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 COMMISSION and COMMISSIONER OF INVESTIGATION AND MEDIATION

---


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

Counsel for the Respondent, Robin Blencoe

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

Ottawa Agent for the Respondent,
Robin Blencoe

**JOHN J.L. HUNTER, Q.C.**
Davis & Company
Barristers & Solicitors
2800 - 666 Burrard Street
Vancouver, BC V6C 2Z7
Tel: (604) 643-2931
Fax: (604) 643-1612

Counsel for the Appellants, British Columbia Human Rights Commission and Commissioner of Investigation and Mediation

**DAVIS & COMPANY**
Barristers & Solicitors
360 - 30 Metcalfe Street
Ottawa, Ontario K1P 5L4
Tel: (613) 235-9444
Fax: (613) 232-7525

Ottawa Agents for the Appellants, British Columbia Human Rights Commission and Commissioner of Investigation and Mediation

**ROBERT B. FARVOLDEN**
Barrister & Solicitor
207 - 27[50] Quadra Street
Victoria, BC V8T 4E8
Tel: (250) 361-3131
Fax: (250) 361-9161

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

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

Counsel for the Intervener, Irene Schell

**BRIAN CRANE, Q.C.**
Gowling, Strathy & Henderson
2600 - 150 Elgin Street
P.O. Box 466, Station D
Ottawa, Ontario K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869

**LANG MICHENER**
Barristers & Solicitors
300 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel: (613) 232-7171
Fax: (613) 231-3191

**BRIAN CRANE, Q.C.**
Gowling, Strathy & Henderson
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869

Ottawa Agents for the Intervener, Irene Schell

## TABLE OF CONTENTS

## PART I - STATEMENT OF FACTS

1. The facts of this Appeal are fully set out in the Amended Petition at paragraphs 1 to 62. A summary only is provided herein.

**Appellant's Record "AR" Vol. I , pp. 26-42**

2. The Respondent Robin Blencoe ( "Blencoe") is the Respondent in two human rights complaints brought by Andrea Willis and Irene Schell, each alleging sexual harassment.

3. The Schell complaint was filed on July 17, 1995 and related mainly to an event that allegedly occurred in March of 1993, which Blencoe denies.

4. The Willis complaint was filed on August 1, 1995 and related to events which had allegedly occurred in August of 1994 for which Blencoe apologized, and in March of 1995 which Blencoe denies and which the British Columbia Human Rights Commission ("the Commission")[1] had held could not stand on its own.

**AR Vol. II, p. 333**

5. The hearings of both complaints were scheduled to take place approximately two years, seven months and two weeks after the date on which the complaints were filed; in the case of Schell, approximately five years after the alleged conduct which gave rise to the complaint and with respect to Willis, almost four years after the alleged conduct which gave rise to the complaint.

6. In summary it took approximately 14 months to even begin to investigate the complaints; it took over 7 months to conduct the investigation; after the investigation was complete and all of the parties submissions had been received it took almost 2 months to decide whether to refer the complaints to a hearing and then it took over 9 months to set the case down for a hearing. The following further breakdown is provided:

---

[1]In the factum, all references to the Commission will include conduct of the British Columbia Human Rights Council ("the Council"), during the period it was so named.

| | | Appellant's Record |
|---|---|---|
| **The Schell Complaint** | | |
| (a) initial notification of complaint | July 20, 1995 | **p. 184** |
| (b) date of signed Complaint form | July 31, 1995 | **p. 189** |
| (c) decision to investigate | Feb. 21, 1996 | **p. 226** |
| (d) investigator assigned | Sept. 6, 1996 | **p. 236** |
| (e) investigation report complete | March 4, 1997 | **p. 245** |
| (f) final Blencoe reply submission | May 14, 1997 | **p. 266** |
| (g) decision to refer to hearing | July 3, 1997 | **p. 268** |
| (h) Notice of Hearing | Sept. 10, 1997 | **p. 269** |
| (i) date of scheduled hearing | March 4-6 , 1998 | **p. 269** |
| **The Willis Complaint** | | |
| (a) complaint filed | August 1, 1995 | **p. 271** |
| (b) complaint forwarded | Sept. 11, 1995 | **p. 271** |
| (c) decision to investigate | January 11, 1996 | **p. 296** |
| (d) investigator assigned | Sept. 6, 1996 | **p. 314** |
| (e) investigation report complete | March 3, 1997 | **p. 323** |
| (f) final Blencoe reply submission | May 14, 1997 | **p. 371** |
| (g) decision to refer to hearing | July 3, 1997 | **p. 373** |
| (h) Notice of Hearing | Sept. 10, 1997 | **p. 374** |
| (i) date of scheduled hearing | March 18-20, 1998 | **p. 374** |

7. The prejudice to the Appellant is fully set out in the Amended Petition at paras. 43 to 62, (AR Vol. I, p. 38 - 42) and further supported in the Affidavits of Robin Blencoe, (AR Vol. I, p. 50); Victoria MacPherson Blencoe (AR Vol. III, p. 381), and their physician Dr. Carroll, (AR Vol. I, p. 47).

8. The Trial Judge provided this summary:

> There can, however, be no doubt about the extent to which allegations of sexual harassment have affected Mr. Blencoe's life and that of his wife and three young children, although it is difficult to say to what extent such can be

> fairly attributed to the time it has taken to bring the complaints by Ms. Schell and Ms. Willis to hearings. Be that as it may, Mr. Blencoe's political career, the only career he has known, appears to be finished. He is not employed; he has moved twice, first to Ontario in the summer of 1996 and then back to Victoria the following spring, in an attempt to make a new life for his family; his financial resources are depleted; he has suffered physically and psychologically over his very public loss of reputation and for many months he has required medical care for clinical depression.
>
> The impact on his family seemed at times an unrelenting media coverage which was traumatic. It followed them to Ontario and completely frustrated their attempt to reestablish their lives in a small community where Ms. Blencoe's family lives and she is well known. They have had to endure almost three years of the stress of turmoil which began with the allegations made by Ms. Yanor, was aggravated by the complaints made by Ms. Schell and Ms. Willis to the Council some months later, and which is not over yet.
>
> The point need to be further stressed. The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe.
>
> **Reasons for Judgment, Supreme Court of British Columbia, February 11, 1998 (hereinafter "B.C.S.C."), at paras. 11 - 13, AR Vol. IV, pp . 633-634**

9. In the Court of Appeal Chief Justice McEachern, with whom Madame Justice Prowse agreed, reiterated the extent of the prejudice experienced by the Respondent.

> There can be no doubt that the Appellant was severely wounded by the publicity surrounding his dismissal from the Cabinet. Such is the price of public life. But for these proceedings, however, it might reasonably be expected that the overwhelming attention would have died away and the Appellant and his family could have attempted to reconstruct their lives.
>
> Instead, as the evidence shows, they have been subjected throughout this long ordeal of delay with constant, relentless publicity from which they have been unable to escape, even by moving to Ontario. So stigmatized has the Appellant been that he has been shunned and rejected as an assistant volunteer coach for his son's soccer team.
>
> ...
>
> I am satisfied the exacerbation of an existing state of affairs may trigger the s. 7 right to security of the person. For the reasons I have stated, I am satisfied that the excessive delay both created a substantial stigma against the

accused and exacerbated an existing state of affairs to the extent that the consequent deprivation must be in accordance with fundamental justice.

...

Thus, I have no doubt that the Appellant has been severely prejudiced by the delay that has attended the prosecution of these complaints

**Reasons for Judgment, Court of Appeal for British Columbia, May 11, 1998 (hereinafter "Case on Appeal"), at para. 53 - 54, 56, 58 AR Vol. IV, pp . 680-683**

## PART II - POINTS IN ISSUE

10. The position of the Respondent is that there are three points at issue in this appeal:

(i) Can state caused delay in human rights proceedings deprive a respondent of liberty or security of the person as guaranteed by s.7 of the *Charter*? And if so, was Blencoe deprived of liberty or security of the person?

(ii) Was Blencoe's liberty or security of the person deprived in accordance with the principles of fundamental justice?

(iii) Was a stay of proceedings a just and appropriate remedy?

## PART III - ARGUMENT

### Introduction

11. Blencoe's position on this appeal can be summarized as follows. The Commission and the Tribunal are government actors that are necessarily subject to the *Charter of Rights and Freedoms* (the "*Charter*"). Section 7 of the *Charter* thus binds these government actors. Whether a person suffers from a deprivation of liberty or security of the person should not depend upon the identity of the government actor. It must turn on the effect of the government conduct on the citizen. If the Crown in a criminal case deprives a person of security of the person by conduct (acts or omissions) that result in stigmatization, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty of outcome and sanction: *R.* v. *Mills,* [1986] 1 S.C.R. 863 at 919 - 920 [hereinafter referred to simply as stigmatization or stigma], then there is no reason in principle, policy or doctrine why a government board or commission that causes (whether by the same or different conduct)the very same prejudice to a citizen in the regulatory context does not likewise deprive the citizen of liberty or security of the person. Whether the deprivation was in accord with the principles of fundamental justice will necessarily depend on the facts of each case. Where the deprivation was caused by state delay, the only inquiry then is whether the delay was unreasonable, which in turn may import consideration of such factors as the length of the delay and the reason for it. Whatever the full content of the principles of fundamental justice, it is clear that unreasonable delay is not a principle of fundamental justice.

