

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

BETWEEN:

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

Appellants
(Respondents)

AND:

ROBIN BLENCOE

Respondent
(Petitioner)

AND:

IRENE SCHELL

Intervener
(Interested Party)

RESPONDENT'S FACTUM
RE: ANDREA WILLIS

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PART I - STATEMENT OF FACTS

1. The Respondent Robin Blencoe ("Blencoe") is the Respondent in two Human Rights complaints brought by the Appellant Andrea Willis ("Willis") and the intervener Irene Schell, ("Schell") each alleging sexual harassment.
2. Blencoe has been a career politician since he was first elected to Victoria City Council in 1977. In 1983 he successfully campaigned as a candidate for the New Democratic Party ("the NDP") in the Victoria constituency (which later became the Victoria-Hillside constituency). In 1991 Blencoe became Minister of Municipal Affairs, Recreation and Housing, and in 1993 he became Minister of Government Services and Minister Responsible for Sport and Commonwealth Games.

Appellants' Record ("AR") Vol. I, p.51 at para. 4

3. On March 1, 1995 Blencoe was informed by then Premier Michael Harcourt ("Harcourt") that allegations of sexual harassment had been made against him. Harcourt told Blencoe that an independent lawyer, Stephen Kelleher, had been selected to conduct an inquiry into the allegations ("the Kelleher inquiry").

AR Vol. I, p. 51 at para. 5

4. On March 8, 1995 the existence of the harassment allegations was made public. On March 9, 1995 Blencoe was publicly identified as the Minister involved. Blencoe stepped down as Minister, but remained in Cabinet pending the results of the Kelleher inquiry.

AR Vol I, p. 52 at paras. 6-7

5. On April 4, 1995 Premier Harcourt removed Blencoe from Cabinet, dismissed Blencoe from the NDP caucus, and terminated the Kelleher inquiry. Premier Harcourt stated that he had lost trust and confidence in Blencoe following the receipt of two additional allegations of sexual harassment. Although the particulars of the allegations have never been disclosed to him, Blencoe understands that the two additional allegations were made by Schell and Willis.

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AR Vol. I, p. 52 at para. 9

6. Blencoe continued to sit as an independent NDP MLA following his dismissal from Cabinet and caucus, but went on stress-related medical leave as of April 11, 1995.

AR Vol I, p. 54 at para. 15

The Schell Complaint

7. On July 17, 1995 Schell contacted the B.C. Council of Human Rights (“the Council”) with respect to filing a complaint of sexual harassment against Blencoe.

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AR Vol. I, p. 31 at para. 6; AR Vol. II, p. 195

8. Blencoe was informed on July 20, 1997 that the Council was considering whether to investigate a complaint filed by Schell. As the complaint dealt with conduct which allegedly occurred in March of 1993, Blencoe was asked to provide submissions regarding the timeliness of the complaint under section 13(1)(d) of the *Human Rights Act*.

AR Vol. I, p. 31 at para.7; AR Vol. II, p. 166 at para. 3

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9. Blencoe requested that the Council produce copies of a Complaint Information form and Particulars of Information in order to enable him to make a full submission on the issue of timeliness.¹ On August 2, 1995 the Council provided Blencoe with a Complaint Information form and Particulars of Allegation dated July 31, 1995.

AR Vol. I, p. 31 at para. 8; AR Vol. II, p. 166 at para. 4-5

10. When Blencoe requested an explanation as to why the documents he received were dated July 31 as opposed to July 17, he was told that Schell had submitted written information upon which to base a complaint on July 17, and that this information was then used to draft the complaint documents which were eventually signed by Schell on July 31. The Council

¹Throughout the factum, references to communication between Blencoe and the Council, Commission and Tribunal are in fact references to letters written by Blencoe’s counsel on behalf of Blencoe.

10 requested that Blencoe provide his submissions regarding the timeliness of the complaint on or before September 7, 1995.

AR Vol. I, p. 31 at para.9; AR Vol. II, p. 167 at para. 6-7

11. Although Blencoe repeatedly requested disclosure of the initial complaint correspondence over the next several months, the Council consistently refused to disclose the documents to him.

AR Vol. I, p. 31 at para.10; AR Vol. II, p.167 at para. 8; p.170 at para. 18; p. 171 at paras. 20-22; p. 174 at para. 36

20

12. Blencoe provided preliminary timeliness submissions to the Council on August 31, 1995, asking that the Council require Schell to adduce evidence to discharge the onus of proving that her complaint was filed in good faith. When the Council stated on September 5, 1995 that it would not require Schell to adduce any further material, Blencoe requested fifteen days to make more detailed submissions regarding timeliness. Blencoe's submissions were provided to the Council on September 22, 1995.

