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 WILLIS

APPELLANTS
(Respondents)

AND:

ROBIN BLENCOE

RESPONDENT
(Petitioner)

AND:

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ATTORNEY GENERAL OF BRITISH COLUMBIA
BRITISH COLUMBIA HUMAN RIGHTS COALITION
WOMEN'S LEGAL EDUCATION & ACTION FUND (L.E.A.F.)
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MANITOBA HUMAN RIGHTS COMMISSION
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PART I
STATEMENT OF FACTS

1. The B.C. Human Rights Coalition ("the Coalition") was granted intervener status by the order of Binnie J. of April 28, 1999.

2. The Coalition is a community based organization with 75 member groups from across British Columbia. Its advocacy component represents the complainants in human rights proceedings in B.C. up to the point of hearing. The objects of the Coalition include the strengthening and promotion of human rights throughout British Columbia and Canada.

Affidavit of S. O'Donnell

3. The Coalition agrees with and adopts the statement of facts set out by the Appellant B.C. Human Rights Commission, and adds the following.

4. Chief Justice McEachern held that the complainants did not have legal rights under the statute, that they had interests or concerns, and that these interests were secondary to the legal rights of the Respondent:

> ...I wish to add that I have not overlooked the interests of the complainants. They, of course, are anxious to have their complaints determined. In such matters the law cannot accommodate everyone, and regrettable as it may be, the legal rights of a party must be given precedence over the concerns of others.

Appellants' Record, Vol IV, p.674

PART II
POINTS IN ISSUE

5. Does section 7 of the *Charter* apply to complainants and respondents in human rights proceedings?

6. If s. 7 applies, did the majority of the B.C.Court of Appeal err in its analysis of the principles of fundamental justice under s. 7?

7. Did the B.C.Court of Appeal err in failing to consider the rights of complainants and the public interest in its section 1 analysis of the Respondent's section 7 application?

8. Did the B.C.Court of Appeal err in failing to consider the rights of complainants in determining that a stay was a just and appropriate remedy under s. 24 (1) of the *Charter*?

PART 3
ARGUMENT

I. INTRODUCTION

Executive Summary

9. The Coalition is concerned about the impact of the lower court decision on the rights of complainants in human rights law and the ability of the law to protect and further the rights of disadvantaged groups. If upheld, the decision will negatively effect the application of human rights and the ability of the *B.C. Human Rights Code* (the "*Code*") to enforce some of its legislative purposes.

10. The complainants in the instant case have been effectively denied access and a remedy to address serious complaints of discrimination without any evidence that the respondent has been prejudiced in his ability to respond to the complaint.

11. The position of the Coalition in relation to s.7 can be summarized as follows: Section 7 should apply to human rights proceedings to determine the legal rights of both respondents and complainants. Life, liberty and security of the person should be broadly construed to include protection of dignity and privacy. The jurisprudence on section 11(b) of the *Charter* with respect to accused persons under the criminal law is contextually different from a consideration of the *Charter* rights of parties to a human rights complaint. In particular, different considerations arise in relation to the principles of fundamental justice, when considered in the context of human rights. The Court of Appeal erred in failing to contextualize the s.7 analysis, which would of necessity include full consideration of the legal rights of complainants under the human rights process.

12. The Coalition's position on the issue of remedy pursuant to s.24(1) of the *Charter* can be summarized as follows: any violation of s.7 can only be cured by a just and appropriate remedy that takes into consideration the legal rights of complainants as well as the legal rights of the respondents. The analysis of remedy in the context of civil proceedings that are

remedial in nature cannot be dealt with like a criminal matter. In the human rights context, a stay of proceedings should only be given in cases where unfairness is shown, and the prejudice cannot be cured by a lesser remedy.

The Legal Rights of Complainants

13. It is submitted that complainants in human rights proceedings have statutory quasi-constitutional rights under the *Code,* and constitutional rights under s. 7 and 15 of the *Charter.* The Court of Appeal was obliged to, and failed to, consider these rights in its analysis of the *Charter* issue before it.