### Isssue # 1: Delay in the human rights context can deprive a person of liberty and security of the person

12. The Commission, (at para. 49), argues that section 7 rights are not implicated by delays in processing complaints of discrimination under human rights legislation and "the *Charter* has no application to the consequences of delay in such non-penal proceedings." The

Commission's position is, with respect, neither principled nor coherent. The Commission does not claim that it is not subject to the *Charter* or section 7. It does not even claim that section 7 is limited to the criminal process.(see para. 55) and indeed concedes that s.7 is triggered in civil or regulatory proceedings that result in "the imposition of serious psychological stress or the impairment of an individual's expectation of privacy": (para. 60) In fact what is most surprising is the Commission's concession that section 7 can have application to human rights proceedings:(para. 70). Yet the Commission says that the section 7 has no application to delay in human rights proceedings.

**Commission Factum at paras. 49, 55, 60, 70**

13. The Commission however provides no principled or persuasive reason why delay in the human rights proceedings should be exempted from section 7 as a kind of enclave of conduct and proceedings that enjoy *Charter* immunity. The reasons the Commission do advance are without merit.

14. The first reason advanced by the Commission is that there is no "generalized right to dignity" in the jurisprudence. While this vastly oversimplifies Blencoe's claim it is nevertheless clear that dignity is an important value underlying all *Charter* rights and freedoms. This was made clear in, *Oakes*, one of the earliest and most important *Charter* decisions and recently reaffirmed by this Court in *M* v. *H* as follows:

> However, it is important not to lose sight of the underlying principles animating this general approach. As Dickson C.J. so eloquently put it in *Oakes*, supra, at p. 136, the inclusion of the words "free and democratic" as the standard of justification in s. 1 of the *Charter* refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on

a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

***M* v.*H* (1999), 171 D.L.R. (4th) 577 (S.C.C.) at para.. 77**

15. This generalized respect for human dignity has been repeated and applied by this Court in number of cases:

A. The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*.
***R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 at 166** per Wilson J.

B. In general terms, the purpose of s. 15(1) 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.

***Law* v. *Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.) at para. 88**

C. That respect for human dignity is one of the underlying principles upon which our society is based is unquestioned.

***Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at para. 26**

D. The fundamental importance of human dignity in Canadian society has been recognized in numerous cases.

***Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 813** per Cory J. (dissenting, Lamer C. J. concurring)

E. I should point out that the view I have expounded regarding the scope of the right to liberty draws considerable support from the reasons of Wilson J. in *R.* v. *Morgentaler* [1988] 1 S.C.R. 30. In that case, my former colleague succinctly expressed her opinion that the s. 7 liberty interest is concerned not only with physical liberty, but also with fundamental concepts of human dignity, individual autonomy, and privacy.

.... as I see it, the autonomy protected by the s. 7 right to liberty encompasses

only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

***Godbout* v. *Longueuil (City)*, [1997] 3 S.C.R. 844 at paras. 65 - 66**

F. This Court has repeatedly recognized that human dignity is at the heart of the *Charter*. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice (*Rodriguez* v. *British Columbia (Attorney General)* (1993), 17 C.R.R. (2d) 193 at p. 207, [1993] 3 S.C.R. 519 at p. 592, per Sopinka J. for the majority), it seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction.

***R.* v. *O'Connor*, [1995] 4 S. C. R. 411 at paras. 64-65**

16. Closely related to human dignity is one's reputation, and the importance of reputation was recognized by this Court in *Hill* v. *Church of Scientology and Manning* as follows:

> The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has been very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. *A good reputation is closely related to the innate worthiness and dignity of the individual.* It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.
>
> Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good

reputation so long as it is merited. [Emphasis added]

***Hill v. Church of Scientology and Manning* [1995] 2 S.C.R. 1130 at paras. 107 -108**
**See also: *S.H.(S.)* v. *Manitoba* (1987), 27 Admin L.R. 303 at 317 (Man. Q.B.); *R* v. *Chatham* (1985), 23 C.C.C. (3d) 434 at 439 (B.C.S.C.); See also: *R.L. Crain Inc.* v. *Couture et al.* (1983), 6 D.L.R. (4th) 478 at 502 (Sask Ct. Q.B.); *Re Dion and The Queen* (1986), 30 C.C.C. (3d) 108 at 117 (Que. Superior Ct.)**

17. While some of the jurisprudence suggests that one should attempt to give meaning to the terms security of the person and liberty independently, it is very clear that common values infuse both terms. As Mr. Justice La Forest confirmed in *Children's Aid Society* (citing his previous decision in *R* v. *Lyons*), "....the rights and freedoms protected by the *Charter* are not insular and discrete....Rather, the *Charter* protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada."

***R.B.* v. *Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315 at para. 76**

> On no occasion has the relationship between "liberty", "security of the person", and essential human dignity been more carefully canvassed by this Court than in the reasons of Wilson J. in *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30. In her judgment, she notes that the *Charter* and the right to individual liberty guaranteed therein are tied inextricably to the concept of human dignity. She urges that both "liberty" and "security of the person" are capable of a broad range of meaning and that a purposive interpretation of the *Charter* requires that the right to liberty contained in s. 7 be read to "guarantee to every individual a degree of personal autonomy over important decisions intimately affecting their private lives" (p. 171). Concurring on this point with the majority, she notes, as well, that `security of the person' is sufficiently broad to include protection for the psychological integrity of the individual.

***R.* v. *O'Connor,* [1995] 4 S. C. R. 411 at para. 111**

18. Personal dignity and self-esteem also lie at the very core of the pursuit of a livelihood. Chief Justice Dickson (dissenting in the result) in *Re Public Service Employee Relations Act,* has provided perhaps the most eloquent articulation of this point in the context of the section 2(d) analysis:

> I wish to refer to one further concern. It has been suggested that associational activity for the pursuit of economic ends should not be accorded constitutional protection. If by this it is meant that something as fundamental as a person's livelihood or dignity in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful consideration. In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.
>
> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. ***A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological emotional and physical elements of a person's dignity and self-respect.***
>
> ...
>
> ***Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 368; approved in *Machtinger* v. *HOJ Industries*, [1992] 1 S.C.R. 986 at 1002**

19. The Chief Justice was therefore correct when he concluded his analysis of the jurisprudence as follows:

> As there seem to be no binding authorities governing this decision, I feel constrained to follow what I regard as the emerging, preferred view in the Supreme Court of Canada that s. 7, under the rubric of liberty and security of the person, operates to protect both the privacy and dignity of citizens against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by the Appellant here. Everyone can be made answerable, according to law, for his or her conduct or misconduct, but a process established by law to provide accountability and appropriate remedies cannot be completely open-ended in the sense that human dignity, even for wrongdoers if such is the case, can be compromised for as long as it has occurred in this case
>
> **Reasons for judgment , Case on Appeal, para. 101, AR Vol. IV, p.702**

20. The second reason advanced by the Commission for denying that section 7 does not apply to delay in human rights proceedings is because it says that remedies for delay must be confined to criminal proceedings. Such circular reasoning is not particularly helpful; it hardly advances the inquiry to point out that this Court has only applied delay in the context of

criminal proceedings if this Court has not had occasion to consider its application in regulatory proceedings. The Commission is left to argue that the protections against "stigmatization" as an aspect of security of person is particular to the criminal process: (para. 62). They say that this is because in the criminal context there is the presumption of innocence and the process is inherently conflictual and adversarial.

**Commission Factum at para. 62**

21. There is much wrong with this analysis: Blencoe too is entitled to the presumption that he is not a sexual harasser. However if he is not entitled to such a presumption then an accusation of sexual harassment carries with it even greater stigma than an accusation of a criminal offence where the presumption of innocence is operative. Furthermore the human rights process is, or certainly in cases such as this one, will be as adversarial and conflictual as a criminal process. While the Court of Appeal was careful not to apply a strictly criminal law approach to the resolution of this case, it cannot be denied that there are similarities between the plight of a respondent in a sexual harassment case and an accused in a criminal case such that some borrowing of the principles arising out of the criminal law jurisprudence is appropriate.

22. As Chief Justice Bayda stated in *Kodellas*, at pp. 152-153:

> **For the purpose of determining the effect upon the "security of the person" I see no logical distinction of substance between the subjection to the vexations and vicissitudes of "a pending criminal accusation" based upon sexual harassment and sexual assault and the subjection to the vexations and vicissitudes of a pending accusation in penal (*i.e.*, *quasi*-criminal) proceedings under s. 35(2) of the Code, of discrimination based upon sexual harassment and sexual assault.** It is but a small step from there to find that for the same purpose no distinction of substance can be made between an accusation in a penal proceedings under ss. 27-33 of the Code. Whether they occur in a criminal context, or in the context of a penal proceeding, such as that provided for in the Code, or in the context of remedial proceedings (which, as will be shown later, is the context relevant to this case), the "vexations and vicissitudes" will invariably "include stigmatization of the [alleged discriminator], loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption

> of family, social life and work, legal costs, uncertainty as to the outcome and sanction". **This is so because the hurt to the alleged discriminator emanates from the accusation, not from the type of proceedings in which the accusation is made. After all, it matters not a whit to all of the relevant actors — the public, the persons who are the source of the hurt, those who are indirectly affected by the hurt (such as the alleged discriminator's family) and the alleged discriminator, who is directly affected by the hurt and who is the subject and direct object of the hurt — whether the accusation is made in one procedural forum or another. What matters is the *fact* of the accusation.** (Emphasis added)
>
> ...
>
> ***Kodellas* v. *Saskatchewan (Human Rights Commission)* (1989), 60 D.L.R. (4th) 143 (Sask. C. A. ) at 152-153. See also p. 178, per Vancise J.A.**

23. In *L. Borys Professional Corp.* v. *Joshi,* an appeal from a decision by the Alberta Human Rights and Citizenship Commission, Murray J. held;

> This type of proceeding has certain components which are akin to a criminal proceeding being initiated by a complaint, an investigation being held and as a result a person possibly being charged with violating the Act. Throughout, the person stands accused of allegations directed against him personally which, if proven, stigmatize him or her.
>
> ***L. Borys Professional Corp.* v. *Joshi,* [1998] A.J. No. 1047 (Q.B.) (QL) at para. 34**

24. And in *NLK Consultants* J.T. Edwards J. used this Court's decision in *Morin* as providing "some guidance" or "statements of principle" to the resolution of delay in the context of a human rights proceedings.