AR Vol. I, pp. 31-32 at para. 11; AR Vol. II, p.167-168 at paras. 8-10

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13. Schell's timeliness submissions were forwarded to the Council on October 11, 1995. However, Blencoe was not informed of the existence of these submissions until November 14, 1995, and even then only after he specifically wrote to the Council requesting an update on the status of the file. Blencoe was told that it was Council's "standard procedure" not to provide a respondent with a copy of a complainant's response.

AR Vol. I, p. 32 at para. 12; AR Vol. II, p.168 at paras. 10-12

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14. On November 16, 1995 Blencoe argued that the Council had committed a serious breach of natural justice by withholding the Schell submissions from him. After failing to receive a response, Blencoe wrote again on December 4, 1995 demanding that the submissions be produced. A copy of the Schell submissions was finally provided to Blencoe on December 15, 1995.

10

AR Vol. I, p. 32 at para. 13; AR Vol. II, p.168-169 at paras. 13-14

15. Blencoe sought to make a reply to the Schell submissions, and established through an exchange of letters that as of February 5, 1996 the Council had not yet made a decision as to whether to proceed with an investigation. Blencoe provided a reply to Schell's submissions regarding timeliness on February 8, 1996. In that reply Blencoe insisted on full disclosure of any information that Schell provided to the Council with any evidence or statements of witnesses that were relevant to the complaint, and further requested access to all information that Schell had at any time provided to the Council. This request was denied by the Council on February 20, 1996.

20

AR Vol. I, p. 32 at para. 14; AR Vol. II, p.169-170 at paras. 15-18

16. On February 21, 1996 Blencoe was informed that the Council had decided under section 13(1)(d) to proceed with an investigation of the Schell complaint. The Council requested that a substantive response to the Particulars of Allegation be provided within 30 days.

AR Vol. I, p. 32 at para. 15; AR Vol. II, p.170 at para. 19

17. By form letter dated March 6, 1996 the Council informed Blencoe that investigative resources were being transferred from the Employment Standards Branch, which had been designated to investigate the Schell complaint, to the Council. The transfer of resources was to be effective April 1, 1996. The Council said that it appreciated Blencoe's "patience in waiting to be notified as to when investigation will begin of this complaint."

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AR Vol. I, p. 33 at para. 16; AR Vol. II, p.171 at para. 21

18. On March 19, 1996 the Council extended the deadline for a response to the Particulars of Allegation to April 10, 1996. Blencoe reiterated his request for disclosure of Schell's original submission to the Council as well as copies of any notes taken by officials in the government who initially interviewed her. On April 1, 1996 these requests were denied. On April 10, 1996 Blencoe provided a general denial to the Schell complaint stating that because

10 he was not afforded procedural fairness in the handling of the complaint, a more detailed response to the Particulars of Allegation was not in order.

AR Vol. I, p. 33 at para. 17; AR Vol. II , p.171 at paras. 22-23

19. A Human Rights Officer was finally assigned to investigate the Schell complaint on September 6, 1996. On November 8, 1996 Blencoe was asked to provide a response to information which had arisen during the course of investigation. A response was provided on December 23, 1996.

AR Vol. I, p. 33 at para. 18; AR Vol. II , p.172 at paras. 25-26

20 20. On January 1, 1997 the *Human Rights Act* was amended to become the *Human Rights Code*. The amended statute split the former Council into two separate bodies: the B.C. Human Rights Commission ("the Commission"), responsible for investigating complaints, and the B.C. Human Rights Tribunal ("the Tribunal"), responsible for adjudicating the complaints referred to it by the Commission.

AR Vol. I, p. 33 at para. 19

21. Blencoe received a completed Investigation Report regarding the Schell complaint on March 4, 1997. Blencoe was requested to submit any comments regarding the Report to the Commission in writing on or before April 8, 1997. The comments of Blencoe were provided
30 to the Commission on March 27, 1997.

AR Vol. I, p. 33 at para. 20; AR Vol. II, p.173 at paras. 28-29

22. In April of 1997 Blencoe was given until May 15, 1997 to provide replies to the submissions received from Schell and the Ministry of Government Services in response to the Investigation Report. Blencoe provided his replies to the Commission on May 14, 1997.

AR Vol. I, p. 34 at para. 21; AR Vol. II, p.173-174 at paras. 31-32

23. By letter dated July 3, 1997 the Commission informed Blencoe that it had decided to refer

10 the Schell complaint to a Tribunal for a hearing. When counsel for Blencoe inquired as to possible hearing dates, he was told that a hearing could be held as early as November of 1997, or as late as January of 1998.

