the accused - including potential loss of physical liberty, subjection to social stigma and ostracism from the community
20 - which are the unavoidable consequences of an open and adversarial justice system.

R. v. Mills, supra at 919-920, per Lamer J.

R. v. Oakes, [1986] 1 S.C.R. 103 at 119-120, contained in *R. v. Beare*, [1988] 2 S.C.R. 387
25 at 403, per La Forest J.

31. From the fact that “security of the person” is interpreted broadly to include the psychological stress of an accused person, it does not follow that it must be extended to respondents to human rights proceedings. To extend the scope of s. 7 to include the stress that
30 arises for respondents in all administrative proceedings where the propriety of their actions is at issue is to propose that applications under the *Charter* be brought as a result of the normal

workings of the state's regulatory and administrative functions.

32. Even in the criminal sphere, concern over the protection of individuals, other than the accused, from extreme psychological stress and physical harm will not prevent the trial from proceeding. A witness may suffer "emotional trauma", "anguish", and be at "risk of retaliation" and nonetheless be required to testify.

R. v. X (1983), 3 D.L.R. (4th) 253 (Ont. H. Ct.) at 255-257

33. It is submitted, in the alternative, that if the comments of Lamer J. in *Mills* regarding the "vexations and vicissitudes" of criminal proceedings are applicable to respondents to human rights proceedings, then the equivalent of a "person charged" in the human rights context is a person named as a respondent when the referral is made to the Board of Inquiry. As it is the delay in the investigation and processing of the complaint that is complained of in this case, no *Charter* right can have been infringed.

R. v. Mills, supra

(3) *the differing purposes of s. 11(b) and s. 7*

34. Not only did the Court of Appeal ignore the context provided by the proceedings, it also ignored the differing purposes of ss. 7 and 11(b), in effect substituting the question "has the proceeding been unreasonably delayed" for the question "was the deprivation not in accordance with the principles of fundamental justice".

35. The purpose of s. 11(b) is to protect the accused from overlong subjection to the "vexations and vicissitudes of an impending criminal accusation" by circumscribing the time within which the prejudice occurs.

R. v. Mills, supra at 919-920, per Lamer J.

36. Section 11(b), which provides a right to trial within a reasonable time, is intended to secure “within a specific framework” the interests protected by s. 7. It exemplifies, as do the rest of the rights set out in ss. 8 to 14 of the *Charter*, the principles of fundamental justice in a penal context. Section 11 has been held not to apply to human rights proceedings.

Reference re s. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 502 and 512, per Lamer J.

R. v. Wigglesworth, [1987] 2 S.C.R. 541

Re Commodore Business Machines et al and Minister of Labour for Ontario et al. (1984), 14 D.L.R. (4th) 118 at 123 (Ont. Div Ct.)

37. The purpose of s. 11(b) contrasts with the purpose of ss. 7 and 11(d). The former protects against (unreasonable) delay in itself; the latter protects the interests of a fair proceeding - the “ability of the accused to mount a full and fair defence”.

R. v. Mills, supra at 921-922 and 945, per Lamer J.

38. Where delay precedes the laying of a charge, the fairness of a trial is not automatically undermined, as it is the effect of the delay, and not the length that matters.

R. v. Mills, supra at 945, per Lamer J.

R. v. L. (W.K.), [1991] 1 S.C.R. 1091 at 1100, per Stevenson J.

(4) *the incorporation of s. 11(b) into s. 7*

39. The effect of the Court of Appeal's decision is to extract an element of s. 11(b) - the element of stigma, which may, in the context of s. 11(b), suffice to create a deprivation of security of the person - and apply it to proceedings that differ with respect to objectives, consequences and procedures.

40. This incorporation of s. 11(b) interests into s. 7 entails not only an overly-expansive and non-contextual interpretation of "security of the person", but a failure to consider whether the claimed deprivation was in accordance with the principles of fundamental justice. From the fact alone of extended delay, undue or "unreasonable" delay is found. And from the conclusion of "unreasonable delay", the further conclusion of "not in accordance with the requirements of fundamental justice" is drawn.