> ***NLK Consultants Inc.* v. *British Columbia (Human Rights Commission)* [1999] B.C.J. No. 380 (S.C.) (QL) at paras. 26 and 33**

25. The Commission characterizes human rights processes and human rights legislation as remedial and not punitive. That may be so assuming the complaints under such legislation are pursued in a timely way. But, when the Commission is responsible for unreasonable delay, the remedial purpose of such legislation is quickly thwarted and the proceeding becomes as a matter of substance punitive. Chief Justice McEachern held that:

> Despite the often-heard characterization of human rights adjudication as a meditative and conciliatory process aimed at remedying discrimination and

> making the victim whole as opposed to punishing the perpetrator, the fact remains that unproven charges of sexual harassment and sexual discrimination are, in our society, charges accompanied by high stigma. Such charges have the power to destroy lives. All the characterization in the world will not change the essential nature of these charges. This fact must be acknowledged when accepting the rights of the Appellant [now the Respondent] to a fair process."
>
> **Commission Factum at para. 41**
> **Reasons for Judgment, Case on Appeal, at para. 57, AR Vol. IV, pp. 682-683**

26. One way in which human rights and other regulatory cases might be distinguished from criminal cases is that in the criminal sphere prejudice is presumed or at least inferred to follow when any charge is laid as all criminal offences are sufficiently serious to warrant the presumption or inference that the accused is going to suffer from the stigma and invasion of privacy and stress referred to in *Mills*. However, given that there are many different kinds of administrative tribunals, it is appropriate that a person who seeks to obtain a *Charter* based remedy based on delay prove that the regulatory conduct including delay has actually caused, contributed to or exacerbated the kind of prejudice that is otherwise presumed or inferred to follow from the laying of a charge and delay in the criminal process. However, as noted above, once that prejudice is proven to exist from regulatory delay there is no principled reason why the Court would not characterize it with the same words as used in the criminal process: i.e. a deprivation of liberty or security of person.

> ***R.* v. *Mills*, [1986] 1 S.C.R. 863 at 919 - 920**
> ***R.* v. *Morin*, [1992] 1 S.C.R. 771**

27. One is tempted to speculate why such an enclave of immunity-- "delay in the human rights process"--should be advanced so forcefully by the Commission and, it seems, all of the Commissions across the country that have intervened in this appeal. As it is submitted that there is no principled reason for this approach it is likely advanced simply because such unreasonable delay happens to be endemic in human rights commissions across the country and these submissions are simply being driven by fear of widespread stays.

28. In response to recommendations on improving effectiveness in the 1998 Report of the Federal Auditor General, the Canadian Human Rights Commission acknowledged that delay was rife in Commissions across Canada.

> With respect to the complaints process, *the Commission recognizes that the time taken to deal with complaints is unsatisfactory. This is a problem faced by all human rights commissions, and one that for the Canadian Human Rights Commission has been exacerbated by past budgetary reductions* and difficulties arising from the current law. We anticipate that the general review of the Canadian Human Rights Act announced by the Minister of Justice will provide the opportunity to consider alternatives to the current approach. In the meantime, we will continue to seek ways to speed up the process, including making greater use of mediation. It is also the Commission's intention to seek one-time funding from the Treasury Board to reduce the current backlog of complaints. [Emphasis added]

***1998 Report of the Auditor General of Canada*** **Chapter 10.123, Appendix A**

29. While *in terrorem* and floodgates arguments ought not to be the basis for *Charter* interpretation and even though many respondents in human rights cases may have suffered from the kind of unreasonable delay suffered by Blencoe, few will be able to demonstrate that his or her liberty or security of person has been deprived by that delay; and those that can should, of course, obtain the appropriate *Charter* remedy irrespective of how many such persons there are. Subsequent to *Blencoe,* the BC Human Rights Tribunal has had occasion to consider a number of delay-based challenges. It is apparent that not only are *in terrorem* arguments unwarranted but the Tribunal has developed its own framework of analysis that demonstrates both the relevance and limitations of a criminal law standard to the human rights context. In *MacTavish* v. *Tennant* Tribunal Chair, N. Iyer said:

> In my view, it is appropriate to continue to apply the framework of analysis I used in *Dahl and Eastgate*. Although Boyd J. suggested that the criminal law approach in *Morin* might apply to human rights proceedings, she did not apply it to determine the petition before her. My own reading of Chief Justice McEachern's remarks is more equivocal. Although McEachern C.J. refers to *Morin* as providing a principled approach to the issue of delay and s. 7 of the *Charter* earlier in his reasons (at D/182), in the passage I have quoted he suggests caution in importing a criminal law approach into human rights proceedings. Further, in her brief concurring reasons, Madam Justice Prowse

said that, although s. 7 of the *Charter* applies to delay in human rights proceedings, it does not mean that the human rights context is analogous to the criminal context (at p. 53):

> While the Court must be careful not to equate proceedings under human rights legislation with proceedings under the Criminal Code given the significant differences between the nature and purpose of the legislation involved, it does not follow that individuals against whom complaints of this nature are made should be required to wait indefinitely for a resolution of their case.

Thus, in my view, nothing in *Blencoe* or in *Levitt* requires that the criminal law approach to delay set out in *Morin* govern the assessment of delay in the human rights context. In view of the far-reaching implications of a determination that criminal law s. 7 jurisprudence applies to human rights proceedings, I believe that it is preferable to continue to apply the framework of analysis in *Dahl and Eastgate*.

***MacTavish* v. *Tennant*, [1998] B.C.H.R.T.D. No. 65 (B.C.H.R.T.) (QL) at para. 55**

30. In *Dahl and Eastgate* Tribunal Chair N. Iyer articulated the following framework of analysis that ought to be applied in a human rights case where unreasonable delay is alleged:

> 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* [1998] B.C.H.R.T.D. No. 46 (B.C.H.R.T.) (QL) at para. 38.**

See also:
*Coop* v. *Tiffany's Plants Ltd.*, [1998] B.C.H.R.T.D. No. 52 (B.C.H.R.T.) (QL) Despite a 35 month delay, a sexual harassment complaint was not dismissed by the Tribunal because evidence as to the complexity of the allegation or stigma was not provided by the respondent.

*MacTavish* v. *Tennant*, [1998] B.C.H.R.T.D. No. 65 (B.C.H.R.T.) (QL) A delay of 39 months, coupled with the ordinary stigma that is created by an unresolved allegation of sexual harassment, infringed the respondent's s. 7 right resulting in dismissal of the complaint.

*Behmardi* v. *Tsin*, [1999] B.C.H.R.T.D. No. 14 (B.C.H.R.T.) (QL) A delay of 31 months in processing a complaint of discrimination on the basis of physical disability was insufficient to order dismissal, absent evidence of stigma.

*Jack* v. *Country Store*, [1999] B.C.H.R.T.D. No. 15 (B.C.H.R.T.) (QL) A delay of 39 months in processing a complaint of discrimination on the basis of race was not dismissed for delay as the lay respondent had not provided evidence of prejudice or stigma.

*Thomas* v. *Capilano Golf and Country Club Limited and Pierre Carrat* (25 Jun 1999), Preliminary Decision B.C.H.R.T.D. (unreported). Although the stigma was ordinary, a delay of 41 - 49 months in processing uncomplicated, albeit serious, allegations of sexual harassment was sufficient to dismiss the complaint made against the individual respondent on the basis of a s.7 breach.