AR Vol. I, p. 34 at para. 22; AR Vol. II, p.174 at paras. 33-34

24. By Notice of Hearing dated September 10, 1997 Blencoe was told that hearing dates had been scheduled for March 4, 5 and 6, 1998.

AR Vol. I, p. 34 at para. 23; AR Vol. II, p.174 at para. 35

20 25. The hearing was scheduled to take place approximately two years, seven months and two weeks after the date on which Schell first contacted the Council with respect to her human rights complaint and approximately six years after the alleged conduct which gave rise to the complaint.

AR Vol. I, p. 34 at para. 24

The Willis Complaint

26. Willis filed a complaint with the Council on August 1, 1995 alleging that she had been sexually harassed by Blencoe. The complaint was primarily based on events which had allegedly occurred in August of 1994. Blencoe was not notified of the filing of this
30 complaint until September 11, 1995.

AR Vol. I, p. 34 at para. 26; AR Vol. II, p.175 at para. 37

27. Through an exchange of letters, Blencoe persuaded the Council to consider whether the Willis complaint should be dismissed on the basis of timeliness pursuant to section 13(1)(d).

AR Vol. I, p. 35 at para. 27; AR Vol. II, p.175 at paras. 38-39

28. Blencoe made submissions to the Council regarding the timeliness of the Willis complaint on October 11, 1995. Willis made submissions to the Council on October 16, 1995. A copy of the Willis submissions was not provided to Blencoe until December 21, 1995, and even

10 then was only produced because Blencoe specifically requested that he be given access to any submissions that Willis might have made.

AR Vol. I, p. 35 at para. 28; AR Vol. II, p.176 at paras. 40, 42

29. On December 18, 1995 Blencoe wrote to the Council asking, amongst other things, when a hearing would be conducted into the complaint. Blencoe did not receive a response to this letter.

AR Vol. I, p. 35 at para. 29; AR Vol. II, p.176 at para. 41

20 30. On January 9, 1996 Blencoe sought to make a reply to Willis' timeliness submissions. However, the Council had already decided on December 18, 1995 that it would proceed with an investigation of the Willis complaint. Blencoe was not informed of this decision until January 11, 1996. When Blencoe asked for an explanation of the delay in communicating the Council's decision, he was told that the delay was attributable to a failure by the Council to return the decision to the Case Management secretary, and to a temporary backlog in the clerical area.

AR Vol. I, p. 35 at para. 30; AR Vol. II, p.176-177 at paras. 43-46

30 31. By letter dated January 11, 1996 the Council originally asked Blencoe to provide a substantive response to the Willis allegations by February 26, 1996. On January 24, 1996 Blencoe asked the Council to request production by Willis of notes of any interview she might have had with representatives of the Premier's Office. Blencoe considered it necessary to review those notes before he could make a substantive response. This request was denied on January 29, 1996.

AR Vol. I, p. 35 at para. 31 AR Vol. II, p.176-177 at paras. 44,47

32. On January 29, 1996 Blencoe stated that he was prepared to waive the investigation stage of the complaint process and proceed directly to hearing. The Council did not respond to this letter until February 22, 1996, when it informed Blencoe that an investigation could not be

10 waived unless the Chair of the Council determined that there was a reasonable basis in the
evidence to warrant a hearing, which in turn required Blencoe to file a response to the
Particulars of Allegation. Blencoe advised the Council by letter dated February 29, 1997 that
he was not prepared to concede that there was a sufficient evidentiary basis to warrant a
hearing.

AR Vol. I, pp. 35 - 36 at para. 32; AR Vol. II, p.178 at para. 48

33. By form letter dated March 6, 1996 the Council informed Blencoe that investigative
resources were being transferred from the Employment Standards Branch, which had been
designated to investigate the Willis complaint, to the Council. The transfer of resources was
20 to be effective April 1, 1996. The Council stated that it appreciated Blencoe's "patience in
waiting to be notified as to when investigation will begin of this complaint."

AR Vol. I, p. 36 at para. 33; AR Vol. II, p.178-179 at para. 50

34. Blencoe provided his substantive response to the Particulars of Allegation on April 10, 1996.
Notwithstanding the Council's letter of February 22, 1996, the Council did not refer to the
Chair the issue of whether to send the complaint directly to a hearing; presumably the
Council was still not satisfied that there was a reasonable basis on the evidence to warrant
a hearing.

AR Vol. I, p. 36 at para. 34; AR Vol. II, p.179 at paras. 51-52

30 35. On April 23, 1996 Blencoe wrote to the Council again asking when he might expect a hearing
to be convened. No response was provided until June 19, 1996, when the Council stated that
it would not know if or when the complaint would proceed to hearing until after the
investigation was completed. The Council acknowledged that no investigator had yet been
assigned and that there was a backlog of investigation files.

