Court File No. 26789

IN THE SUPREME COURT OF CANADA
(On 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 WILLS

APPELLANTS
(Respondents)

AND:

ROBIN BLENCOE

RESPONDENT
(Petitioner)

AND:

IRENE SCHELL
ATTORNEY GENERAL OF BRITISH COLUMBIA
BRITISH COLUMBIA HUMAN RIGHTS COALITION
WOMEN'S LEGAL EDUCATION & ACTION FUND (L.E.A.F.)
COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE
CANADIAN HUMAN RIGHTS COMMISSION
MANITOBA HUMAN RIGHTS COMMISSION
NOVA SCOTIA HUMAN RIGHTS COMMISSION
ONTARIO HUMAN RIGHTS COMMISSION
SASKATCHEWAN HUMAN RIGHTS COMMISSION

INTERVENERS

FACTUM OF THE INTERVENER
WOMEN'S LEGAL EDUCATION AND ACTION FUND

JENNIFER L. CONKIE
DIANNE POTHIER
Suite # 7200, Randall Building
555 West Georgia Street
Vancouver, BC V6B 1Z5

Tel: (604) 662-7544
Fax: (604) 662-7555

Solicitors for the Intervener,
Women's Legal Education and Action Fund

CAROLE BROWN
Borden Elliot Scott & Aylen
60 Queen Street
Suite 1000
Ottawa, ON K1P 5Y7

Tel: (613) 237-5160
Fax: (613) 230-8842

Ottawa Agent for the Intervener,
Women's Legal Education and Action Fund

TO: REGISTRAR

AND TO:

John L. Hunter, Q.C.
Davis & Company
#2800 - 666 Burrard Street
Vancouver, BC V6C 2Z7

Tel: (604)643-2931
Fax: (604)643-1612

Counsel for the Appellants, BC Human Rights Commission and Commissioner of Investigation & Mediation Mediation

Davis & Company
Suite 360
30 Metcalfe Street
Ottawa, Ontario K1P 6L2

Tel: (613)235-9444
Fax: (613)232-7525

Ottawa Agent for the Appellants, BC Human Rights Commission and Commissioner of Investigation &

Katherine A. Hardie
B.C. Human Rights Tribunal
#401 - 800 Hornby Street
Vancouver, BC V6Z 2C5

Tel: (604)775-2000
Fax: (604)775-2020

Counsel for the Appellant, British Columbia Human Rights Tribunal Tribunal

Lang Michener
Suite 300
50 O'Connor Street
Ottawa, Ontario K1P 6L2

Tel: (613)232-7171
Fax: (613)231-3191

Ottawa Agent for the Appellant, British Columbia Human Rights

Robert Farvolden
Barrister & Solicitor
Suite # 206 - 1006 Fort Street
Victoria, BC V8V 3K4

Tel: (250)361-3131
Fax: (250)361-9161

Counsel for the Appellant, Andrea Willis Andrea Willis

Brian Crane, Q.C.
Gowling, Strathy & Henderson
Suite 2600 - 150 Elgin Street
Ottawa, Ontario K1P 1C3

Tel: (613)233-1781
Fax: (613)563-9869

Ottawa Agent for the Appellant,

Joseph Arvay, Q.C.
Arvay, Finlay
#400 - 888 Fort Street
Victoria, BC V8W 1H8

Jennifer MacKinnon
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Tel: (250)388-6868
Fax: (250)388-4456

Counsel for the Respondent, Robin Blencoe
Robin Blencoe

Tel: (613)236-9665
Fax: (613)235-4430

Ottawa Agent for the Respondent,

Mark C. Stacey
Allard & Company
#600 - 815 Hornby Street
Vancouver, BC V6Z 2E6

Tel: (604)689-3885
Fax: (604)687-0814

Counsel for the Intervenor, Irene Schell
Irene Schell

Brian Crane, Q.C.
Gowling, Strathy & Henderson
2600 - 150 Elgin Street
Ottawa, Ontario K1P 1C3

Tel: (613)233-1781
Fax: (613)563-9869

Ottawa Agent for the Intervenor,

Harvey M. Groberman, Q.C.
Ministry of Attorney General
Legal Services Branch
1001 Douglas Street, 6th Floor
Victoria, BC V8W 9J7

Tel: (250)356-8848
Fax: (250)356-9154

Counsel for the Intervener,
Attorney General of British Columbia
Columbia

Jennifer MacKinnon
Burke Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Tel: (613)236-9665
Fax: (613)235-4430

Ottawa Agent for the Intervener,
Attorney General of British

Héléne Tessier
360 rue St-Jacques
1er etage
Montreal, Quebec H2Y 1P2

Tel: (514)873-5146, poste 212
Fax: (514)964-7982

Counsel for the Intervener, Commission
des Droits de la Personne et Des Droits
Personne et
de la Jeunesse (CDPD)

Richard Gaudreau
Bergeron, Gaudreau
167 rue Notre Dame
Hull, Quebec J8X 3T3

Tel: (819)7928
Fax: (819)770-1424

Ottawa Agent for the Intervener,
Commission des Droits de la

Des Droits de la Jeunesse (CDPD)

Fiona Keith
Legal Advisor
Canadian Human Rights Commission
9th Floor, 344 Slater Street
Ottawa, Ontario K1A 1E1

Tel: (613)943-9153
Fax: (613)993-3089

Counsel for the Intervener,
Canadian Human Rights Commission

Aaron L. Berg, General Counsel
Donna Seale, Crown Counsel
Civil Legal Services (S.O.A.)
Department of Justice
3730 - 405 Broadway
Winnipeg, Manitoba R3C 3L6