31. While the *Dahl and Eastgate* decision would seem to impliedly recognize an interplay between the deprivation of security of the person and the principles of fundamental justice it is important to recognize their independent features as well, and we do so in the next section of this factum. However at this juncture it is of interest to note that the BC Human Rights Tribunal has characterized the stigma which can trigger a security of person claim as having both "external" and "internal" dimensions. In *MacTavish* v. *Tennant* Tribunal Chair N. Iyer explained these concepts in this way:

> In *Dahl* and *Eastgate*, I described stigma as having "external" and "internal" dimensions. External dimensions relate to the degree of publicity surrounding the allegations of sexual harassment. Internal dimensions relate to the impact of the unresolved allegations on the individual. In Blencoe, the Court of

> Appeal described the stigma experienced by Mr. Blencoe as unusually severe, both in its external and in its internal aspects. McEachern C.J. described Mr. Blencoe and his family as having been subjected to "relentless" media attention both in B.C. and in Ontario (at D/182). There was considerable evidence of public knowledge of and ongoing interest in the allegations. With respect to the internal dimensions of the stigma, McEachern C.J. described Mr. Blencoe as having suffered severe impairment to his finances, and physical and mental health, all of which were demonstrably caused by the outstanding allegations. Additionally, McEachern C.J. identified the length of the delay and the nature of the allegations as factors relevant to the s. 7 inquiry.
>
> ***MacTavish* v. *Tennant, supra*, at para. 14**

32. And in *Thomas,* the Tribunal made the following finding (in contrast to the findings made by the Court of Appeal in *Blencoe*):

> In this case, the external dimension to the stigma was minimal. There has been no publicity surrounding the complaint, and few people have been informed of the allegations. Mr. Carrat states that he is aware of some gossip about the complaint among his co-workers. That is the sort of stigma to be expected in any sexual harassment complaint. Similarly, the internal dimension to the stigma is what one would expect in an ordinary complaint. Mr. Carrat does not report any adverse medical or financial consequences as a result of the complaint. The psychological and personal effects are of the sort one would expect to be experienced by most people who are alleged to have engaged in harassing conduct. I do not underestimate the stress and stigma that is likely to result from a complaint of this nature. It is a matter of degree, however, and the prejudice in this case falls far short of that described in Blencoe. I find that the stigma, both internally and externally, is ordinary in degree.
>
> ***Thomas* v. *Capilano Golf and Country Club Limited and Pierre Carrat* (25 Jun 1999), Preliminary Decision B.C.H.R.T.D. (unreported) (B.C.H.R.T.) at para. 70**

33. In conclusion on this point, it is respectfully submitted that delay in the human rights context can result in a deprivation of liberty or security of the person and the majority of the Court of Appeal correctly ruled that Blencoe's liberty and security of the person were deprived by the state-caused delay in this case.

**Reasons for Judgment, Case on Appeal at para. 101, AR Vol IV , pp. 702-703**

**Blencoe's Liberty and Security of Person were Deprived by the State**

34. The Commission claims that there is no real and substantial connection between the state action or inaction here and the "significant hardship" suffered by Blencoe.

**Commission Factum at para. 109**

35. While the delay of the Commission and the Tribunal was the real and substantial cause of Blencoe's prejudice, in our submission, it is sufficient if the delay is a contributing cause to this condition of prejudice and of this there can be no doubt. In *Morgentaler*, this Court struck down the statute because the statutory provisions "produced", "caused" , or "often causes", "contributed to," "in large measure created", was the "source of", could be "traced to", "was one part of", " results in" or "is at least indirectly the cause of" the unconstitutional delay experienced by women seeking a therapeutic abortion.

***Morgentaler, supra,* at 62, 65, 66, 70-71, 72, 75, 92, 97, 98-99, 100, 103**

36. An approach which advocates an examination of the entire relationship between the *Charter* breach and the surrounding circumstances on a case by case basis has developed in other areas of *Charter* jurisprudence. This approach rejects the adherence to strict causal connection in determining the remedy when a violation of the *Charter* has occurred through state action in obtaining evidence. In *Strachan* Dickson C.J, speaking for the Court, warned against the "pitfalls of causation", and instead embarked upon a form of "proximity analysis" that measures the entire relationship between a breach of the *Charter* and subsequently discovered evidence.

***R.* v. *Therens*, [1985] 1 S.C.R. 613 at 649**
***R.* v. *Strachan*, [1988] 2 S.C.R. 980 at 1005-6**
***R.* v. *Goldhart*, [1996] 2 S.C.R. 463**
**See also *Jane Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Gen. Div.)**

37. The position of the Commission is also inconsistent with the finding of fact of either the Chambers Judge or the majority of the Court of Appeal. As Prowse J.A. stated:

While it is true that Mr. Blencoe suffered prejudice in the form of stigmatization arising from allegations of sexual misconduct apart from these proceedings, the trial judge found as a fact that:

> The stigma attached to the outstanding complaints has *certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced.* His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe. [para. 13] (Emphasis added)

Thus, I am unable to agree with Mr. Justice Lambert's view that the stigma suffered by Mr. Blencoe was not "much exacerbated" by the protracted nature of the proceedings. (Emphasis added)

**Reasons for Judgment, Case on Appeal at para. 109, AR Vol. IV, pp. 706-707**

38. Chief Justice McEachern made this finding:

> I have carefully considered the submission of counsel for the Commission that the deprivation or prejudice suffered by the Appellant was caused not by these proceedings, but rather by the actions of the Premier. Additional to the findings of the Chambers judge just quoted, I am reminded that the Supreme Court of Canada in *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 584, seems to have elevated the "exacerbation" of an existing deprivation to the same level as the creation of a deprivation itself. In that case, the Crown had argued that Mrs. Rodriguez's deprivation of security of the person was not caused by government action, but by her physical disabilities. Sopinka J. for the majority, rejected this argument, finding that the prohibition against assisted suicide would "contribute to the appellant's distress..." This rejection was in obiter. However, the statement is clear enough that I am satisfied the exacerbation of an existing state of affairs may trigger the s. 7 right to security of the person. For the reasons I have stated, *I am satisfied that the excessive delay both created a substantial stigma against the accused and exacerbated an existing state of affairs* to the extent that the consequent deprivation must be in accordance with fundamental justice. That said, I am satisfied that the delay I have described is not in accordance with that kind of justice. (Emphasis added)

**Reasons for Judgment, Case on Appeal at para. 56, AR Vol. IV, pp. 681-682**

39. Nor does it lie in the Commission's mouth to argue that Blencoe's chosen career as a politician ands the profile that involves somehow negates or excuses the unreasonable delay. The Commission takes its victims as it finds them and if true and substantial equality is to be achieved, the Commission must be sensitive to the very real differences and circumstances of many respondents.

40. Professor Black in his Report recommended that cases should be priortized. The recommendation reads as follows:

> 3 - C - 11 It is recommended that the Commission (and the existing Council) develop guidelines for setting priorities for dealing with cases. These guidelines should take account both of special circumstances of individuals and of the goal of correcting persistent patterns of equality and affecting groups.
>
> **AR Vol. IV, p. 582**

41. This approach is also consistent with the approach of the BC Human Rights Tribunal subsequent to the Court of Appeal's decision where the Tribunal recognized the length of the delay and the severity of the prejudice are interrelated and that one of the reasons or dimensions for such for prejudice is external; i.e. the unusual publicity surrounding the filing of the complaints.

> ***Dahl and Eastgate* v. *True North RV*, [1998] B.C.H.R.T.D. No. 46 (B.C.H.R.T.) (QL)**
> ***MacTavish* v. *Tennant*, [1998] B.C.H.R.T.D. No. 65 (B.C.H.R.T.) (QL)**
> ***Thomas* v. *Capilano Golf and Country Club Limited and Pierre Carrat* (25 Jun 1999), Preliminary Decision (B.C.H.R.T.)**

**Issue #2: The Principles of Fundamental Justice**

42. Once it is accepted that state caused delay in the human rights process can, with proper evidence, result in a deprivation of liberty or security of person the second question is whether that deprivation occurred in accordance with the principles of fundamental justice. It is necessarily for the government to point to some principle of fundamental justice to justify the deprivation. None is offered here.

43. The Commission claims that Blencoe's reasoning is circular because, according to the Commission, Blencoe sees delay as both the source of the deprivation of liberty and the occasion for the breach of fundamental justice: (para. 73). That is not our submission; it is this: that state caused delay can be and in this case was the sufficient cause that Blencoe's liberty or security of person was deprived and since that delay was **unreasonable** (i.e inordinate and without good reason) it is a deprivation that cannot be in accordance with fundamental justice. There is no principle of fundamental justice that the state can or should engage in unreasonable delay in the administrative process. In fact the well known rationales for the existence of the administrative process is that it will be informal, inexpensive and **expedient.** In *Douglas College*, La Forest J. used this to justify the jurisdiction of administrative tribunals to consider constitutional questions:

> ...the raison d'être of administrative tribunals --specialization, simple rules of evidence and procedure, speedy decisions." ...There are, as well, clear advantages for the decision-making process in allowing the simple speedy, and inexpensive processes of arbitration and administrative agencies to sift the facts and compile a record for the benefit of a reviewing court.
>
> ***Douglas / Kwantlen Faculty Assn.* v. *Douglas College,* [1990] 3 S.C.R. 570 at 602 - 603**

44. In the specific context of the human rights process, Professor Bill Black, Special Advisor to the Minister appointed to examine the B. C. *Human Rights Act,* identified that one of the purposes of the human rights legislation is "to provide an effective, expeditious remedy

through a fair process" and with respect to the BC regime his verdict is clear and unequivocal: "the objective of an expeditious process is not being achieved.";

**AR Vol. IV, pp. 569, 578**

See also the *1998 Report of the Auditor General*:

> In 1977 Parliament established the Canadian Human Rights Commission and the Human Rights Tribunal Panel to resolve complaints about human rights quickly, impartially and expertly. This model was chosen as the alternative to the formal legal processes of the Federal Court. However, the approach that has evolved is cumbersome, time-consuming and expensive

***1998 Report of the Auditor General of Canada* Chapter 10.120, Appendix A**

45. The Commission tries to restrict the content of the principles of fundamental justice to the common law principles on delay. We have a number of responses to this: firstly, the common law is not as restrictive as the Commission argues (or as Lowry J, in the Chambers Court held).

A. The concept of procedural fairness and natural justice encompass abuse of discretion and abuse of process founded on delay and the court in the exercise of its supervisory function over statutory tribunals may prohibit further proceedings as a remedy.