AR Vol. I, p. 36 at para. 35; AR Vol. II, p.179 at para. 53

36. A Human Rights Officer was finally assigned to investigate the Willis complaint on

10 September 6, 1996. On November 8, 1996 Blencoe was asked to provide a response to information which had arisen during the course of investigation. This response was provided on December 23, 1996.

AR Vol. I, p. 36 at para. 36; AR Vol. II, p.179-180 at paras. 54-55

37. Blencoe received a completed Investigation Report regarding the Willis complaint on March 3, 1997. Blencoe was requested to submit any comments regarding the Report to the Commission in writing on or before April 8, 1997. The comments of Blencoe were provided to the Commission on March 27, 1997.

AR Vol. I, p. 37 at para. 37; AR Vol. II, p.180 at para. 8

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38. On February 28, 1997 Blencoe wrote to the Commission requesting that he be advised when a hearing of the Willis complaint might be conducted should the complaint be referred to hearing. On April 11, 1997 Blencoe wrote again requesting a response to the letter of February 28, 1997. A response was finally received on April 15, 1997 stating that hearing dates cannot be scheduled until the Commissioner of Investigation and Mediation determines that a hearing is warranted.

AR Vol. I, p. 37 at para. 38; AR Vol. II, p.180-181 at paras. 56-59

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39. In April of 1997 Blencoe was given until May 15, 1997 to provide replies to the submissions received from Willis and the Office of the Premier in response to the Investigation Report. Blencoe provided his replies to the Commission on May 14, 1997.

AR Vol. I, p. 37 at para. 39; AR Vol. II, p.181 at para. 60

40. By letter dated July 3, 1997 the Commission informed Blencoe that it had decided to refer the Willis complaint to a Tribunal for a hearing. When counsel for Blencoe inquired as to possible hearing dates, he was told that a hearing could be held as early as November of 1997, or as late as January of 1998.

AR Vol. I, p. 37 at para. 40; AR Vol. II, p.181 at paras. 61-62

- 10 41. By Notice of Hearing dated September 10, 1997 Blencoe was told that hearing dates had been scheduled for March 18, 19 and 20, 1998.

AR Vol. I, p. 37 at para. 41; AR Vol. II, p.182 at para. 64

42. The hearing was scheduled to take place approximately two years, seven months and two weeks after the date on which Willis filed her human rights complaint and almost four years after the alleged conduct which gave rise to the complaint.

AR Vol. I, p. 37-38 at para. 42

Summary (for Willis Complaint only)

20 *Pre-Investigation*

43. The complaint was filed August 1, 1995 but it was not provided to Blencoe until September 11; the only "complaint" within the 6 months period related to an allegation that Blencoe rested his arm on top of her arm and gave a leering smile, a complaint that the Council agreed could not stand on its own: (AR Vol. II, p. 333) Blencoe provided a response on time on October 11 (AR Vol. II, pp. 280-281) and then waited until December 18th wondering where the Willis response was: (AR Vol. II, p. 291) only to find out on Dec 27, 1995 that Willis had responded on Oct 16, 1995 (AR Vol. II, p. 295); Blencoe wanted to respond to Willis on Jan 9, 1996, only to find out on Jan 11, 1996 that the Council had already decided the
30 timeliness complaint and had done so on Dec 18, 1995: (AR Vol. II, pp. 296-299) and then only to find out on February 12, 1996 that the delays were due to a "temporary backlog in the clerical area": (AR Vol. II, p. 300). Accordingly the period of delay from October 11 to February 12, 1996 of approximately 4 months were entirely of the Council's doing.

44. As early as Jan 29, 1996 Blencoe asked for a hearing and was prepared to waive the investigation stage which was presumably for his benefit. It took the Council another 3 weeks to respond, informing Blencoe that an investigation could not be waived unless the Chair of the Council determined that there was a reasonable basis in the evidence to warrant

10 a hearing, which in turn required Blencoe to file a response to the Particulars of Allegation.

AR Vol. II, pp. 301, 302-303, 304

45. Blencoe made his substantive submission on April 10, 1996, (AR Vol. II, p. 311) but as nothing was going to be investigated until September 6, 1996, no blame can be attached to Blencoe with respect to his legitimate request for proper disclosure prior to this time. Furthermore there was no valid reason that the Council would not waive the investigation as of April 10, 1996, as Blencoe had responded and based on the complaint alone the Council could have found that there was a "reasonable basis on the evidence to warrant a hearing without further investigation: (AR Vol. II, pp. 302-303). No explanation for the delay
20 between April and September 1996 is given.