Tel: (204)945-0185
Fax: (204)948-2826

Counsel for the Intervener,
Manitoba Human Rights Commission

Lara J. Morris
Reierson Family Legal Services
#600 - 1741 Brunswick Street
Halifax, Nova Scotia B3J 3X8

Tel: (902)492-2866
Fax: (902)492-2470

Counsel for the Intervener,
Nova Scotia Human Rights Commission
Commission

Peter C. Engleman
Carole, Engelmann, Gottheil
#500 - 30 Metcalfe Street
Ottawa, Ontario K1P 5L4

Tel: (613)235-5327
Fax: (613)235-3041

Ottawa Agent for the Intervener,
Nova Scotia Human Rights

Kathryn Pike/Jennifer Scott
Barristers & Solicitors
Ontario Human Rights Commission
180 Dundas Street West, 8th Floor
Toronto, Ontario M7A 2R9

Henry S. Brown
Gowling, Strathy & Henderson
#2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel: (416)326-9871
Fax: (416)326-9867

Counsel for the Intervener,
Ontario Human Rights Commission

Tel: (613)233-1781
Fax: (613)563-9869

Ottawa Agent for the Intervener,
Ontario Human Rights Commission

Milton Woodard, Q.C.
Staff Lawyer
Saskatchewan Human Rights Commission
8th Floor - 122 - 3rd Avenue North
Saskatoon, Saskatchewan S7K 2H6

Tel: (306)933-5956
Fax: (306)933-7863

Counsel for the Intervener,
Saskatchewan Human Rights Commission

Gowling, Strathy & Henderson
Suite 260
150 Elgin Street
P.O.Box 466, Station D
Ottawa, ON K1P 1C3

Tel: (613)233-1781
Fax: (613)563-9869

Ottawa Agent for the Intervener,
Saskatchewan Human Rights Commission

Hart Schwartz
Ministry of Attorney General of Ontario
8th Floor, 720 Bay Street
Toronto, ON M5G 2K1

Tel: (416)326-4455
Fax: (416)326-4015

Counsel for the Intervener,
Attorney General of Ontario

Frances Kelly
Community Legal Assistance Society
1800 - 1281 West Georgia Stret
Vancouver, B.C. V6E 3J7

Tel: (604)685-3425
Fax: (604)685-7611

Counsel for the Intervener,
British Columbia Human Rights Coalition

Osler, Hoskin & Harcourt
Suite 1500
50 O'Connor
Ottawa, ON K1P 6L2

Tel: (613)787-1009
Fax: (613)235-2867

Ottawa Agent for the Intervener,
British Columbia Human Rights Coalition

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PART I - THE FACTS

1. The Women's Legal Education and Action Fund takes no position with respect to the facts.

PART II - POINTS IN ISSUE

2. This case concerns the proper considerations for determining whether and how s.7 applies in human rights proceedings, including:

a. Whether a threshold s.7 interest - life, liberty or security of the person - is engaged;

b. If so, whether the deprivation of such an interest has been done in accordance with the principles of fundamental justice; and

c. If so, no issue having been raised about s.1, what the appropriate and just remedy may be.

PART III - ARGUMENT

A. Summary

3. The interpretation and application of s.7 *Charter* rights to human rights proceedings has significant implications for the ability of women and other equality seekers to have their human rights complaints investigated and adjudicated.

4. LEAF's submissions may be summarized as follows:

a. LEAF is generally in favour of a liberal, expansive interpretation of s.7 that expands its applicability to complainants in criminal proceedings and to parties in some other penal and non-penal proceedings.

b. A contextually sensitive analytical framework is necessary to determine whether and how to apply s.7 of the *Charter* to human rights proceedings, and what is an appropriate and just remedy pursuant to s.24.

c. Human rights proceedings engage at least the security interests of complainants.

d. Great care must be taken in determining whether human rights proceedings engage the threshold s.7 interests of respondents.

e. Even if only one party to a human rights proceeding can invoke s.7 rights, the principles of fundamental justice require fairness to all parties to the proceeding and also need to take the public interest into account. The principles of fundamental justice, procedurally and substantively, must incorporate s.15 and s.28 rights into the analysis of s.7. Thus equality rights of complainants are central to a proper s.7 analysis.

f. Delay as an issue under s.7 cannot arise at large: it is a fundamental justice issue, not part of the threshold question.

g. A stay of human rights proceedings is almost never an appropriate or just remedy pursuant to s.24 as it offends the rights of complainants contrary to s.7, s.15 and s.28 of the *Charter*.

B. Context and Underlying Norms

5. Discrimination against women takes many forms of which sexual harassment is one. Eradicating such discrimination is a matter of basic human dignity, integrity and equality all of which are protected by ss.7 and 15 of the *Charter*.

6. Sexual harassment acts as a significant barrier to women's full participation in the paid workforce. Close to 95% of victims are women, and over 95% of sexual harassers are men. However, only about 10% of women who experience harassment initiate external complaints, some of which are human rights complaints.

> Welsh S., Dawson M. and Griffiths E., 1999, "Sexual Harassment Complaints to the Canadian Human Rights Commission" *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports,* Status of Women Canada, p.177-215, at 187, 214.
> Gruber J.E., 1998, "The impact of male work environments and organizational policies on women's experiences of sexual harassment", *Gender & Society* 12(3):301-20
> *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at 1284 per Dickson C.J.