***Brown* v. *Association of Professional Engineers and Geoscientists of British Columbia*, [1994 B.C.J. No. 2037 (B.C.S.C.) (QL)**

B. The concept of natural justice or procedural fairness as outlined by Dickson J. in *Martineau* is broad enough to encompass principles which, in other contexts, have been termed abuse of discretion or abuse of process because of delay and related matters.

***Misra v. College of Physicians and Surgeons (Saskatchewan)* (1988), 36 Admin. L.R. 298 at 317 (Sask. C.A.)**

C. ... the position of the appellant is that where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence. I agree with the appellant on this ...

> [Abuse of power] is not limited to acts giving rise to procedural unfairness. Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay.

***Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.) at 345-47**

D. The principles of fundamental justice both reflect and accommodate the nature of the common law doctrine of abuse of process. Although I am willing to concede that the focus of the common law doctrine of abuse of process has traditionally been more on the protection of the integrity of the judicial system whereas the focus of the *Charter* has traditionally been more on the protection of individual rights, I believe that the overlap between the two has now become so significant that there is no real utility in maintaining two distinct analytic regimes. We should not invite schizophrenia into the law.

***R. v. O'Connor, supra,* at para. 71**

E. In the most recent decision of *NLK Consultants*, Edwards J. applying only the common law held that "unreasonable delay per se will establish prejudice."
***NLK Consultants Inc.* v. *British Columbia (Human Rights Commission)*[1999] B.C.J. No. 380 (S.C.) (QL) at para. 40**

46. Secondly, if the Commission was correct that unreasonable delay is only contrary to the principles of fundamental justice when it results in an "unfair hearing" (e.g. lost or missing evidence) this would be inconsistent with the decisions of this and other courts that have found the principles of fundamental justice violated in the criminal sphere by reason of unreasonable delay even where there has been no concern of an unfair trial.

***R v. Mills*, [1986] 1 S.C.R. 863**
***Re Rahey*, [1987] 1 S.C.R. 588**
***R v. Askov*, [1990] 2 S.C.R. 1199**
***Reference re: Sections 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123**

47. The issue before the Court is a constitutional one and whatever may be the case at common law, when state-caused delay deprives someone of security of person (in the sense of "stigmatization" etc.) and not merely because of an unfair hearing, then it makes no sense to somehow suggest that the principles of fundamental justice are only breached if the hearing will be unfair. It is state-caused delay that can result in the deprivation of security of person and it is because it is unreasonable that it is not in accordance with the principles of fundamental justice. To say that it is only unreasonable when it results in unfair hearing,

but not when it creates a deprivation of security of the person is to render meaningless the "rights" portion of section 7.

48. The final basis for attempting to deny the application of section 7 to delay in human rights cases turns essentially on the rights of complainants. The Commission suggests that because the Court of Appeal granted Blencoe a stay with the consequences that the complaints of Willis and Schell would not proceed this somehow meant that the principles of fundamental justice were not met.

**Commission's Factum at paras. 94 - 100**

49. This argument also virtually guts section 7. The Commission is essentially arguing that a state-caused delay that results in the deprivation of security of person is nonetheless in accordance with the principles of fundamental justice because any other conclusion would be contrary to the complainant's interests. This is not a principled approach. If it were, administrative tribunals and indeed courts could, with impunity, deprive our citizenry of their liberty and security of person as there will always be a complainant or victim who would be entitled to plead his or her interest in seeing the case proceed. The Chief Justice was correct when he said that "In such matters the law cannot accommodate everyone..." Blencoe's constitutional rights were infringed by the state; no such rights of the complainants are in issue. And whatever statutory entitlement the complainants have, they can not trump or negate Blencoe's constitutional rights.

**Reasons for Judgment, Case on Appeal, at para. 39, AR Vol. IV, p. 674**

50. If unreasonable delay is not in accordance with the principles of fundamental justice ( if the interests of the complainants are not taken into account), then the unreasonable delay does not somehow magically transform into a principle of fundamental justice merely because the complainants do not like the consequences. This is to fail to distinguish between the breach of the section 7 right and the just and appropriate remedy. We return to the question of remedy below.

51. The Commission also argues that the principles of fundamental justice should incorporate a societal interest: (para. 97). Even if this is so, there is a societal interest in ensuring that human rights proceedings be conducted with reasonable dispatch.

52. This Court recognized this principle in the criminal context in *Askov*, where it held that speedy trials ensure that those who transgress the law are dealt with promptly, and reassure victims and the community that the criminal justice system works fairly, efficiently and with reasonable dispatch. As Cory J. stated:

> Continued community support for our system will not endure in the face of lengthy and unreasonable delays ...
>
> [Where the right to trial within a reasonable time is denied] public confidence in the administration of justice must be shaken. Justice so delayed is an affront to the individual, to the community and to the very administration of justice.
>
> ***R. v. Askov*, [1990] 2 S.C.R. 1199 at 1221, 1240; See also: *Morin*, *supra*, at 786-87**

53. A majority of the Saskatchewan Court of Appeal applied similar principles to human rights proceedings in *Kodellas*, where Vancise JA. stated that:

> There is a social value in having proceedings like this dealt with in an efficient and expeditious manner. A failure by the commission to initiate proceedings under the appropriate sections of the Code will reduce respect and confidence in the administration of justice. A failure to vigorously pursue complaints of this kind and other violations will inevitably lead to a diminution of rights sought to be provided and protected under the Code ... In my opinion, it is essential that [inquiries under the Code] proceed as quickly as possible in order that the objects of the Code are achieved and fundamental human rights are preserved and protected.
>
> ***Kodellas*, *supra*, at 196**

54. The Commission recognizes this as well. In the *1994-95 Annual Report* it recognized that "with adequate resources, we could reduce delays in resolving complaints, increase education initiatives and **strengthen public confidence in the human rights system**" In the 1993-94 Report the "Council recognizes that such backlogs hurt everyone involved ..."

**AR Vol. IV, pp. 542, 533**

55. While the complainants in this particular case may be disappointed by the decision of the Court of Appeal staying the proceedings, it must be recognized that in the long term this decision is for the benefit of all complainants and respondents. The decision of the Court of Appeal has already had a salutary effect in ensuring that the human rights process in BC proceed with greater dispatch. Such decisions require a government to commit the necessary resources if they wish to do more than pay lip service to human rights and to ensure that the purpose and object of human rights legislation is given effect.

56. The *Annual Report* 97/98 of the Commission, published in January 1999, after the judgment of the Court of Appeal, includes a section entitled: "Commission Reduces Backlog" where the Commission said that one of its "major priorities this year was the reduction of backlogged cases left by the previous Council" and concluded that "The process has improved to benefit both complainants and respondents."

***British Columbia Human Rights Commission Annual Report 1997/98* at 2, Appendix B**

57. If the principles of fundamental justice require a consideration of the community interest then it may be useful for this Court to know what the community in which both Blencoe and the complainants live were saying through the media. The community's newspaper (the Times-Colonist) called for the Province to "make a decision" in March 1997, a year prior to the case being heard by the Court of Appeal.

> Spend the money and hire the staff needed to ensure that the Council isn't violating people's constitutional right to a speedy hearing. Or

close it down and send serious cases to the criminal courts, where the rights of accused persons are taken more seriously.

**AR Vol. III, p.389**

58. Likewise the CFAX Radio Commentary the morning after the Petition was filed said:

> I have no idea whether the charges of sexual harassment against former NDP Cabinet Minister Robin Blencoe were justified, but I do know one thing - three years is too long to wait for a hearing.
> Blencoe is going to court to have the charges quashed, on the basis that he has not been given an opportunity to face his accusers within a reasonable time.
> The hearing into the allegations is scheduled for next March. That will be three years after the complaints were filed, and almost five years after the alleged events took place. In the meantime, witnesses have died, memories may have dimmed, and Blencoe's life has been on hold.
> In the criminal courts a three year delay getting a case to trial would not be tolerated. It shouldn't be tolerated in sexual harassment charges either. In many ways, those kind of allegations are more damaging to a person's reputation than most criminal charges are.
> Robin Blencoe deserved his day in court. The system has failed to offer him that opportunity within a reasonable time. Quashing the case is far from the ideal solution, but for the sake of all the people who will face similar accusations in the future the courts should throw this case out and make it clear that in the future, cases will have to be heard within a reasonable time or face a similar fate.

**AR Vol. IV, p. 616**

59. The societal interest should also take into account the nature of the complaint. As the "seriousness of the offence increases so does the societal demand that the accused be brought to trial" *R.*v. *Cocker*. In this case even if the allegations of the complainant are to be taken to be true (for the purpose of this Appeal) on any objective reading of the complaints they are not such that their pursuit at all costs can be tolerated. Yet in *Cocker,* a case of much greater seriousness, a delay of 17 1/2 months was considered too long and proceedings

stayed notwithstanding that the victim was left without recourse.

***R.* v. *Cocker* (1997), 89 B. C. A. C. 276; *Morin, supra,* at 787**

60. In this case it is necessary to examine the record to consider just how prejudiced the complainants are by a stay and conversely why there is no societal interest at odds with Blencoe's constitutional rights. Willis received an apology from the Appellant for his conduct on August 17, 1994 which she accepted; the alleged incident in March 1995 the Commission conceded "could not stand on its own as evidence of sexual harassment".