Post -Investigation

46. The same person who was dealing with the pre-investigation stage was assigned to conduct the investigation. Although she was appointed on September 6th she did not report until March 4, 1997 and the investigation reports are extremely brief without any supporting documentation. As Chief Justice McEachern said: "... the investigation was necessarily one dimensional as there were no eyewitnesses, and a week at most would have sufficed."

Reasons for Judgment, Case on Appeal at para. 51, AR Vol. IV, p. 679

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47. There was a further unexplained delay between the date of receiving Blencoe's final submission on May 14, 1997, and the decision to refer the matter to a hearing on July 13, 1997, and an unexplained delay of almost 9 months from the date a hearing was ordered to the actual hearing, a delay particularly egregious given Blencoe's constant requests for an early hearing date.

AR Vol. II, p. 217; AR Vol. II, p. 220; AR Vol. II, p. 234; AR Vol. II, p. 244; AR Vol. II, p. 253

48. Willis states that that the pre-hearing conference was unilaterally cancelled by counsel for

10 Blencoe. Mr. Justice Lowry stated that: "At the beginning of October, Mr. Blencoe's
solicitors unilaterally canceled the hearing conference. I am told there appeared to be some
prospects of a mediated resolution." The pre-hearing conference was cancelled at the request
of Blencoe simply because Blencoe was preparing to enter into the mediation process and
it was considered to be at that time an unnecessary process and expense. It is difficult to
understand how the Tribunal cancelled the pre-hearing conference without obtaining the
consent of all of the Complainants but it is clear that the Complainants did not object to the
cancellation. The pre-hearing conference could have been scheduled at any other time after
the mediation failed. But, the fact of the matter is, after Blencoe filed his Petition in
November of 1997, it was not reasonable to expect Blencoe to be, at the same time, incurring
20 the expense necessary to prepare for a hearing which he believed in good faith might not
proceed. Blencoe sought to have the Judicial Review heard on December 15, 1997, but the
Commission and Willis (with Schell in support) successfully applied to adjourn the Judicial
Review until January 26, 1997

Willis Factum at para. 40

Reasons for Judgment, B.C.S.C. at para. 8, AR Vol. IV, p. 631

49. Willis has gone to great lengths to attribute the delay to Blencoe. On this specific issue,
Chief Justice McEachern held:

30 I am not, however, able to identify any steps taken by the Appellant that he was not
entitled to take in defending himself against the complaints and then noting that in
his Factum, counsel for the Commission did not suggest the Appellant had
contributed substantially to the delay.

Reasons for Judgment, Case on Appeal at para. 44, AR Vol. IV, p. 677

The Impact of the Delay

50. Following the initial harassment complaints made against Blencoe in March of 1995, and his
40 subsequent dismissal from Cabinet and the NDP caucus, the print, radio and television news

10 media began to hound Blencoe and his family. Blencoe's home was placed under surveillance, and members of his family were followed, filmed and questioned by journalists.
AR Vol. I, p. 38 at para. 43; Vol. I, p. 52 at para. 8; pp. 53-54 at paras. 11-13; p. 55 at para. 17; Vol. III, p. 382 -383 at para. 5

51. The constant media barrage took a significant toll on the physical, psychological and emotional well-being of every member of the Blencoe's family. Blencoe's children became the subjects of insults and name-calling in school. Blencoe and his wife began to feel increasingly isolated, and both experienced stress-related fatigue. Blencoe also began to suffer from severe depression, loss of appetite, agitation and sleep disorders, and took a
20 medical leave from work as of April 11, 1995.

AR Vol. I, p. 38 at para. 44; Vol. I, p. 54 at para. 14-15; Vol. III, pp. 382 -383 at paras. 5-8; Vol. I, p. 47 at para. 2

52. The filing of Schell's human rights complaint in July of 1995 sparked a new round of extensive media coverage, as did the filing of the Willis complaint in August of 1995. Additional stories surfaced every time there was a new development in the processing of the complaints.

AR Vol. I, p. 38 at para. 45; p. 55 at para. 17

30 53. Both Blencoe and his wife sought psychological counselling in the Summer of 1995. Blencoe was referred by Dr. Derek Carroll ("Dr. Carroll"), his personal physician, to Dr. Kenneth McLeod ("Dr. McLeod"), a local psychiatrist. Following his meeting with Blencoe, Dr. McLeod contacted the Canadian Medical Protective Association, which informed him that legal and quasi-legal bodies such as the B.C. Human Rights Commission can compel production of clinical records created in relation to a party to a human rights complaint. After Blencoe discussed the issue with Dr. McLeod and Dr. Carroll, a collective decision was made not to engage Blencoe in a full psychotherapeutic relationship while there was a possibility that Blencoe's counselling records could be subpoenaed for use in relation to the outstanding human rights complaints.