7. Sexual harassment attacks a woman's dignity, autonomy and self-worth. It is power-based, predatory, and intimidating in nature, and can be a form of violence against women. As such it has

some similarity to sexual assault, which this Court has found to constitute an "assault upon human dignity and a denial of any concept of equality for women".

R. v. *Osolin*, [1993] 4 S.C.R. 595, at 669, *per* Cory J.
R. v. *Ewanchuk*, [1999] 1 S.C.R. 330, at 362, ¶69, *per* L'Heureux-Dubé J.
Janzen, *supra*, at 1284 *per* Dickson, C.J.

8. Sexual harassment creates a poisoned work environment for all members of the group whose member is harassed. It violates women's security interests and often causes loss of employment, career prospects and status, and exacerbates existing and historical social and economic inequalities. As harassment increases in its severity and men attempt to exercise increased power and control over women, the situation can become life-threatening.

Sears Canada Inc. v. *Davis Inquest (Coroner of)*, [1997] O.J. No. 1424 at ¶4 *per* Adams J. (Div. Ct.)
Welsh, Sandy,1999, "Gender and sexual harassment" *Annual Review of Sociology* 25:169-90 at 183

9. The chief goal of human rights statutes is to identify and eliminate discrimination. In order to benefit to both complainants and respondents, the process must fully investigate, mediate, resolve and remedy complaints. This process is an integral if not the central component through which women exercise their right to be free from sexual harassment. Furthermore, sexual harassment as a cause of action is arguably restricted to human rights proceedings and unavailable as a tortious cause of action in Canadian common law civil courts. Thus, a full and fair human rights process for complainants is vital.

R. v. *Ewanchuk*, *supra*, at 362 ¶ 70 *per* L'Heureux-Dubé J.
R. v. *Mills*, SCC, November 25, 1999 at ¶ 59
Béliveau St. Jacques v. *Fédération des Employées et Employés de Services Publics Inc.*, [1996] 2 S.C.R. 345 at 384 at ¶75

10. Investigations of sexual harassment are often difficult and involved, because of the absence of witnesses other than the complainant and respondent. These investigations are further complicated because the harassment may be based on grounds other than sex. It is imperative, consistent with the corrective purposes of human rights regimes, that any s.7 time constraints neither prevent the discovery of material evidence nor impede a fair and equal process for all parties.

11. While the notion of discrimination as fault-based often permeates arguments made by respondents, human rights statutes are remedial, not punitive, and do not carry the stigma or the

consequences associated with penal schemes. Human rights statutes were created, and the grounds of discrimination expanded over time, to deal with the harmful effects of discrimination, not for the purpose of finding fault. To focus on the harm of the allegation of discrimination, instead of on the harm of discrimination itself, has the powerful effect of silencing victims of discrimination.

Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. *Simpsons-Sears*, [1985] 2 S.C.R. 536 at 547, *per* McIntyre J.
Canada (Human Rights Commission) v. *Taylor*, [1990] 3 S.C.R. 892, at 933 *per* Dickson C.J.
British Columbia (Public Service Employee Relations Commission) v. *BCGSEU*, S.C.C., September 9, 1999 at ¶ 49 *per* McLachlin J.

10

12. Legislation which is created to protect the fundamental right to be free from discrimination must be administered in accordance with the *Charter*, specifically s.7 and s.15. Therefore, any potential applicability of s.7 to human rights commissions and tribunals must be filtered through the lens of both s.15 and the broad societal goals embodied in the legislation.

BCGSEU, supra at ¶48
New Brunswick (Minister of Health and Community Services) v. *G.(J.)*, unreported, S.C.C. September 10, 1999 at ¶ 112 *per* L'Heureux Dubé J.

20 **C. The Application of Section 7 to Human Rights Proceedings**

(a) The *Charter*: Interpretation and Application

13. The determination of whether governmental action - in this case, the actions of the Commission and Tribunal - is consistent with the *Charter* is a contextual exercise which requires consideration of the larger social, political and legal framework within which the government is acting.

R. v. *Turpin*, [1989] 1 S.C.R. 1296 at 1331, *per* Wilson J.

30

14. In the context of a human rights proceeding, what triggers the application of the *Charter* pursuant to s.32 is the fact that the state, through a legislative scheme, has instituted an administrative structure (commissions and tribunals) to effectuate a governmental program to

provide redress against discrimination, in both the public and private realm.

Vriend v. *Alberta* [1998] 1 S.C.R. 493 at 535
McKinney et al v. *University of Guelph et al*, [1990] 3 S.C.R. 229 at 265

15. Once a complaint is brought before the Commission, the subsequent administrative process must conform to the *Charter*. The Commission must, in accordance with the *Charter*, decide whether and how to deal with a complaint. A refusal to accept a complaint, even if labeled non-action, is nonetheless subject to *Charter* scrutiny, as is a complaint involving private parties. It is the administration of a governmental program that demands *Charter* scrutiny. Whether or how s.7 is engaged is a separate question.

Vriend, supra at 532-3, 535 ¶60, 66

(b) Interpretation of Section 7

16. This Court has consistently held that a breach of s.7 involves two stages: (1) a deprivation of one or more of life, liberty, or security of the person; (2) not in accordance with the principles of fundamental justice. There is no free standing right to life, liberty, or security of the person. There is no prima facie breach of s.7 unless the requirements at both stages are met. The analysis never reaches the stage of examining the principles of fundamental justice if there is no deprivation of life, liberty or security of the person. The ultimate right in s.7 is a right to fundamental justice if a threshold s.7 interest is engaged.