**AR Vol. II, pp. 271-277; AR Vol. II, pp. 281-289 ; AR Vol. II, pp. 291-294; AR Vol. II, p. 333**

61. For Schell there is a general denial. There is a real doubt that there was any sexual harassment in law, let alone on the facts, given that she was not an employee of Blencoe. Her complaint against the Government was dismissed as there was no possibility that there was any discrimination "with respect to a service customarily available to the public." Further the Commission held that "there was evidence that funding to the sports organization was not negatively impacted by the Minister during the relevant time frame." The conduct that forms the basis of the Schell complaint was, at worse, two alleged kisses and a hug. Schell has gone to the media twice to provide a very detailed and public description of her complaint.

**AR Vol. II, p. 247; AR Vol. II pp. XXX-250; AR Vol. I, p. 102; AR Vol. I, p. 122**

62. In conclusion, the Commission is wrong when it limits the principle of fundamental justice to the question whether the impending hearing will be unfair (e.g. in the sense of lost or missing evidence). A state-caused delay which deprives a respondent of liberty or security of the person will not be in accordance with the principles of fundamental justice when that delay is unreasonable.

## Was the Delay Unreasonable in This Case

### A. When the Clock Begins to Run

63. The Commission submits that the 22 months described as the "initial intake and investigation" period should be analogized to pre-charge delay in the criminal process. This is neither a realistic nor properly contextual point of view. Blencoe was "charged" with sexual harassment the moment the complaints were laid; the whole machinery of the state descended upon him at that time. It was highly public; it placed him in real jeopardy; it required him to retain and instruct counsel; and required him to make formal answer to the complaint. There is a perfect correlation between the moment the complaint was laid and the moment a charge is laid in a criminal case.

64. It is submitted that the period of time that preceded the laying of the complaints should also be taken into account in determining the reasonableness of the delay. In *R.* v. *J. T. G.* Caputo J. of the Ont. Gen. Div. stated:

> But cases suggest that prejudice to the accused is an important factor in deciding whether a remedy is to be granted for delay. While lengthy pre-charge delay per se does not violate an accused's right to a fair trial, the effects of pre-charge delay can subvert trial fairness and give rise to a violation of ss.7 and 11(d) of the *Charter*.

***R. v. J.T.G.* [1999] O.J. No. 674 (Gen. Div.) (QL) at para. 50**

65. Not only did the alleged behaviour giving rise to the complaints occur, in the case of Willis 11 months prior to the laying of the complaint and 29 months in the case of Schell, but the record suggests that either or both of these women "complained" of Blencoe's comments to the Premier's office or other government officials in March 1995.

**AR Vol. I, p. 102; AR Vol. II ,p. 325; AR Vol. II, p. 189 AR Vol. II, p. 273**

66. Given that these complaints to the Premier's Office are what resulted in the removal of Blencoe from Cabinet, the Caucus, and the Party, this period, at a minimum, should also be taken into account when assessing the reasonableness of the delay.

67. In sum, when it is state delay which deprives a person of liberty or security of the person the period of delay must be measured at least from the time that the complaint has been filed or received by the state and in some cases, such as the present one, even earlier.

**B. The Reasonableness of the Delay**

68. The Commission claims that only five months of the delay was unreasonable. This does not withstand any serious scrutiny. The facts of the delay are set out in detail in the Amended Petition. We summarize our position here as follows:

69. The Commission is simply wrong in saying that the "first period, from August 1995 to April 1996 could not be relied upon by ... Blencoe." A close review of the record bears out that most of the time in that period was the fault of the Commission because it had deployed procedures that were in clear breach of the rules of procedural fairness and the delay was due to instances of bureaucratic bungling and inadequate resources.

**AR Vol. II, pp. 165-172 at paras 2 - 24; AR Vol. II, pp. 175-179 at paras. 37-53**

70. Furthermore as the Chief Justice noted that there was no step taken by Blencoe "that he was not entitled to take in defending himself against these complaints" and he concluded as follows:;

> With respect, the underlined portion of the [reasons of the Chambers Judge] above constitutes an error of law. Although clearly at risk in these proceedings, the Appellant was under no obligation to respond to a complaint that was filed out of time and was awaiting adjudication as to good faith.

**Reasons for Judgment, Case on Appeal, at paras. 44, 46, AR Vol. IV, pp. 677-678**

71. The period between April 1996 and September 1996 is conceded by the Commission to be a period of unreasonable delay. While the Commission has not tendered any evidence in explanation for this delay it is now described as "systemic": (para. 129). However it should also be conceded by the Commission that the entire period of August 1995 to September

1996 was unreasonable delay as there is no evidence offered by the Commission that the investigation would have been commenced any earlier than September 1996 no matter how quickly the pre-investigation stage had been completed. Indeed the evidence is that the Commission did not have the procedures in place to assign the investigator, let alone consider commencing the investigation of the complaint until September of 1996.

**AR Vol. II, p. 229; AR Vol. II, p. 235; AR Vol. II, p.236**

72. With respect to the period of the investigation, Sept, 1996 - July, 1997 the Commission relies upon the finding of the Chambers Judge who said in part: "the time that has elapsed has not been shown to have been attributable to anything other than the time required to process complaints of this kind given the limitations imposed by the resources available"

**Commission Factum at para. 124**

73. In the first place it is clear that the Chambers Judge was of the view that, given the nature of the complaints, "two years would not be required to determine that they warrant a hearing." But the case before the Chambers Judge was not *Charter* case and he said that while the delay was "a reflection of the Commission's resources... *absent any Charter consideration*, this concern must be addressed by the government, not the Court." As the *Charter* does apply, the failure of the government to allocate appropriate resources is fatal to the Commission's case.

**Reasons for Judgment, B.C.S.C. at para. 46, AR Vol. IV, pp. 648-649**

74. In *Douglas and Jonlee Holdings Ltd.*, Lawton J. said the following:

> I have examined the Commission's explanation for the delay. It was caused by lack of resources. But that lack was not a sudden shortfall. It was a permanent condition. Certainly some allowance has to be made for limited resources but two years seven months is too long to be excused on that ground. If society believes that discrimination is to be discouraged and eliminated, then society must ensure that the necessary steps are taken to that end and that resources to take those steps are available. I am not prepared to justify or dismiss the lengthy delay on the ground of lack of resources.

***Douglas and Jonlee Holdings Ltd. v. Human Rights Commission (Sask.) And Marcotte.* (1989), 79 Sask R. 44 (Q.B.) at 50**

75. In *R. v. Morin*, Sopinka J. said:

> While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(b) meaningless. The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources.

***R. v. Morin, supra,* at 795-796**

76. In *Kodellas, supra*, Wakeling J.A said:

> If the government has failed to provide sufficient funding to enable the commission to adequately carry out its function, or the commission has failed to employ adequate or reliable staff, the remedy provided by the legislators becomes illusory. In other words, the loss of the remedy is not so much the result of the judicial order as it is the failure of the government to provide the machinery by which this remedy could be adequately provided to a complainant. The order is in essence no more than the acknowledgment of the illusory nature of the remedy.

***Kodellas, supra*, at 199; See also p. 181; See also *Mogentaler, supra*, at 61 - 63**

77. In *R.* v. *MacDougall* , McLachlin J. held:

> The failure of the government to provide sufficient courtrooms, prosecutors and judges may result in unreasonable systemic delay. While recognizing that the institutional resources available to deal with a given case may vary between provinces and districts (see Askov, supra), **courts must nonetheless be vigilant to ensure that delays based on a deficiency in the amount of institutional resources are not legitimized.**

***R. v. MacDougall,* [1998] 3 S.C.R. 45 at para. 54**

78. The *1994-95 Annual Report of the British Columbia Human Rights Council* referenced the report of Professor Bill Black who "criticized the length of time required to resolve a complaint," and the Council concluded that it had "serious concerns about the growing delays in investigation and the impact of such delays on the parties and on the enforcement of human rights legislation generally".

**AR Vol. IV, p. 546; AR Vol. IV, p. 555; AR Vol. IV, pp. 557-558**

79. In its *1995-96 Annual Report* the Council said this:

> Human rights investigations were not given the priority they deserved and, with increasing volumes of new complaints, the result was a growing backlog of human rights investigations and lengthy delays. To address this **untenable situation**, the Council began diverting some of its resources toward investigations but, with the continuing growth of new complaints, intake remained the Council's major focus. (emphasis added)
>
> **AR Vol. IV, p. 561**

80. As Professor Black has said:

> The objective of an expeditious process is not being achieved...Part of the reason for these delays is the lack of sufficient staff to process all complaints quickly. ... The lesson is that the problem lies in the way the system is organized rather than in those who have to work within this system. It is almost impossible to make the human rights process as expeditious as it should be if the Council has no investigative resources of its own.
>
> **AR Vol. IV, p. 578**

81. The *1994-95 Annual Report* of the Council states:

> B.C. has the highest volume of complaints per capita in Canada, yet the lowest budget per capita for human rights protection and education.
> **AR Vol. IV, p. 546; See also: *Black Report,* AR Vol. IV, pp. 589-590**

82. Notwithstanding the *Black Report* and the recommendations it made, the Chief Commissioner has admitted that the Commission still required additional resources in order to eliminate the backlog of files awaiting investigation and speed up the investigation

process.

**AR Vol. III, p. 388**

83. In *NLK Consultants, supra*, the annual reports of the Commission (filed in that case by the Commission) suggesting that the inordinate delay was due to lack of institutional resources, was met by Edwards J. with the response that "the lack of institutional resources cannot be used as an excuse for justification of unreasonable delay. Those who are responsible for the lack of facilities should be bear the burden of criticism."