40 **AR Vol. I, pp. 38-39 at para. 46; p. 55 at para. 18; Vol. III, p. 382 at paras. 3-4; Vol. I, p.48 at paras. 3-5**

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54. Throughout the Fall of 1995 Blencoe considered whether he would run for re-election in 1996 as an independent NDP candidate. Blencoe eventually decided not to seek the NDP nomination in his riding because he knew that Premier Harcourt would not endorse his nomination when unresolved human rights complaints were still hanging over Blencoes's head.

AR Vol. I, p. 39 at para. 47; p. 55 at para. 19

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55. The existence of the outstanding human rights complaints also prevented Blencoe from running as an independent in the 1996 election. Blencoe felt unable to seek political support from his constituents at a time when his reputation had been besmirched by unproven sexual harassment complaints. As a result, Blencoe was forced to retire from his 20 year political career..

AR Vol. I, p. 39 at para. 48; p. 56 at paras. 20-21

56. The extensive media coverage given to the harassment allegations and unresolved human rights made it virtually impossible for Blencoe to obtain alternate employment in Victoria.

AR Vol. I, p. 39 at para. 49; p. 56 at para. 22

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57. Blencoe and his family moved to his wife's home town of Essex, Ontario in August of 1996. Blencoe felt that he and his family could escape the invasive media coverage which had caused so much suffering in Victoria, and that the family would benefit by having relocated to a community comprised of his wife's family and friends.

AR Vol. I, p. 39 at para. 50; p. 57 at para. 23; Vol. III, p. 384 at paras. 9-10

58. Although the unresolved human rights complaints still made it difficult for Blencoe to obtain employment, he eventually secured a position as a part-time Administrator for the Chamber of Commerce in Amherstburg, Ontario in February of 1997.

AR Vol. I, p. 39 at para. 51; p. 57 at paras. 25-26

- 10 59. On February 19, 1997 the Windsor Star ran a front-page story about Blencoe entitled "Sex Claims Haunt Chamber Official." Over the next two weeks numerous local and regional papers in Ontario ran articles regarding the unresolved human rights complaints against Blencoe. The stories were also picked up by newspapers in British Columbia. These articles were extremely damaging to Blencoe's reputation, and to his working relationship with his new colleagues.

AR Vol. I, p. 40 at para. 52; pp. 57-58 at paras. 27-28

- 20 60. The revival of media attention regarding the outstanding human rights complaints was extremely hurtful to Blencoe and his family. Blencoe's children were exposed to a second battery of insults and name-calling, this time in their new Ontario schools. The local and regional Ontario stories were particularly damaging to Blencoe's wife, who was embarrassed and humiliated at having the story of the harassment allegations played out in front of her home-town friends, neighbours and relatives.

AR Vol. I, p. 40 at para. 53; p. 58 at para. 29; Vol. III, pp. 384-385 at paras. 12-14

- 30 61. Although the Amherstburg Chamber of Commerce continued to employ Blencoe, the advantages of the move to Ontario had been destroyed by the media. As a result, when Blencoe's wife was offered a job in Victoria in May of 1997, Blencoe and his family decided to return to British Columbia. Blencoe returned to Victoria in mid-July of 1997.

AR Vol. I, p. 40 at para. 54; p. 58 at para. 30; Vol. III, p. 385 at para. 15

62. The slurs cast against Blencoe's reputation by the still-unresolved human rights complaints continue to seriously affect his day-to-day life. As recently as September of 1997, Blencoe was prevented from volunteering as an Assistant Coach of his youngest son's soccer team because the Executive of the Soccer Association did not want him "working with children." Public knowledge of the unproven and unresolved complaints has also prevented Blencoe from obtaining employment.

AR Vol. I, p. 40 at para. 55; pp. 60-61 at para. 38

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63. Until the human rights complaints were resolved, Blencoe had good reason to believe that he would be unemployable in British Columbia. Aside from the issue of employment, the Commission's and the Tribunal's delay in processing the Schell and Willis complaints caused other financial hardships. Blencoe and his family moved twice seeking to escape the stigma which had attached to them as a consequence of the complaints, and their family savings were drained in order to retain counsel throughout the extended complaint process.