B. (R.) v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 339 *per* Lamer C.J.
R. v. *Morgentaler, Smoling and Scott*, [1988] 1 S.C.R. 30 at 52-53 *per* Dickson C.J.
Reference Re Section 94(2) of the Motor Vehicles Act, [1985] 2 S.C.R. 486 at 500 - 501 *per* Lamer J.

17. It is submitted that the majority of the Saskatchewan Court of Appeal in *Kodellas* erred in not making a clear distinction between the two stages of s.7, and failing to address the stage at which delay factors into the analysis. The case at bar and cases following have similarly erred.

Saskatchewan Human Rights Commission v. *Kodellas*, (1989) 60 D.L.R. (4th) 143 (Sask. C.A.)
Blencoe, Case on Appeal
Dahl & Eastgate v. *True North R.V. et al.*, [1998] B.C.H.R.T.D. No. 46 (QL)
MacTavish v. *Tennant*, [1998] B.C.H.R.T.D. No. 65 (QL)

18. In contrast, Chief Justice Bayda, dissenting in the result in *Kodellas*, properly drew a clear distinction between the two stages of s.7 and concluded that delay was only an issue at the fundamental justice stage. Delay as an issue under s.7 cannot arise at large. The Court must ask: delay with respect to what interest? For example, was the dignity or the autonomy of the individual affected so negatively as to amount to an interference with life, liberty, or security of the person? Only if the first stage of s.7 is triggered does delay become potentially relevant, as a fundamental justice issue.

10 *Kodellas, supra,* at 157 *per* Bayda C.J.S.

19. All rights holders are not similarly situated, whether historically, socially or economically. The differences which exist among rights claimants must be taken into account in the analytical framework for s.7, which must include a consideration of the s.15 interests of those subject to discrimination in our society. As Madam Justice L'Heureux-Dubé said in *G.(J.)*:

> All Charter rights strengthen and support each other ... and s.15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of
20 equality, guaranteed by both s.15 and s.28, are a significant influence on interpreting the scope of protection offered by s.7.
> ...
> Thus, in considering the s.7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups as protection is at the heart of s.15. The rights in s.7 must be interpreted through the lens of ss.15 and 28, to recognize the importance of insuring
30 that our interpretation of the Constitution responds to the realities and needs of all members of society.

G.(J.), supra at ¶ 112, 115
Godbout v. *Longueil*, [1997] 3 S.C.R. 844 at 890, *per* La Forest J.

20. The Respondent ignores the gendered realities of sexual discrimination claims. In his repeated appeal to "the good of the citizen", he neglects to reference obvious and important gender

differences, and thus avoids s.15 considerations altogether. His argument is thus improperly premised on a hierarchy of rights, which privileges respondents in human rights proceedings.

21. Section 7 must be interpreted in a manner consistent with s.15 and s.28, recognizing the equal human worth and dignity of all individuals. In this way two distinct purposes, which also animate human rights legislation, are served: first, "the protection of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration"; and second, provision of a significant remedial component designed to "rectify and prevent discrimination against particular groups suffering social, political, and legal disadvantage in our society."

Eldridge v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at 667, *per* La Forest J.

22. Given that "women's needs and aspirations are only now (beginning to be) translated into protected rights", this Court must ensure that women, when confronted with the power of the state, benefit equally from the protection of s.7 consistent with the requirements of s.15 and s.28.

Vriend, supra, at 543, *per* Cory J.
Morgentaler, supra at 172, *per* Wilson J.

23. Much of the s.7 jurisprudence to date has developed predominantly in the criminal justice domain. Any application of s.7 rights and interests to human rights proceedings must be analyzed in a contextually sensitive and effects-focussed manner.

24. In the criminal domain, this Court has recognized the s.7 rights of complainants. The acceptance of complainants' rights is also evidenced by amendments to the *Criminal Code* pertaining to sexual assault reflecting Parliament's concern and intention "to promote and help to ensure the full protection of the rights guaranteed under ss.7 and 15 of the *Charter*."

Ewanchuk, supra, at 365 ¶ 74, *per* L'Heureux-Dubé J.
Morgentaler, supra at 161 - 184 *per* Wilson J.

25. This Court should not accept the lower Court's direct application of the traditional criminal paradigm to the human rights context with its exclusive focus on the Respondent's alleged suffering

and loss. This paradigm, which is too restrictive and one-sided even in the criminal context, is totally inappropriate in the human rights context.

26. To apply this traditional criminal paradigm may reinforce certain myths and stereotypes which have historically permeated sexual assault law, and may perpetuate the notion that sexual harassment is not serious. This in turn may improperly lead to conclusions that complainants' rights are less valuable than those of respondents. This Court must be vigilant to ensure that sexual harassment claims receive full and fair hearings. Section 7 must not become another systemic barrier for the victims of sexual harrassment.

10 *Ewanchuk, supra* at 372 - 373 ¶ 89
Blencoe, Case on Appeal ¶ 39

(i) Human Rights Proceedings Engage S.7 Life, Liberty or Security of the Person for Complainants

27. Complainants who come before a human rights commission allege that they have suffered discrimination. The state has enacted human rights legislation precisely because it recognizes, as does judicial interpretation of this legislation, that unremedied discrimination is an affront to dignity
20 and self-worth at a fundamental level, going to the core of personhood. Being a victim of discrimination thus has "a serious and profound effect on a person's psychological integrity", which is recognized by this Court as the touchstone of security of the person under s.7.

