Court File No. 26789

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

BETWEEN:

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

Appellants
(Respondents)

AND:

ROBIN BLENCOE

Respondent
(Petitioner)

AND:

IRENE SCHELL

Intervener
(Interested Party)

RESPONDENT'S FACTUM
RE: BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

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PART I - STATEMENT OF FACTS

1. The Respondent, Robin Blencoe ("Blencoe"), does not take issue with the Statement of Facts in the Tribunal's Factum, with the following exceptions an additions:

a) At paragraph 4, the Tribunal says that it appeared in the Courts below but "took no position on the merits of the complaints against the Respondent or the merits of the Respondent's allegations of delay in the processing of the complaints." That is not strictly accurate. In its submission before Mr. Justice Lowry, the Tribunal argued: that it had jurisdiction to hear the complaints; that s.7 of the *Charter of Rights and Freedoms* (the "*Charter*") does not apply, and if it did apply, the remedies would not be more expansive than those based on administrative law principles; that it was
20 premature to establish a constitutional breach before the Tribunal hearing. In its submission before the Court of Appeal the Tribunal argued that Section 7 had no application to human rights proceedings because of their non-penal nature. Furthermore, even if Blencoe had established an infringement of Section 7, the Tribunal argued that the infringement would be in accordance with the principles of fundamental justice if there had been no violation of administrative law principles.

Outline of Argument of the British Columbia Human Rights Tribunal, Supreme Court of British Columbia, at paras. 8-10, Appendix A
Factum of the Respondent, British Columbia Human Rights Tribunal, Court of Appeal for British Columbia, at paras. 13, 40, 43, 50, Appendix B

30 b) The Tribunal has offered no excuse or justification for the delay between July of 1997 when the Commissioner of Investigation and Mediation referred the Willis and Schell complaints for a hearing and the dates of the hearing in March of 1998.

10 **PART II - POINTS IN ISSUE**

2. The Tribunal says that, in this Court, it will not take any position on the issue of whether or not delay in the processing of the human rights complaint can trigger and breach a Respondent's rights under Section 7 of the *Charter* but seeks only to make submissions on the following question (para. 21):

> In what forum may alleged breaches of Section 7 of the *Charter* in relation to delay in the human rights process and remedies for such violations be determined?

Blencoe respectfully submits this point is not in issue in this case.

PART III - ARGUMENT

3. In the Court of Appeal, Chief Justice McEachern rejected the Commission's submission that the hearing should be allowed to proceed so that the Tribunal could determine whether Blencoe's *Charter* rights had been infringed. The Chief Justice stated:

> While I am content, for the purpose of this case to leave open the question of whether the Tribunal is a competent Tribunal for such purposes, I have concluded that the Appellant has already been deprived unjustly of his Section 7 *Charter* rights. Allowing the hearing to continue will only make that deprivation more serious regardless of their outcome.
>
> **Reasons for Judgment, Court of Appeal for British Columbia, May 11, 1998 (hereinafter "Case on Appeal"), at para. 106 , AR Vol. IV, pp . 704 - 705**

4. It is very significant that the Tribunal, in this Court, does not question the correctness of the Chief Justice's ruling or in any way ask this Court to overrule the Chief Justice in that respect.

5. Indeed, it would be most inappropriate for the Tribunal to now argue that it should be in the position of determining whether or not Blencoe has s.7 *Charter* rights and whether those *Charter* rights have been violated given that the Tribunal has already taken a position against Blencoe in the lower Courts (see para. 1(a) above).