AR Vol. I, pp. 40-41 at para. 56; p. 59 at paras. 32-33

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64. The delay in processing the complaints has also deprived Blencoe of the ability to call Bob Bearpark ("Bearpark") as a witness on his behalf. Bearpark, the author of a government briefing note outlining the process by which decisions regarding sports funding are made in British Columbia, passed away in late 1996. Blencoe had intended to call Bearpark as a witness in response to the Schell complaint, which alleges that Blencoe could have exerted influence over decisions regarding the funding of the sports organizations she represented. Blencoe learned of Bearpark's death in September or October of 1997.

AR Vol. I, p. 41 at para. 57; p. 59 at para. 34

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65. Blencoe will also be unable to call Bobbi Steen ("Steen") to testify with respect to the Schell complaint. Steen, former Co-Chair of the B.C. Summer and Winter Games and Executive Director of an organization dedicated to promoting women in sport, passed away in 1995. Blencoe had intended to call Steen as a witness to testify regarding the nature of his interaction with Schell.

AR Vol. I, p. 41 at para. 58; pp. 59 - 60 at paras. 35

66. The Commission's and the Tribunal's delay in processing the Schell and Willis complaints has significantly contributed to Blencoe's professional, physical, emotional, and financial problems by extending the period of time in which rumours have circulated, thereby contributing to the besmirching of his character. Additionally, the delay has prevented

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Blencoe from responding to his accusers in a timely manner at a hearing

AR Vol. I, p. 42 at para. 61; p. 61 at paras. 40-41

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67. By taking over two and one-half years to advance the Schell and Willis complaints to a hearing (complaints which related to conduct that allegedly occurred almost six and four years ago respectively), the Commission and the Tribunal have prolonged the suffering which Blencoe and his family have endured, and has in effect imposed a penalty on Blencoe despite the fact that the complaints against him have never been proven or upheld. While Blencoe has apologized to Willis for his conduct of August, 1994 and has otherwise denied the allegations of sexual harassment levelled against him by Willis and Schell the fact remains that Blencoe has, by reason of the delay in these proceedings, paid a much greater penalty than can ever be justified even if all the allegations against him are made out.

AR Vol. I, p. 42 at para. 62

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68. In her uncontradicted Affidavit, the Respondent's wife, Victoria MacPherson Blencoe, cogently summarized the impact of delay on the Respondent and his family:

Our entire family is sick of having a dark cloud in the form of unresolved human rights complaints hanging over our heads. As long as the complaints go unresolved we will continue to be subjected to media attention, public innuendo and unsubstantiated rumours. I feel that we have suffered enough over the last two and a half years, and that we deserve an end to the worry and financial hardship which the inordinately long complaint process has caused.

AR Vol. III, p. 386 at para. 17

PART II - ISSUES

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69. The Respondent states that the issues are as follows:

(1) Does s. 7 of the *Charter* apply to delay in human rights proceedings as the Court of Appeal held?

(2) If so, were Blencoe's s.7 rights violated in this case as the Court of Appeal held?

(3) If so, was the proper remedy a stay of proceedings as the Court of Appeal held?

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PART III - ARGUMENT

Issue # 1

Does s. 7 of the *Charter* apply to delay in human rights proceedings as the Court of Appeal held?

70. Blencoe adopts and incorporates here paras. 10 to 32 in the factum filed in response to the factum of the Appellant, the British Columbia Human Rights Commission, and adds only the following in specific response to new points made by Willis.

20 73. Willis asserts that in the context of a human rights proceeding, it is a private party, the complainant, who has conduct of the case. This is both inaccurate and irrelevant. It is inaccurate because the Human Rights Commission has broad control of a case to the extent of accepting, deferring, dismissing and referring the case at its discretion.

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

74. The Commission may also be entitled to be party to the proceedings in which case it likely has conduct of the proceedings at the hearing as well

Human Rights Code R.S.B.C. 1996, c.210 ss 21 (3)

30 75. This argument is irrelevant as it is the state that has been responsible for the delay and thus the deprivation of Blencoe' section 7 rights. It is the state therefore that must answer for that breach. The fact that the complainant in human rights case might be blameless for the state caused delay is no different than the situation in a criminal case where the complainant or victim is blameless and yet the proceedings are stayed.