Law v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 525-530 *per* Iacobucci J.
G.(J.), supra at ¶60

28. In defining and interpreting "life, liberty and security of the person" it is necessary to examine the meaning of the interests individually and collectively, as they are interconnected and
30 inform each other. At the heart of each interest is the notion of human dignity and personhood in its fullest sense.

Morgentaler, supra at 175 *per* Wilson J
B.(R.), supra at 368 *per* La Forest J

29. Like other human rights complainants, women who are sexually harassed need a viable process and remedy. To apply s.7 to human rights processes with a low threshold for respondents and no concomitant rights for complainants, as does the Court below, would constiute a gender blind legal analysis which further invalidated women's experiences.

30. The majority of the Saskatchewan Court of Appeal in *Kodellas*, and some courts in other cases, have asserted or assumed without analysis that complainants have no s. 7 rights. It is respectfully submitted that this is in error.

10 *Kodellas, supra* at 192 *per* Vancise J.A. and at 199 *per* Wakeling J.A.
Blencoe, Case on Appeal¶ 39
MacTavish, supra at 62

31. The statutory human rights process engages at least the security of the person for complainants because of the effects of discrimination. The severity of the discrimination will impact on the severity of the security deprivation, but discrimination in and of itself implicates security of the person. Once the state, through human rights legislation, offers a remedy for discrimination, it is required to follow through. The fact that the allegation of discrimination is not yet proven does not preclude the triggering of a security of the person interest since this interest is only the threshold
20 to get to a right to fundamental justice. As this Court held in *Singh:*

> [I]t will be recalled that a Convention refugee is by definition a person who has a well-founded fear of persecution in the country from which he is fleeing. In my view, to deprive him of the avenues open to him under the [Immigration] Act to escape from that fear of persecution must ... impair his right to life, liberty and security of the person ... "Security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. ... It must be recognized that the appellants are not at this stage entitled to assert rights as Convention refugees; their claim is that they are entitled to fundamental
30 justice in the determination of whether they are Convention refugees or not.

Singh v. *Minster of Employment and Immigration*, [1985] 1 S.C.R. 177, at 205-208, *per* Wilson J.

32. As in *Singh*, to deprive a complainant of the avenue under human rights legislation to escape from discrimination will impair her security of the person. This does not automatically grant a

finding of or remedy for discrimination; it only requires that, pursuant to the second stage of s. 7, the process for determining those issues must comply with fundamental justice. Clearly, a remedy for discrimination cannot be granted immediately upon the filing of a complaint. Even where a complaint is successful, there will always be some period of unremedied discrimination that will engage the security of the person. However, there is no prima facie breach of s. 7 if there is a proper process, completed within the appropriate time, which accords with the principles of fundamental justice. Thus the adverse consequences of undue delay for complainants in the human rights process, as a s.7 issue, relate only to fundamental justice.

G.(J.), supra at ¶ 2
Singh, supra

33. Madam Justice L'Heureux-Dubé in *O'Connor* recognized that the right to security of the person is engaged for complainants in the criminal process. That argument is even clearer in the human rights process where complainants are full parties in a process designed to protect them.

O'Connor, supra at 480 *per* L'Heureux Dubé J.

(ii) Do Human Rights Proceedings Engage S.7 Life, Liberty or Security of the Person for Respondents?

34. The implications of human rights proceedings for respondents are quite different than for complainants. Chief Justice MacEachern's attempt to conflate complainants in criminal processes with respondents in human rights processes is misdirected. Being an alleged victim of discrimination is very different from being an alleged discriminator.

Blencoe, Case on Appeal ¶ 74

35. It is settled law that corporate respondents cannot raise a s.7 argument. For individual respondents, is being an alleged discriminator, in and of itself, sufficient to engage life, liberty or security of the person? In *Kodellas*, Chief Justice Bayda answered "yes" to this question, whereas the Manitoba Court of Appeal answered "no" in *Nisbett*.

Attorney General of Quebec v. *Irwin Toy Limited et al.*, [1989] 1 S.C.R. 927 at 1002 - 1003 *per* Dickson C.J.
Kodellas, supra at 152-157

Nisbett v. *Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.) at 755

36. It should be noted that since human rights respondents are not "charged with an offence" under s.11, they cannot invoke s.11(b) of the *Charter*. However, the argument that respondents may be deprived of security of the person in human rights proceedings is by analogy to s. 11(b), because it is out of the s. 11(b) jurisprudence that the argument that allegations in themselves can raise s.7 concerns, As stated by Lamer J. (as he then was):

> [U]nder s.11(b), the security of the person is to be safeguarded as jealously as the liberty of the individual. In this context, the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (A. Amsterdam, loc. cit., at p. 533). These include stigmatization of the accused, 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.

Mills v. *The Queen*, [1986] 1 S.C.R. 863, at 919-920

37. It must be remembered that s.11(b) does not have the same two stage structure as s.7. The "overlong" associated in the above passage with security of the person is actually properly an aspect of the reasonableness element of s.11(b), which is akin to the fundamental justice part of s.7. The question is to what extent can factors in the s.11(b) analysis - such as stigmatization - be transposed to administrative proceedings under s.7.