6. It would appear that the position of the Tribunal before the Court of Appeal is no longer the view of the Tribunal in light of the more recent decisions which have been rendered by the Tribunal, subsequent to the decision of the Court of Appeal in the case at bar. At paragraph 28 of the Tribunal's factum, there is a list of a number of decisions of the Tribunal in which the Tribunal has held that it not only has jurisdiction to determine whether delay in the human rights process can deprive a respondent of his or her rights under Section 7 of the *Charter* but has held that respondents do have such Section 7 rights. Indeed the Tribunal has dismissed some complaints on that basis. The Tribunal has begun the process of

developing its own jurisprudence and has said that the essential question is as follows:

> In my view, the most reasonable interpretation of McEachern C.J.'s reasons is that the length of the delay and the severity of the prejudice are interrelated in the sense that less delay is justifiable when the prejudice is known to be unusual and severe than might be justified when the prejudice is less. Section 7 interests in liberty and security of the person may be engaged even absent a demonstration of extraordinary prejudice of the degree found in Blencoe. The s. 7 right will be violated in an "ordinary" sexual harassment complaint where the delay is inordinate. Thus, I read McEachern C.J. as holding that there is some outer bound to the length of time that the Constitution will permit for the processing of any sexual harassment complaint. In cases where the stigma felt by the Respondent is not unusually severe, a greater delay will be constitutionally acceptable than in cases of extraordinary stigma. The acceptable length of delay will also vary depending on factors such as the complexity of the allegations.
>
> ***Dahl and Eastgate* v. *True North R.V. and Kummerfield,* [1998] B.C.H.R.T.D. No. 46 (B.C.H.R.T.) (QL) at para. 38**
> **See also:**
> ***Thomas* v. *Capilano Golf and Country Club Limited and Pierre Carrat* (25 June 1999) Preliminary Decision (B.C.H.R.T.) [Unreported]**

7. While the Tribunal does not take a particularly forceful position before this Court as to its jurisdiction to decide whether a respondent's Section 7 rights have been violated by state-caused delay, it does at least suggest that the Tribunal should have that jurisdiction stating that it is "often in a better position to carry out required fact-finding, than a court of review or appeal. Such a practice provides the backdrop of a full record, prevents the court's or tribunal's proceedings from being fragmented, and honours the principles of prematurity and exhaustion of remedies."

Tribunal Factum at para. 46

8. For the purposes of this appeal, it is respectfully submitted that the question of the Tribunal's jurisdiction is not in issue and Blencoe should not be called upon to make submissions on what is essentially a moot point. The Tribunal does not have the power to initiate what, in effect, is a "reference" on a point of law to this Court.

9. Nevertheless, if response is called for then Blencoe's brief response is as follows: if the Tribunal has the jurisdiction to respond to a respondent's application that a complaint against him or her ought to be dismissed on the basis that it infringes his or her liberty or security of person contrary to Section 7 of the *Charter*, it is submitted that a Tribunal should never be held to have such exclusive jurisdiction, particularly to the exclusion of the Superior Courts. Not only would such a position be contrary to the Constitution but such a position may, in many cases, defeat the ends of justice.

***MacMillan Bloedel Ltd.* v. *Simpson*, [1995] 4 S.C.R 725**

10. In other words, there may be many cases — and the Blencoe case is an example — where waiting for the Tribunal to rule on the respondent's application would simply exacerbate the delay suffered by the respondent. A respondent in the position of Blencoe should always be able to go the Supreme Court at the point that his or her Section 7 rights have been violated and seek a remedy from the Supreme Court and not be required to wait until the hearing is convened by the Tribunal.

11. In the case at bar, the Tribunal would not have heard Blencoe's case until March 18 - 20, 1998. Blencoe filed his Petition on November 27, 1997, and filed a Notice of Hearing returnable in the British Columbia Supreme Court December 15, 1997. The hearing before the British Columbia Supreme Court would have proceeded at that time but for an application on December 9, 1997 by the complainant, Willis, and the Commission to adjourn it to January 26, 1998. The case was argued in the British Columbia Supreme Court on February 3 - 5, 1998 and the judgment was rendered on February 11, 1998. The appeal from the judgment of Mr. Justice Lowry was heard in the Court of Appeal on March 3, 1998.

12. It is worth noting that the parties were able to prepare Appeal Books and full factums and argue the case in the Court of Appeal in **20 days** which demonstrates that the courts were able and prepared to deal on an expedited basis with issues far more complicated than the

issues surrounding the merits of the complaint against Blencoe.