***NLK Consultants Inc.* v. *British Columbia (Human Rights Commission), supra*, at paras. 30 - 32**

84. The Commission has no persuasive answer to the conclusion of the Chief Justice that the investigation period instead of taking over 7 months could have taken "a week at the outset". The Commission says that the majority of the Court of Appeal failed to give sufficient weight to the requirements of natural justice" (para. 128). Yet, as the Chief Justice point out the "investigation was necessarily one-dimensional as there were no eye witnesses." A review of the investigation reports reveal just how true that is: the same person deployed to conduct the investigation was the very same person who had conducted the pre-investigation. It is also perfectly clear from the Investigation Reports that there was no documentation that was not already before the Commission in April, 1996. There is no evidence of any witnesses being interviewed or, if so when, and in any event for each complaint, there were only two minor witnesses referenced. Those Investigation Reports could have been done literally in days and at most weeks.

**Reasons for Judgment, Case on Appeal, at para. 51, AR Vol. IV, p. 679**
**AR Vol. II, p. 250; AR Vol. II, p.335**

10 85. The Commission is completely silent on the period from July 1997 to March 1998. Admittedly this period of delay is the responsibility of the Tribunal and the Tribunal offers no explanation or defence of this. Nevertheless, as state caused delay, it is a period of unreasonable delay that the Court must have regard to.

86. The Record is clear that Blencoe was pressing for an early hearing throughout the entire process and as early as December 18, 1995 and then again on January 29, 1996, April 23, 1996, February 28, 1997 and April 11, 1997 (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) . He even asked that the investigation process be waived and the matter proceed directly to a hearing (AR Vol. II, p. 301). When
20 he was first told of the hearing in July of 1997 he was told that it might be as early as November of 1997 (AR Vol. II, p. 181). The date of March of 1998 was set unilaterally without his consent and at no time was Blencoe ever led to believe that the date was negotiable. It is not incumbent upon Blencoe to press for earlier dates in order to make this argument. The obligation is on the Tribunal to explain why, knowing full well that the matter was of great concern to Blencoe, that an earlier date was not set. No explanation has ever been offered. In a radio interview given on September 19, 1997 the Chief Commissioner, in reference to Blencoe's case, accepted that "...justice delayed is justice denied...".

**AR Vol. III, p. 388**

30

87. If the Court carefully scrutinizes the period of delay it is clear that each month of the delay had serious consequences for Blencoe and his family. For example had the case come to a hearing in the six to nine months, which is the period of time that the Chief Commissioner has said is her objective for most such cases, (AR Vol. III, pp. 390 - 392) it would have been resolved before the provincial election in April 1996 leaving Blencoe free to run in that election and pursue his life long career. If the case had been resolved in 14 months it would have obviated the need for Blencoe to have moved his family to Ontario with all the disruption and trauma that entailed. Had the case been resolved in 20 months Blencoe and

his family may have been able to stay in Ontario and start a new life. Had the case been resolved in 24 months Blencoe and his family may have been able to reestablish himself in Victoria without suffering the further indignity of being suspected of being a problem "working with children", etc.

88. The period of time that occurred in this case should be compared with the recommendations of Professor Black, who examined the *Human Rights Act* and made recommendations for both statutory and administrative reform. Black recommended as the statutory time limits for each stage of the process. These time periods should be compared with what was recommended by Professor Black as the statutory time limits for each stage of the process:

- 15 days to assign an investigator to a claim once the claim has been completed;
  Schell: 402 days; Willis: 401 days
- 100 days to complete the investigation;
  Schell: 179 days; Willis: 178 days
- 30 days (ordinarily) for the parties to comment on the report of the investigator;
  Schell: 71 days; Willis: 72 days
- 30 days for the decision whether to refer the claim to a hearing
  Schell: 50 days; Willis: 50 days
- hearing to be conducted within 60 days (ordinarily) from the date the complaint is referred to a hearing;
  Schell: 244 days; Willis: 258 days

**AR Vol. IV, pp. 586-587**

89. We urge this Court to hold that the government's consistent and deliberate failure to allocate sufficient resources is not to be condoned particularly where constitutional rights are at stake. By not assigning the appropriate resources the government has effectively undermined the purpose and object of the Human Rights legislation which is to "provide an effective, expeditious remedy through a fair process". The

consequences of failing to provide adequate resources renders the human rights regime effectively punitive rather than remedial.

**AR Vol. IV , p. 569**
***O'Malley* v. *Canadian Human Rights Commision*, [1985] 2 S.C.R. 536 at 547**

**C. The Length of the Delay**

90. The majority of the Court of Appeal correctly concluded that the delay of over 30 months from the date of the complaints to a hearing on the merits is far too long.

**Reasons for Judgment, Case on Appeal at para. 47, AR Vol. IV, p. 678; para. 109, Ar Vol. IV, pp. 109-110**

91. The Chief Justice applied a careful, relative and sensitive analysis in determining whether delay was inordinate:

> 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.

**Reasons for Judgment, Case on Appeal at para. 105, AR Vol. IV, p. 704 (emphasis added)**

92. In conclusion, the majority of the Court of Appeal correctly concluded that the delay in the case was excessive and therefore not in accordance with the principles of fundamental justice.

**Reasons for Judgment, Case on Appeal at para. 104, AR Vol. IV, p. 704**

**Issue # 3: The Just and Appropriate Remedy**

93. The only just and appropriate remedy in this case was the stay as ordered by the Court of Appeal.

94. The suggestion of the Commission that it would be more just and appropriate to simply order expediting the hearing is to truly ignore and further deprive Blencoe of his constitutional

rights. The deprivation of his liberty and his security of person occurred prior to the hearing of the court proceedings and it simply can not be cured by ordering a hearing. That would be a case of "too little, too late."

95. The Commission relies on criminal law cases on the issue of remedy even though earlier it submits that the criminal jurisprudence ought not be applicable in human rights cases. Leaving aside the inconsistent approach, it is clear that even in criminal cases a trial court has the discretion to stay even serious criminal charges and will do so " where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. "

**_R._ v. _Jewitt,_ [1985] 2 S.C.R. 128 at 136 - 137; See also _R._ v. _Askov_, [1990] 2 S.C.R. 1199; See also _Canada (Minister of Citizenship and Immigration)_ v._Tobiass,_ [1997] 3 S.C.R. 391 at paras. 86 - 88**

96. In addition to all that has been submitted above, we refer as well to the observation of Lowry J, who said that "there is ... substance to the contention that the hardship Mr. Blencoe, his wife, and his children have suffered, and continue to suffer, is markedly disproportionate to the value there can now be in an adjudicative resolution." The prejudice that Blencoe has suffered by the delay can not be cured by a hearing; it will only be exacerbated no matter what the outcome.

**Reasons for Judgment, B. C.S.C. at para. 50 , AR Vol. IV, pp. 650**

97. Furthermore, the BC Human Rights Tribunal has ordered a stay in a number of cases without resort to section 24 of the *Charter* on the grounds that the violation of the respondent's constitutional rights deprives the Tribunal of jurisdiction and the Tribunal must therefore halt the proceedings. The Court therefore cannot decline to grant a stay if the Tribunal is bound to do so.

***Behmardi* v. *Tsin,* [1999] B.C.H.R.T.D. No. 14 (B.C. H.R.T.) (QL) at para. 32**

## PART IV - NATURE OF ORDER SOUGHT

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

Date: August 6, 1999

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"JOSEPH S. ARVAY"

Joseph J. Arvay, Q.C.
Counsel for the Respondent, Robin Blencoe

## PART V - TABLE OF AUTHORITIES

**Pages in Factum Where Cited**

**Cases**

**Statutes**

# Canadian Human Rights Commission - Human Rights Tribunal Panel



## Introduction

### Role of the Canadian Human Rights Commission

**10.8** The *Canadian Human Rights Act* sets out the Commission's responsibilities. The purposes of the Act are to protect individuals from discrimination and promote equality of opportunity. It applies to federal government departments and agencies, Crown corporations, chartered banks, airlines, telecommunications and broadcasting organizations, and shipping and interprovincial trucking companies.

**10.9** The Commission investigates complaints of discrimination. Complaints may relate to employment, or to the provision of goods, services, facilities and accommodation that are customarily available to the general public. The Commission also has a statutory responsibility to foster public understanding and recognition of the principles of the Act.

**10.10** Complaints of discrimination may be made based on race, national and ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted. Complaints of discrimination based on sex include complaints about pay inequities between men and women.

**10.115** However, the Tribunal does not have the statutory authority to mediate complaints. It also does not have formal standards and policies governing mediation and the mediators rely on their own experience.

**Performance reporting needs to be improved**

**10.116** The Tribunal's fall 1997 Performance Report to Parliament stated that its objective is to provide Canadians with "a fair, impartial and efficient public inquiry process for the enforcement and application of the *Canadian Human Rights Act* and the *Employment Equity Act* ." The report provides useful information on the Tribunal's average cost per case by both ground and year, on the average number of hearing days per case by ground and by year, on the number of cases resolved through Alternative Dispute Resolution and on the outcomes of cases.

**10.117** The Tribunal's Performance Report states that it will achieve its objective by demonstrating, for example:

- timeliness of the hearing and decision process;
- increased use of Alternative Dispute Resolution processes; and
- well-reasoned decisions, consistent with the evidence and the law.

**10.118** We believe that establishing targets such as reducing the average costs and hearing days by a specified percentage could enhance reporting.

**10.119** We noted that the report does not contain information on the elapsed time between hearing a case and rendering a decision. We found that it takes on average about a year for tribunals to complete hearings and render a decision on complaints referred to it by the Commission. However, more complex cases can take much longer.