76. Willis claims that respondents in human rights cases should not be treated like accused in criminal proceedings. The Chief Justice did not strictly apply a criminal law model. He said:

10 Courts of law have developed an extensive jurisprudence surrounding the determination of unreasonable delay in the context of criminal proceedings. Nothing that I say in this case should be taken to suggest that this jurisprudence must now be applied in the human rights context in all cases. **In my view, the delay in this case is so excessive when weighed against the seriousness of the charge and the simplicity of the issues that it could never be viewed as reasonable under any test.** An analysis of the precise scope of the test for unreasonableness should be left for a case which is not as clear cut as this one and which requires a more principled approach

20 **Reasons for Judgment, Case on Appeal, at para. 105, AR Vol. IV, p.701 (emphasis added)**

77. Furthermore, Willis has no answer to the opinion of the Chief Justice who sought to afford to persons in Blencoe's situation at least the protection of the Constitution that complainants in criminal proceedings receive. Chief Justice McEachern said:

30 Clearly, if complainants in sexual assault cases have the protection of s. 7 of the Charter when facing disclosure of confidential materials, then respondents in sexual harassment hearings, facing a protracted intrusion into the intimate details of their lives based on as of yet unproven charges, must also be extended the same protection. The stigma and general prejudice they face, though not the same, is analogous

Reasons for Judgment, Case on Appeal, at para. 74, AR Vol. IV, p. 690

Issue # 2

If so, were Blencoe's s.7 rights violated in this case as the Court of Appeal held?

78. Blencoe adopts and incorporates the submission made at paras. 33 to 91 in his response to the Commission Factum and adds only the following in specific response to new points made by Willis.

40 79. Willis spends a great deal of time suggesting that Blencoe is the cause of his own prejudice claiming that he "sought to fight his case in the public domain"(para. 104) while, Willis, "has never discussed her case in public". Both allegations are incorrect. That Willis did discuss

10 her case in public is illustrated at least in part by the following references to newspaper accounts

- A. In the Victoria weekly, "Monday Magazine", October 26 - November 1, 1995 Willis said "This sort of thing can take over your life if you let it. I just didn't want to draw any media attention to it."

AR Vol. I, p. 131

- B. In the Victoria daily "Times Colonist", January 17, 1996, Willis is quoted as saying: "I'm pleased that they've taken the issue of Mr. Blencoe's conduct seriously and will take action on this matter".

20 **AR Vol. I, p. 132**

- C. In the "Vancouver Sun" on January 18, 1996 Willis is quoted as saying: "I am pleased. I feel extremely confident in my case". In the same story, Blencoe indicated that he was upset the Appellant had commented to the media. He said: "That clearly indicates she is more interested in continuing this saga...rather than finding a resolution. It's very unfortunate to make this a highly political issue."

AR Vol. I, p. 133

- 30 D. In the "Times Colonist" April 26, 1996, it was reported that while Willis has not been seeking a high profile, she was quoted as saying that "there comes a time when you have to draw the line".

AR Vol. I, p. 135

- E. In the Vancouver Sun February 20, 1997 Willis was quoted as saying "I was aware he [Blencoe] had left B. C. I haven't lost hope he might accept responsibility for this."

AR Vol. I, p. 155

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F. On March 7, 1997 the Times Colonist published a story entitled "Commission's new boss promises quicker action" in which Willis was quoted as saying "I would like to see this matter resolved as quickly as possible for everybody involved."

AR Vol. III, p. 390

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80. Nor did Blencoe seek to fight his case in the public domain as Willis charges. Blencoe was already in the public domain as a long-term member of the Legislature and as a Minister of the Crown. Blencoe did not attempt to argue the merits of his case in the media. In fact he said that he wanted to avoid a trial by media (AR Vol. I, p. 128) It is true that not being satisfied with the progress in his private efforts at resolution of the complaint he made some public comments; e.g. he did release an open letter to his constituents, which is an entirely appropriate form of communication between a politician and his constituents. Blencoe outlined the measures he had taken to advance a mediated or arbitrated resolution to the Willis' complaint. The open letter to his constituents simply states that Willis rejected or did not respond to his suggestions of mediation, arbitration or some other solution. The extremely rare and brief public statements that Blencoe made are all in keeping with a man under siege by the media and endeavouring to maintain some semblance of self-respect and dignity while awaiting the much delayed hearing. He can not be faulted for this or in any way have taken to have forfeited his constitutional rights.

AR Vol. 1, p.128

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Issue # 3

If so, was the proper remedy a stay of proceedings as the Court of Appeal held?

81. Blencoe adopts and incorporates the submission made at paras. 91 to 95 in his response to the Commission Factum.

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PART IV - NATURE OF ORDER SOUGHT

82. The Respondent submits that the appeal should be dismissed.

Date: August 5, 1999

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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"JOSEPH J. ARVAY"

Joseph J. Arvay, Q.C.

Counsel for the Respondent, Robin Blencoe

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PART V - TABLE OF AUTHORITIES

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**Pages in Factum
Where Cited**

Statutes

Canadian Charter of Rights and Freedoms 18, 19

Human Rights Act, S.B.C. 1984. c. 22 2,5

20 *Human Rights Code*, R. S. B. C. 1996, c.210 as amended 5, 19