10 **PART IV - NATURE OF ORDER SOUGHT**

13. No Order is sought by the Tribunal and no Order would be appropriate.

Date: August 5, 1999

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"JOSEPH J. ARVAY"

Joseph J. Arvay, Q.C.

Counsel for the Respondent, Robin Blencoe

10 **PART V - TABLE OF AUTHORITIES**

Pages in Factum Where Cited

Cases

Action Number: 974616
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*,
R.S.B.C. 1979, c. 209

BETWEEN:

ROBIN BLENCOE

PETITIONER

AND:

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

RESPONDENTS

Outline of Argument of the British Columbia Human Rights Tribunal

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Tribunal Jurisdiction to Hear and Decide Complaints

8. The Petitioner seeks an order of prohibition preventing the Tribunal from hearing the Schell and Willis complaints. The following passage from Sara

Blake,*Administrative Law in Canada,* 2d ed. (Vancouver: Butterworths, 1997) at 180 **[Tribunal Submission Tab 1]** addresses the jurisdictional terms for this remedy (footnotes are excluded):

> Where a tribunal is about to take a specific action that is not authorized by statute, a court may prohibit that action. Such a drastic order will be made by a court only where a tribunal clearly lacks authority to proceed. If the existence of authority is debatable or turns on findings of fact that have yet to be made by the tribunal, an order of prohibition may be refused. It must be clear beyond doubt that the tribunal lacks authority to proceed. A tribunal acting within authority will not be prohibited from embarking upon what may be regarded as unnecessary, unwise, or fruitless pursuits....
>
> A court may be reluctant to entertain an application for an order prohibiting a tribunal from proceeding, when the tribunal has not been offered an opportunity to decide itself whether it has authority to proceed. If the applicant's assertion that the tribunal lacks authority is correct, the tribunal, upon being advised may agree and voluntarily halt its proceedings. One must not assume in advance that a tribunal will intentionally act illegally. Tribunals have a duty to decide whether they have statutory authority to proceed as contemplated, and courts may permit them to fulfil that duty before interfering.

Also see:

> *N.B. School District No. 15 v. N.B. (Human Rights Board of Inquiry)* (1989), 62 D.L.R. (4th) 512 (N.B.C.A.) at 520, leave refused (1989), 101 N.B.R. (2d) 270N (S.C.C.) **[Tribunal Submission Tab 2]**
>
> *CIP Paper Products Ltd. v. Sask. (Human Rights Commission)* (1978), 87 D.L.R. (3d) 609 (Sask. C.A.) at 612 **[Tribunal Submission Tab 3]**
>
> *Tran v. Human Rights Commission (Sask.)* (1997), 155 Sask. R. 133 (Q.B.) at 152-153 **[Commission Authorities Tab 14]**

9. The Tribunal has jurisdiction to determine whether proceedings before it constitutes an abuse of its process and, more specifically in the context of this application, whether delays or deficiencies in disclosure undermine the fairness of

those proceeding: *Cicci v. B.C. Securities Commission* (1993), 39 B.C.A.C. 126 (B.C.C.A.) at 136; *Hancock v. Shreve* (1992), 8 Admin L. R. (2d) 128 (Ont. Ct. Gen Div. (Divisional Court)) at 130; *Latif v. Ontario (Human Rights Commission)* (1992), 4 Admin. L.R. (2d) 227 (Ont. Ct. Gen Div. (Divisional Court)) at 228-9; *Ontario College of Art v. Human Rights Commission (Ont.)* (1993), 11 O.R. (3d) 798 (Ont. Ct. (Div. Ct.) at 800; *Tran v. Human Rights Commission (Sask.)* (1997), 155 Sask. R. 133 (Q.B.) at 152-153 **[Commission Authorities Tabs 17, 16, 8 and 14]**.