41. The reconfiguration of s. 7 as a s. 11(b) right results in the abandonment of the interests of the collective, balanced in s. 7, through a consideration of the principles of fundamental justice. The interest in a fair proceeding protected by s. 7 becomes simply the interest of the respondent in disposing of the allegations (speedily).

42. The jurisprudence interpreting s. 11(b) in the years since *Mills* indicates that this Court now regards s. 11(b) as having a secondary, societal component - that of ensuring that those who transgress the law are brought to trial - and that delay may not, in itself, displace this interest. Upholding the decision of the Court of Appeal would have the perverse result of permitting respondents to human rights complaints, but not accused individuals in criminal proceedings, to escape liability for reason of delay alone, without reference to the impact of the delay upon the fairness of the proceedings.

Issue 2: If s. 7 interests can be engaged by state-caused delay, did the Court of Appeal err in concluding that Blencoe's s. 7 rights had been infringed in a manner contrary to the principles of fundamental justice?

43. While the Commission's position is that delay in the context of human rights proceedings cannot deprive the respondent of his s. 7 rights, it is submitted in the alternative, that Blencoe's rights were not infringed in a manner contrary to the principles of fundamental justice.

(1) general principles

44. The principles of fundamental justice are guided by the purpose of section 7: a fair "trial". The fairness of a trial must be viewed from the perspective of the rights claimant as well as from the point of view of the community and the complainant.

New Brunswick (Minister of Health and Community Services) v. G.(J.), supra
R. v. O'Connor, supra at 458, per L'Heureux-Dubé J.

45. Section 7 guarantees a fair trial not a perfect trial: it does not guarantee the most favourable procedures imaginable. Where the fairness of the hearing is not affected by the deprivation of section 7, the principles of fundamental justice have not been breached.

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

46. A determination of the principles of fundamental justice involves balancing the rights of the individual claimant against the countervailing interests of the state and the complainant, and as such, individual rights may "be subordinated to substantial and compelling collective interests" in some circumstances.

Expressed in the language of s.7, the notion of balancing the individual rights against collective interests itself reflects what may rightfully be termed a “principle of fundamental justice” which, if respected, can serve as the basis for justifying the state’s infringement of an otherwise sacrosanct constitutional right.

Godbout v. Longeuil (City), [1997] 3 S.C.R. 844 at 900, per La Forest J.

A. (L.L.) v. B.(A.), [1995] 4 S.C.R. 536 at 584-585, per L’Heureux-Dubé J.

R. v. O’Connor, *supra* at 458, per L’Heureux-Dubé J.

47. The principles of fundamental justice are found in the basic tenets and principles of our judicial system. Equality is one of the basic tenets. From an equality perspective, fundamental justice protects against the complete erasure of complainants’ interests in the human rights process.

B.(R.) v. The Children’s Aid Society of Metropolitan Toronto, *supra* at 374, per La Forest J.

(2) *the availability of administrative law remedies*

48. The principles of fundamental justice also vary according to the context in which they are invoked. In the administrative law context, they include the principles of natural justice: the right to procedural fairness and a fair hearing.

Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869 at 883, per Iacobucci J.

B.(R.) v. The Children’s Aid Society of Metropolitan Toronto, *supra* at 380, per La Forest J.

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

49. In Ontario, a party may seek review of the decisions of the investigating body, the Commission; the Divisional Court may quash the referral of a complaint to the Board of Inquiry if the statutory pre-conditions for the referral have not been met, if the respondent has not been accorded procedural fairness, or if the decision is unreasonable.

5 *Re Federation of Women Teachers' Association of Ontario and O.H.R.C., supra*

10 50. The Board of Inquiry, for its part, must observe the rules of natural justice, codified in the *Statutory Powers Procedure Act*. The Board of Inquiry has the jurisdiction to stay its proceedings where the continuation would constitute an abuse of process, and has done so for reasons of delay in the filing or processing of a complaint.