38. It is well settled that not all defendants in all civil proceedings may claim a deprivation of security of the person, even though some level of anxiety is associated with any legal proceeding. For example, it is clear that a defendant in a breach of commercial contract case could not pass the security of the person threshold simply by virtue of being a defendant. A minimum threshold must be passed before security of the person under s.7 is engaged. In both *Morgentaler* and *G.(J.)*, this Honourable Court included "serious" state-imposed psychological stress and specifically noted that the impugned state action must have "a serious and profound effect on a person's psychological integrity". The deprivation of bodily integrity when life and death are literally at stake, as in

involved in potential incarceration. In *G.(J.)* and *B. (R.)*, it was held that the apprehension of a child also engaged the security interest of a parent. However:

> It is clear that a right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringed the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it mean for a right to be constitutionally protected.

G.(J.), supra, at ¶ 59
Morgentaler, supra
Rodriguez v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 585, *per* Sopinka J.
B.(R.), supra

39. A respondent in a human rights proceedings does not face conviction for a criminal offence, nor a "pronouncement as to his ... fitness or ... status", nor incarceration hanging over him. Human rights proceedings are designed to be remedial rather than fault finding. Accordingly stigma, which in the criminal context is closely tied to moral blameworthiness, must to be analyzed differently in the human rights context. This point is ignored by Chief Justice Bayda who in *Kodellas* emphasizes the nature of the accusation rather than the nature of the proceeding within which the accusation is made.

Robichaud v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 84, *per* La Forest J
O'Malley, supra at 547 *per* McIntyre J
Kodellas, supra at 152-157 *per* Bayda C.J.S.

40. The following comments, though made in the context of s.8 rather than s.7, also draw a distinction between the stigma associated with a criminal compared to an administrative process. Given that the case dealt with a regulatory, yet still penal, regime, the comments have even greater relevance to the human rights context which is non-penal in nature.

> The underlying purpose of inspection is to ensure that a regulatory statute is being complied with. It is often accompanied by an information aspect designed to promote the interests of those on whose behalf the statute was enacted. The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. While regulatory statutes incidentally

provide for offences, they are enacted primarily to encourage compliance.

Comité paritaire de l'industrie de la chemise v. *Potash*, [1994] 2 S.C.R. 406 at 421 ¶13

41. Is there a subset of respondents who can claim a deprivation of security of the person? In *Jack*, a BC Human Rights Tribunal queried whether the holding in *Blencoe* was limited to sexual harassment cases. It is respectfully submitted that such a limitation would be inappropriate as it would create a hierarchy of discrimination that this Honourable Court has found to be contrary to s. 15 of the *Charter*.

10 *Jack, supra* at ¶12
Vriend supra at 541 *per* Cory J. and Iacobucci J.

42. It would also be contrary to the underlying values of the *Charter* to accept that prominent respondents can engage security of the person whereas other respondents cannot. Yet that is the effect of the Respondent's argument that delay affects his security of the person: the effect of delay is tied to media scrutiny of him, to which by definition prominent persons are more exposed. Linking the security of the person argument to the status of the individual respondent, rather than to the nature of the claim, is inappropriate. In *G.(J.)*, this Court emphasized that security of the person under s.7 involves an objective assessment of the deprivation:

20 > For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

G.(J.), supra at ¶ 60

30 43. Moreover, where the publicity at issue is not generated by the human rights commission, and even precedes the filing of a complaint that invokes the application of the *Charter*, it is difficult to conclude that publicity could be a state caused deprivation of security of the person. The Court below circumvents this argument by finding that the Commission's delay exacerbated the problem. In so doing, the Court below imports an element of fault on the part of the state actor that has not

heretofore been an element of the threshold of s.7. Rather, the standards of appropriate state behaviour should be measured against the principles of fundamental justice.

44. Where delay is only an administrative law issue, because the corporate status of the applicant precludes the invocation of s.7, it is treated as an issue of natural justice, which this Court has considered a subset of the principles of fundamental justice.

BC Motor Vehicle Act Reference, supra

45. To argue that only respondents who suffer undue delay are deprived of security of the person means that at some ill-defined point a proceeding changes from one to which s.7 does not apply into one to which it does. If there is any subset of respondents for whom security of the person is engaged, that determination must be made at the outset, on the basis of the nature of the complaint and the potential consequences it brings.

46. The length of time required for a human rights complaint to proceed to a hearing may implicate the principles of fundamental justice. In the context of child protection proceedings, this Court recognized that "the seriousness of the interests at stake varies according to the length of the proposed separation of parent from child".

G.(J.), supra at ¶ 87

47. Delay under s.7 can only be assessed in terms of the context in which the delay arises. Delay in waiting for a permit application to be processed, whether for an individual or a corporation, does not pass the threshold of s.7. This Honourable Court has held that corporations cannot claim s.7 rights because life, liberty, and security of the person raise concerns related to human beings. Given that a corporation can suffer the effects of delay it is reasonable to conclude that delay is not a threshold issue under s.7.

(iii) Principles of Fundamental Justice

48. The principles of fundamental justice are the "basic tenets of our legal system whose function

is to ensure that state intrusions on life, liberty and security of the person are effected in a manner which comport with our historic and evolving notions of fairness and justice." Equality is an essential element of fairness. Because a fundamental justice analysis requires a substantive as well as procedural review, it is important to consider s.15 equality guarantees and the rights of complainants in a human rights proceeding. Like other guarantees in the *Charter*, the principles of fundamental justice are to be developed according to the particular context surrounding the s.7 right.

> *Rodriguez, supra*, at 619, 621 *per* McLachlin J., at 607 *per* Sopinka J.
> *BC Motor Vehicle Act Reference, supra,* at 503, 512-13, *per* Lamer J.
> *Morgentaler, supra*, at 70, *per* Dickson C.J.
> *Pearlman* v. *Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at 882. *per* Iacobucci J.