Relevance of Section 7 of the Charter

10. Decisions binding on this Court hold:

(a) that s. 7 of the Charter does not apply to proceedings under human rights legislation: *Watson v. B.C. Council of Human Rights*, [1994] B.C.J. No. 3196 (S.C.); *Dunn v. Paul's Restaurants Ltd.* (1995), 11 C.C.E.L. (2d) 108 (B.C.S.C.); *Nisbett v. Manitoba (Human Rights Commission)* (1993), 14 Admin. L.R. (2d) 216 (Man. C.A.); *Canadian Airlines International Ltd. v. Canadian Human Rights Commission and Belloni*, [1996] 1 F.C. 638 (Fed. C.A.) **[Commission Authorities Tabs 15, 7, 11, 6]**.

(b) that if s. 7 of the Charter did apply it would not afford more expansive remedies for delay and abuse of process than administrative law principles: *Bennett v. B.C. Securities Commission*, (1992) 94 D.L.R. (4th) 339 (B.C.C.A.) at 355 **[Commission Authorities Tab 3]**.

(c) that in any case it would be premature to attempt to establish a constitutional breach or remedy before the Tribunal hearing of the complaints goes forward: *Bennett v. B.C. Securities Commission*, (1992) 94 D.L.R. (4th) 339 (B.C.C.A.) at 355 **[Commission Authorities Tab 3]**; *Ontario College of Art v. Human Rights Commission (Ont.)* (1993), 11 O.R. (3d) 798 (Ont. Ct. (Div. Ct.) at 800.

Court of Appeal File No. V03211
Victoria Registry
S.C.B.C. Action No. 97-4616
Victoria Registry

COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, BEFORE THE HONOURABLE MR. JUSTICE LOWRY BEING AN APPEAL FROM THE JUDGEMENT PRONOUNCED THE 11th DAY OF FEBRUARY, 1998 NOT YET ENTERED

BETWEEN:

ROBIN BLENCOE

PETITIONER
(APPELLANT)

AND:

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

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13. It is the position of the Tribunal that the Appellant's section 7 *Charter* rights to "liberty" and "security of the person" are not engaged because section 7 has no application to human rights legislation and proceedings, which are non-penal and administrative (civil) in nature. The Tribunal also says that, even if it is assumed for the sake of argument that the Appellant can establish an infringement of his rights to "liberty and security of the person" under section 7 of the *Charter*, if administrative law principles have not been violated, then any section 7 infringement is in accordance with the "principles of fundamental justice". In the context of human rights proceedings, any principles of fundamental justice mandated by section 7 of the *Charter* would be

40. *Nisbett* was followed by the Federal Court of Appeal in *Canadian Airlines International Ltd., supra,* as well as the British Columbia Supreme Court in *Watson, supra,* and *Paul's Restaurant, supra.* The Tribunal respectfully submits that the analysis in the *Nisbett, Canadian Airlines* and *Watson* cases are consistent with Supreme Court of Canada authority and ought to be applied by this Court. The Tribunal therefore asks this Court to dismiss the Appellant's section 7 of the *Charter* arguments on the basis that it has no application to human rights proceedings because of their administrative, non-penal nature. The Appellant's section 7 *Charter* rights have simply not been affected by these proceedings.

43. If it is accepted that, for the sake of argument, the Appellant's section 7 *Charter* rights have been infringed, the issue that is then raised concerns the question of the effect, if any, of section 7 of the *Charter* on the administrative law principles governing natural justice and abuse of process. It is the Tribunal's position that section 7 of the *Charter* does not afford more expansive remedies for delay or abuse of process than those remedies provided for under existing administrative law principles: *Bennett v. B.C. Securities Commission* (1992), 69 B.C.L.R. (2d) 171 (C.A.) at p. 186. Section 7 of the *Charter* would thus add nothing to the administrative law analysis.

50. The Tribunal respectfully submits that there is no principled basis upon which fundamental justice for section 7 *Charter* purposes should be seen to embrace principles which are different from natural justice principles in an administrative law context. This is particularly so, where the Tribunal's constating statute does not purport to diminish those principles. To paraphrase Professor Evans, in *The Principles of Fundamental Justice: The Constitution and the Common Law, supra,* those administrative law principles that have not shocked the common law conscience should not disturb constitutional sensitivities either.