## Conclusion and Recommendation

**10.120** In 1977 Parliament established the Canadian Human Rights Commission and the Human Rights Tribunal Panel to resolve complaints about human rights quickly, impartially and expertly. This model was chosen as the alternative to the formal legal processes of the Federal Court. However, the approach that has evolved is cumbersome, time-consuming and expensive.

**10.121** The Commission and the Tribunal are operating in an increasingly litigious and complex environment that poses major risks. In general, while stakeholders appreciate that the Commission and the Tribunal are dealing with difficult matters, they have major concerns about the efficacy of the process.

**10.122** The Minister of Justice has stated that a broad review of the *Canadian Human Rights Act* will be undertaken. The Commission has stated that this should be done sooner rather than later. The December 1997 Third Report of the Senate Standing Committee on Legal and Constitutional Affairs also called for a comprehensive assessment. We agree that a fundamental review by Parliament is needed. The various issues we have identified are for the most part interrelated and cannot be easily addressed individually.

**10.123 The government should identify and present to Parliament an integrated set of specific measures to improve the effectiveness of addressing human rights complaints. Such measures could:**

- **provide for periodic reviews by Parliament of the relevance and impact of the grounds of discrimination;**
- **broaden the choice of ways that complainants and respondents could use to resolve human rights complaints, possibly permitting complainants to take cases directly to the Tribunal or the Federal Court;**
- **clearly separate the Commission's roles as promoter of human rights, investigator and**

**conciliator of complaints, representative of the public interest and advocate for an expanded interpretation of the *Canadian Human Rights Act* ;**

- **ensure that the Commission and the Tribunal are independent and accountable;**
- **provide for greater transparency in appointments to the Commission and Tribunal;**
- **establish statutory deadlines for the receipt and disclosure of information to and by the Commission;**
- **ensure that specific standards are established and followed that safeguard the reliability, impartiality and transparency of the investigation, conciliation and decision-making processes;**
- **require clear, complete and timely disclosure of reasons for decisions;**
- **require parties to consider voluntary mediation by a neutral independent mediator, early in the complaint management process;**
- **ensure that there is legislative authority for the mediation policies and procedures that may be used by the Commission and Tribunal;**
- **require greater disclosure of information on performance against defined service standards; and**
- **ensure that there are legislative authority and resources to undertake international projects.**

***Canadian Human Rights Commission's response:*** *In general, the Commission finds the report's observations helpful, and has already begun to address some of the major recommendations.*

*With respect to the complaints process, the Commission recognizes that the time taken to deal with complaints is unsatisfactory. This is a problem faced by all human rights commissions, and one that for the Canadian Human Rights Commission has been exacerbated by past budgetary reductions and difficulties arising from the current law. We anticipate that the general review of the Canadian Human Rights Act announced by the Minister of Justice will provide the opportunity to consider alternatives to the current approach. In the meantime, we will continue to seek ways to speed up the process, including making greater use of mediation. It is also the Commission's intention to seek one-time funding from the Treasury Board to reduce the current backlog of complaints.*

*In terms of the quality of investigations, we continue to believe that complaints are properly investigated and that the Commissioners are provided with the information they require to make informed decisions. Some of the standards noted in the report were put in place at a time when the Commission's workload was less demanding, and their contribution to the investigation process may need to be reassessed.*

*As the report points out, providing assistance to human rights institutions in other countries is a new area of activity, which has increased significantly over the past few years. The Commission intends to seek confirmation of its mandate in this area, and to ensure that the resources and systems required to meet the demand effectively are in place.*

*As a final point, we should note that the audit does not examine the Commission's promotion activities. These are an important element in the Commission's statutory mandate.*

***Human Rights Tribunal Panel's response:*** *We are in general agreement with the conclusions and recommendations contained therein that pertain to the Tribunal Panel.*

---

## About the Audit

### Objective

The objective of the audit was to determine whether:

- the activities of the Canadian Human Rights Commission and the Human Rights Tribunal Panel are consistent with their mandates under the *Canadian Human Rights Act* and *Employment Equity Act* ;

- appropriate accountability and independence frameworks are in place to ensure independence from government with appropriate complementary accountability, including whether results are usefully measured and reported to management and Parliament;
- the process for handling human rights complaints is accessible, equitable and well managed within available resources;
- the Commission is in a position to implement its new employment equity audit mandate under the *Employment Equity Act* in a satisfactory manner;
- information technology planning is adequate; and
- financial risks are well managed.

**Scope and Approach**

We interviewed Commission and Tribunal officials. We discussed mandate, accountability and independence issues, and the operations of the Commission and Tribunal with a wide cross section of stakeholders. We asked the Commission and the Tribunal to help identify the stakeholders we should interview to obtain reliable information on the mandate and operations of both entities. We interviewed these stakeholders as well as others to whom these parties referred us. We also examined reviews of provincial human rights commissions and obtained information for comparison purposes from provincial and other national human rights commissions and ombudsmen.

We reviewed the information provided by the Commission and the Tribunal to Parliament in their Estimates, annual reports and performance reports. We also reviewed decisions of the Federal Court and the Supreme Court on the Commission and the Tribunal. In addition, we examined relevant studies conducted by the Commission and the Tribunal.

We verified and used the data in the Commission's complaint management system to describe the nature and disposition of complaints received by the Commission and the timeliness of dealing with complaints. Manuals and policy documents of the Commission and the Tribunal were reviewed and a stratified random sample of 50 investigation complaint files and a random sample of 20 conciliation files were examined.

We examined the Commission's audit plans for implementing its new employment equity mandate. We compared the Commission information technology planning practices with those recommended by the Treasury Board and those used by comparable agencies.

We examined financial and management controls relating to pay and benefits, contracts and contribution agreements.

**Criteria**

In assessing the Canadian Human Rights Commission and the Human Rights Tribunal Panel, we used as audit criteria management standards and policies, Treasury Board policies, and practices in and studies on comparable commissions and tribunals.

**Audit Team**

Assistant Auditor General: David Rattray
Principal: Alan Gilmore
Directors: Frances Taylor, Diane Charron

Greg Boyd
John Cathcart
Allison Fader
Camille Gilbert
Sue Morgan
Janice Murray

# BCHRC ANNUAL REPORT 97/98

*On this page...*



*See also...*


- Charts, Graphs & Statistics 97/98
- Annual Report 96/97
- Charts, Graphs & Statistics 96/97
- What's New In Human Rights In BC

Home Page All Pages Top of This Page


## Commission Reduces Backlog


# Commission Reduces Backlog

The Human Rights Commission has completed its first fiscal year. One of the Commission's major priorities this year was the reduction of backlogged cases left by the previous Council. Substantial resources were devoted to this task. Staff spent most of the fiscal year in transition from the Council complaints handling system to a new system that would deal more effectively with complaints. Many changes were made to improve the efficiency and speed in handling cases including: better screening procedures, new computer systems, and the expansion of the Vancouver office.

The Human Rights Commission reduced the backlog of cases by half in the 97/98 fiscal year. The year began with 1,743 files in the backlog, and by the middle of July, three or four months into the fiscal year, the intake and decision backlog had been cleared. Approximately 800 investigation files have been carried forward into the 98/99 fiscal year. To speed the reduction, the Commission hired three extra staff members to take complaints, 10 more human rights officers to process them, as well as an extra team to work specifically on investigations.

Extra help also assisted in paring down the decision backlog. "I was able to use the services of experienced and qualified delegates inside and outside the organization to render decisions on case dismissals and referrals," said Kelly-Ann Speck, Commissioner of Investigation and Mediation. Delegates decreased the number of cases in the decision backlog by determining whether to dismiss complaints or refer them to the BC Human Rights Tribunal for a hearing.

"We made significant progress," said Commissioner Speck, "but we're still working on it. Reducing the backlog will continue to be a priority into next year."



Because of better screening, referral and early resolution, t e u new complaints has dropped from 1436 in 96/97 to just over 1000 in 97/98. The decrease is also due to a new system that assigns file numbers to cases rather than assigning each party in a case with separate file numbers. assigning cases-rather than individuals-with file numbers, reduces the time human rights officers spend cross referencing files and photocopying documents. The new system gives officers more time to work on resolving complaints. In addition, a new computer database has increased efficiency by allowing human rights officers to better monitor their case loads. So, while the actual number of cases hasn't diminished, the system is quicker and more efficient, meaning that cases are dealt with sooner.

To ensure that cases are processed efficiently, the Vancouver office was expanded this year from a branch location to a full-service facility with a manager and full-time staff. With over 50 per cent of complaints coming from the Lower Mainland, expanding the Vancouver office was an instrumental change. Complaints based in the Lower Mainland will now be handled locally. Complaints from Vancouver Island and the rest of the province will continue to be handled in Victoria.

The process has improved to benefit both complainants and respondents. The complaint is assigned to a human rights officer when it is sent to the respondent. This eliminates the lengthy waiting periods previously endured before an investigator was assigned. The change means respondents can readily provide their response and both parties will know who will be responsible for investigating or assisting them to settle the complaint.

Commissioner Speck is still looking for ways to improve service. "One of the most consistent concerns about the current system is that it is very formal and requires a high level of literacy. Everyone goes through the same process and there's no ability to tailor services to the particular needs of the parties involved," said the Commissioner. "We are researching other ways of handling cases, and the new fiscal year may find them being implemented."

Home Page All Pages Top of This Page

---

**Resolving Disputes Through Mediation**

# Resolving Disputes