Hancock v. Schreve (1992), 21 C.H.R.R. D/146 (Ont. Bd. Inquiry)

15 *Anonuevo v. General Motors of Canada Ltd.* (1998), 32 C.H.R.R. D/322

Statutory Powers Procedures Act R.S.O. 1990, c. S.22, s.23.

20 51. Adopting the comments of the Manitoba Court of Appeal in *Nisbett*, the Divisional Court has held that human rights proceedings may be stayed where there is evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing.

25 *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.)

30 52. The Ontario Courts have not found it necessary to rule that s. 7 is inapplicable in the context of delay in human rights proceedings. Where a respondent sought to quash a Commission decision requesting the appointment of a Board of Inquiry on the basis of delay in processing the complaint, the Divisional Court quashed the application for judicial review as premature.

Latif v. Ontario (Human Rights Commission) (1992), 17 (C.H.R.R.) D/198 (Ont. Div. Ct.)
leave to appeal denied June 8, 1992.

53. Consistent with the ruling of this Court in *Harelkin*, the Ontario Courts have cautioned against the judicial interruption of proceedings where an administrative body has the capacity to grant an equivalent, effective remedy. In the category of matters that an administrative tribunal such as a human rights Board of Inquiry can deal with, the Courts have included the issues raised in a s. 7 *Charter* application - not because the tribunal was a court of competent jurisdiction - but because the tribunal was best-placed to determine whether the delay would prejudice the respondent's right to a fair proceeding.

Harelkin v. The University of Regina, [1979] 2 S.C.R. 561

Latif, supra

Ressel v. Board of Directors of Chiropractic (1990), 41 O.A.C. 321 (Ont. C.A.)

54. As remedies are available in the administrative law context to deal with the issue of state-caused delay in human rights proceedings, recourse should not be made to the *Charter*. Where a common law remedy is available, a remedy under the *Charter* should not be granted.

Bennett v. British Columbia (Securities Commission) (1992), 94 D.L.R. (4th) 339 at 354 (B.C.C.A.)

Misra v. College of Physicians and Surgeons of Saskatchewan (1998), 52 D.L.R. 477 at 480 (Sask. C.A.)

55. It is submitted that opening the door to delay-based s. 7 applications on the part of respondents, quite apart from denying complainants the right to have their complaints adjudicated on the merits, will either undermine the purpose of s. 7 or provide a more expensive,

time-consuming and formal means of assessing the impact of delay upon the fairness of the proceedings than is currently available.

(3) application of the general principles to Blencoe

5 57. It is submitted that a determination of whether the proceedings in the instance case, said to cause a deprivation of a s. 7 right, were not in accordance with the principles of fundamental justice requires consideration of the interests of the respondent, complainant and society as a whole.

10 57. With respect to the interests of the respondent, no argument is made that his ability to respond to the allegations was impaired. In any case, such arguments prior to the hearing are premature, due to the difficulty of anticipating to what extent the passage of time will truly affect his ability to respond. The hearing may, indeed, exonerate the respondent.

15 58. Accordingly, Blencoe can assert no impairment of his entitlement to a fair hearing, but only a “right to be free from stigma”, if so found by this Honourable Court. It is against this interest alone that the Court must balance the complainants’ right to have their complaints heard, and the public interest in enforcing human rights.

20 59. The complainants have an interest, not simply in succeeding on the merits, but in having their allegations dealt with in accordance with the processes provided by law, regardless of the outcome. Since the ruling of this Court in *Bhadauria*, tort law has not been available to complainants for the pursuit of human rights.

25 60. The public also has an interest in the enforcement of human rights. This interest is evident from the quasi-constitutional nature of human rights legislation and society’s commitment to the elimination of discrimination.

Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321 at 339, per Sopinka J.

61. Notwithstanding the above, the Court of Appeal held that undue, prolonged humiliation and public degradation as experienced by Blencoe is, by its very nature, contrary to the principles of fundamental justice. By failing to consider the principles of fundamental justice, the Court of Appeal eviscerated the very essence of the section 7 right - the balancing of the individual's right to liberty and security of the person with the collective interests at stake.