49. LEAF submits that while complainants in human rights processes do have security of the person interests, respondents may not. In contrast, the majority of the B.C. Court of Appeal held that while respondents pass the threshold of security of the person, complainants do not. The Court below further held that if only one party, the respondent, gets past that threshold, the principles of fundamental justice enable their rights to trump the mere interests of others, the complainants. That is not consistent with a purposive interpretation of the *Charter*.

> In interpreting and applying the *Charter* I believe that the Court must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has its object the improvement of the condition of less advantaged persons.

> *R. v. Edwards Books and Arts Ltd.*, [1986] 2 S.C.R. 713 at 779, *per* Dickson, C.J.
> *Blencoe, Case on Appeal*

50. It is respectfully submitted that the Court of Appeal erred in assuming that the principles of fundamental justice can ignore one party to a proceeding in favour of the other. A proper consideration of the context of the proceedings must include not only the person claiming the s. 7 *Charter* right, but also other persons involved in the proceedings, as well as the public interest.

> *R. v. Mills,supra* at ¶ 72 and 73
> Martin, S.L., "The Reluctance of the Judiciary to Balance Competing Interests: R. v. Morgentaler in the Ontario Court of Appeal", *Canadian Journal of Women and the Law*, Vol. 1, No. 2, 1986 537 at 539

51. Thus even if respondents in human rights cases, generally or in particular circumstances, cannot claim s. 7 rights, the fundamental justice owed to complainants must consider fairness owed to respondents. Such a conclusion is buttressed by consideration of *Charter* values. Even if respondents cannot claim *Charter* rights, given the nature of human rights proceedings, which were recognized as quasi-constitutional even before the *Charter*, the principles of administrative law by which commissions and tribunals administer the statute should be informed by the constitutional principles of fundamental justice as a matter of *Charter* values. In other words, the administration of human rights legislation must be such as to effectuate, not frustrate, its purpose. In utilizing *Charter* values, the focus would be on state obligations in administering the scheme, as opposed to the rights of parties, but all parties would indirectly reap the benefits through administrative law remedies.

Hill v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1169 - 1172 *per* Cory J.

52. In the context of determining whether state-funded counsel was required in child protection proceedings, this Court held that the principles of fundamental justice must take into account the following factors: "seriousness of the interests at stake, the complexity of the proceedings, and the capacity of the appellant".

G.(J.), supra at ¶ 75, *per* Lamer C.J.

53. Similarly, in determining the requirements of fundamental justice in the human rights context from a substantive equality perspective, at least the following factors must be considered:

a. The context in which the principles of fundamental justice are being raised;
b. The complainant's interest in obtaining a remedy in what may be the only available forum;
c. The effect of the proceedings on complainants and on others in the same environment as the complainants and respondents;
d. Whether a respondent has been so seriously prejudiced in his ability to defend the complaint that a fair hearing is no longer possible; and
e. The public interest in ensuring that contraventions of human rights legislation are identified and remedied.

54. LEAF agrees with the Respondent that an effects-oriented analysis of fundamental justice is required. LEAF submits that it is contrary to the principles of fundamental justice if complaints are arbitrarily dismissed in furtherance of administrative expediency.

Singh, supra at 218-219 per Wilson J.

55. If a remedy for discrimination comes very late, it may no longer be useful, particularly if the discrimination was ongoing during the human rights process. Delay may also cause a complainant to abandon an otherwise meritorious claim. On the other hand, the risk of "rushed justice" is that complex matters may be oversimplified or a systemic dimension of discrimination may be overlooked.

56. In assessing a respondent's argument about delay, it is important to assess the conduct of the respondent. For example, as occurred in this case, if a respondent raises a timeliness issue, with the object of having the case thrown out so that it is never heard on the merits, the issue will require time to resolve. If the respondent loses on the timeliness argument and the case proceeds, he cannot count the time spent arguing that the case should not be heard in his calculation of the alleged undue delay.

57. Complainants often suffer from the consequences of delay, and this should not be overlooked. Respondents may also suffer from the consequences of delay. As a matter of fundamental justice, justice delayed is justice denied. Keeping in mind the need to be context sensitive, the application of factors developed in the criminal jurisprudence to determine whether delay is unreasonable must be applied cautiously and with some diffidence for the different requirements of human rights proceedings.

58. Thus a different test than the one developed in *R.* v. *Morin* is needed to determine whether delay, for example, is so excessive as to offend principles of fundamental justice in the human rights proceeding. Factors to consider when assessing delay in the human rights process are: who was responsible for the delay and the basis for the delay; whether in some cases institutional delay may

responsible for the delay and the basis for the delay; whether in some cases institutional delay may be justifiable, given the complexity and the systemic nature of issues raised by the complaint; the scope and nature of the investigation required; and the application of any mediation and facilitation services to the complaint.

R. v. *Morin*, [1992] 1 S.C.R. 771 at 787-788 *per* Sopinka J.
Bryden P.,"Blencoe v. British Columbia (Human Rights Commission) A Case Comment", *UBC Law Review*, Vol. 33 No. 1 1999, 153-67 at 162 - 164

(c) A Stay is Not an Appropriate or Just Remedy in this Case

10

59. Even if the Respondent were able to establish a breach of s.7, it was nonetheless inappropriate for the Court of Appeal to grant a stay of a human rights proceeding. Since no argument was made under s.1, a breach of s.7 requires consideration of s.24(1) of the *Charter*. It is submitted that even assuming a breach of s.7, the remedy in this case is contrary to the *Charter* and specifically violates the s.15, 28 and 7 rights of complainants. The basic injustice of a stay remedy for complainants is that it has the same effect as a complete dismissal of the complaint, but without any consideration of the merits.

60. The purpose of human rights proceedings ought not to be frustrated by the remedy. A stay
20 directly affects the complainants' rights for whose benefit the proceeding was initiated and maintained. A stay thwarts both the goals of the scheme and access to justice for complainants: "the remedy from their standpoint creates a stark implacable injustice".

Kodellas, supra, at 166, *per* Bayda, C.J.S.

61. A stay is an extraordinary remedy and in human rights proceedings will rarely be "appropriate and just in the circumstances" within the meaning of s.24(1) of the *Charter*. The word "just" in s.24 requires that any remedy must be fair to all who are affected by it. The Court should identify those who are likely to be affected by the remedy and consider the nature and purpose of the proceedings
30 in a context sensitive way.

Kodellas, supra at 165 - 167 *per* Bayda, C.J.S.

62. The complainants are the most obvious class of persons who must be considered in any assessment of the justness of the remedy:

> It is axiomatic that a remedy that has the effect of frustrating the clear purpose of a remedial proceeding will directly affect the complainants for whose direct benefit the proceeding was initiated and maintained.

Kodellas, supra, at 165, *per* Bayda C.J.S.

63. The community at large is also affected by a stay. The reputation of the administration of justice is not advanced when the forum which provides redress for discrimination is summarily closed off.

64. In a case where a mother suffered a s.7 breach in child protection proceedings, this Honourable Court held that a stay that had negative repercussions for third parties, in that case the children, would be inappropriate and contrary to the purpose of the governing legislation. LEAF submits that the same applies to a stay of a human rights proceeding.

G.(J.), supra at ¶ 101

65. When remedies other than a stay are available, which might give the administrative body (commission or tribunal) a financial incentive to manage delay relate problems efficiently, granting a stay should be a rare and extraordinary remedy. An example of an alternate remedy is an expedited hearing. However, this Court should give appopriate direction to lower courts and tribunals so that expediting hearings are not dispropotionately applied to certain types of complaints.

66. In considering an appropriate or just remedy, it is important to assess the consistency in the position of the party seeking the remedy. The nature of the respondent's legal claim is that the *Charter* breach arises from delay in being able to clear his name, but the remedy sought and granted by the Court of Appeal - the elimination of the proceeding where such could take place - means he will in fact never be able to clear his name.

67. To grant a stay on the facts of the case at bar, when a respondent has experienced delay that is partly state caused and partly self caused, and not at all caused by the complainant, is to send a message not only of complete disregard for complainants but also of trivialization of the impact of sexual harassment on historically oppressed groups.

PART IV - NATURE OF ORDER SOUGHT

68. LEAF asks that the appeal be allowed, the stays be lifted, and the matters be remitted to hearings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30 day of November, 1999.

Jennifer L. Conkie

Dianne Pothier

PART V - AUTHORTIES

CASES

ARTICLES

Court File No. 26789

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

Appellants

- and -

ROBIN BLENCOE

Respondent

SUPREME COURT OF CANADA

On Appeal from the Court of Appeal for the Province of British Columbia

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FACTUM OF THE INTERVENER LEAF

Women's Legal Education and Action Fund
415 Yonge Street, Suite 1800
Toronto, ON M5B 2E7

JENNIFER L. CONKIE
DIANNE POTHIER

Tel: (604) 662-7544
Fax: (604) 662-7555

Solicitors for the Women's Legal Education and Action Fund

Court File No. 26789

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

THE BRITISH COLUMBIA HUMAN RIGHTS COMMISSION AND COMMISSION OF INVESTIGATION AND MEDIATION AND ANDREA WILLIS AND THE BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL.

APPELLANTS

- and -

ROBIN BLENCOE

RESPONDENT

ERRATA

Corrections to the FACTUM OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF), are as follows:

1. Paragraph 38 should read:

> It is well settled that not all defendants in all civil proceedings may claim a deprivation of security of the person, even though some level of anxiety is associated with any legal proceeding. For example, it is clear that a defendant in a breach of commercial contract case could not pass the security of the person threshold simply by virtue of being a defendant. A minimum threshold must be passed before security

of the person under s. 7 is engaged. In both *Morgentaler* and *G. (J.)*, this Honourable Court included "serious" state-imposed psychological stress and specifically noted that this impugned state action must have "a serious and profound effect on a person's psychological integrity". The deprivation of bodily integrity when life and death are literally at stake, as in *Rodriguez*, is an obvious interference with s. 7 threshold interest, as is the deprivation of liberty involved in potential incarceration. In *G.(J.)* and *B.(R.)*, it was held that the apprehension of a child also engaged the security interest of a parent. However:

> It is clear that a right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interrupted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.

2. Paragraph 58 should read:

Thus a different test than the one developed in *R. v. Morin* is needed to determine whether delay, for example, is so excessive as to offend principles of fundamental justice in the human rights proceeding. Factors to consider when assessing delay in the human rights process are: who was responsible for the delay and the basis of the delay; whether in some cases institutional delay may be justifiable, given the complexity and the systemic nature of issues raised by the complaint; the scope and

nature of the investigation required; and the application of any mediation and facilitation services to the complaint.