Issue 3: If Blencoe was deprived of his section 7 rights, was the stay of proceedings an appropriate and just remedy?

1. *Section 24(1) of the Charter*

62. Where a violation of section 7 of the *Charter* has been established, the court must fashion an appropriate and just remedy under s. 24 of the *Charter*. The term "appropriate and just" provides the court with considerable flexibility and discretion when determining its remedy.

R. v. O'Connor, *supra* at 460-461, per L'Heureux-Dubé J.

63. When deciding the appropriate remedy under s. 24(1), the court must examine the effect of the remedy on the parties to the proceeding, the public interest and the integrity of the judicial system. Respect for human dignity and equality is fundamental to the integrity of the judicial system and the public interest.

R. v. O'Connor, *supra* at 465-466, per L'Heureux-Dubé J.

64. The Court must exercise its discretion under section 24(1) in a manner that is respectful of all *Charter* values. The decision whether to grant a stay will depend upon a balancing of all *Charter* rights to ensure that any adverse effects upon one right is proportionate to the salutary

effects of the constitutional objective being furthered.

R. v. O'Connor, *supra* at 479-480, per L'Heureux-Dubé

65. A stay of proceedings does not automatically flow from a s. 7 breach. Rather, it will only
 5 be granted in the clearest of cases, where the prejudice to the respondent's right to a fair hearing
 cannot be remedied through any other means. It is a last resort, only to be taken when all other
 avenues have been exhausted.

10 *R. v. O'Connor*, *supra* at 460-461, 466 and 468, per L'Heureux-Dubé

(2) *Application to Blencoe*

15 66. The Court of Appeal failed to consider the effect of the stay on the complainants' *Charter*
 rights, the public interest and the integrity of the judicial system. As such, the court was unable
 to determine whether the stay was appropriate and just in the circumstances of this case. The
 stay simply followed automatically from the finding that section 7 had been breached.

20 67. In the event this Court finds that section 7 *Charter* rights include human dignity and
 psychological integrity in the human rights context, these rights are also engaged for the
 complainants. The right to pursue one's human rights goes to the heart of what it means to enjoy
 25 human dignity and individual autonomy. The denial of this right is unconstitutional.

68. The complainants' section 15 rights have also been infringed by the stay. The stay denies
 the complainants any effective recourse for the discrimination they have experienced and
 30 communicates to them a complete disregard for their human rights. It tells them that they are
 "less worthy of recognition or value as human beings or as members of Canadian society,
 equally deserving of concern, respect, and consideration", a discriminatory effect recognized

by this Honourable Court.

Law v. Canada (Minister of Employment and Immigration), supra at 535, per Iacobucci J.

Egan v. Canada, [1995] 2 S.C.R. 513 at 545, per L'Heureux-Dubé J.

5 69. The stay also jeopardizes the public interest. Society's commitment to the elimination of discrimination in Canadian society "is essential, not only to achieving the kind of society to which we aspire, but to democracy itself".

10 Human rights legislation is amongst the most pre-eminent category of legislation... One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised.

15 *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, supra at 339, per Sopinka J.

20 70. The stay jeopardizes the integrity of the judicial system. It ignores the complainants' *Charter* rights and allows the respondent's rights to effectively trump all other *Charter* rights. This Honourable Court has repeatedly stated that there is no hierarchy of human rights.

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

25 71. The adverse effects of the stay - to the complainants, the public interest, and the integrity of the judicial system - are disproportionate to the salutary effects of furthering the respondent's section 7 rights, in the absence of any demonstrated prejudice to the respondent's right to a fair hearing. It is therefore submitted, that a stay is neither appropriate nor just on the facts of this case.

PART IV - ORDER REQUESTED

72. The Ontario Human Rights Commission respectfully requests that the appeal be allowed and the order for a stay be quashed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF
NOVEMBER, 1999.

"Cathryn Pike"

Cathryn Pike

"Jennifer Scott"

Jennifer Scott

Counsel to the Ontario Human Rights
Commission

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