14. In the majority decision below McEachern C.J. said:

> I wish to add that I have not overlooked the interests of the complainants. They, of course, are anxious to have their complaints determined. In such matters the law cannot accommodate everyone,and regrettable as it may be, the legal rights of a party must be given precedence over the concerns of others.
>
> Appellants' Record, Vol IV, p.674

15. With respect, this statement constitutes an error of law. Both respondents and complainants have express legal rights under the *Code*. Both are full parties to the complaint and both have the opportunity to be represented by counsel, to present relevant evidence, to cross-examine witnesses and to make submissions. It is wrong in law to minimize and dismiss complainants' rights by characterizing them as interests or concerns which are secondary to the legal rights of the respondent: *Code*, ss. 1 and 35(2).

16. It is the Coalition's position that the rights extended by statute to complainants in human rights proceedings attract constitutional protections. It is significant in this regard that the classes of individual protected under the *Code* are also protected under the equality provisions of the *Charter*. It is submitted that the equality principles protecting such groups must qualify and inform the legal debate in relation the s. 7 rights in issue: ss. 7, 8, 9 10, 11, 13, and 14 *Code*; see also Madam Justice L'Heureux-Dubé in *New Brunswick (Minister*

of Health and Community Services) v. G. (J.) [J.G.] (10 September 1999) New Brunswick Registry, (S.C.J. No. 47 File No. 26005) (hereafter *"G. (J)."*) at pp. 26-27.

17. This Court has recognized that human rights legislation plays a critical role in furthering equality for marginalised groups. Sopinka J. described such legislation as:

> .... the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.
>
> *Zurich Insurance Company v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321 at p.339.

18. In addition, it is well established that human rights legislation differs from other legislation in purpose and effect. In *Ontario Human Rights Commission v. Simpson Sears* [1985] 2 SCR 536 at 547, McIntyre J. said:

> Legislation of this type (human rights) is of a special nature, not quite constitutional but certainly more than ordinary–and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.

19. It is submitted that denying the complainants access to the tribunal and a legal remedy undermines their right to substantive equality. This Court has recognized that the ability of disadvantaged groups to access the human rights system to remedy discrimination is constitutionally protected under s. 15 of the *Charter.* Staying the proceedings ultimately deprives the complainants of access to the human rights process, and thus deprives them of their equality rights.

> *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497
> *Vriend v. Alberta* [1998] 1 S.C.R. 493

20. Equality guarantees are further triggered as some disadvantaged groups protected under human rights legislation (persons with disabilities and women) are particularly vulnerable to all forms of sexual exploitation, including harassment and assault. Denying these groups

access to a legal remedy to address this serious concern further adversely impacts them.

> F.Marshal & A.Vallaincourt, "*Changing the Landscape: Ending Violence - Achieving Equality" Final Report: The Canadian Panel on Violence Against Women* (Ottawa:1993) at pp.67-69

21. In addition, it is submitted that the class of disadvantaged individuals protected under human rights has a direct s. 7 security interest in working and living in an environment free of harassment. Such individuals also have a basic dignity interest in being able to pursue a legal remedy when confronted by harassing or discriminatory behaviour. Indeed, the reasoning that led the majority to recognise the s. 7 rights of the respondent also applies to determine the rights of complainants in this process.

> P. Bryden, "Blencoe v. British Columbia (Human Rights Commission): A Case Comment" *U.B.C. Law Review,* Vol.33:1, 211 (pending) at p.225.

22. Not only did the Court of Appeal err in failing to acknowledge the legal rights of the complainants, it further erred in imposing a hierarchy of rights when it allowed the rights of the respondent to trump the rights of the complainants. This runs directly contrary to the reasoning of this Court, which has firmly rejected the theory that one *Charter* right can automatically trump another. In *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, Lamer J. states at p.877:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individual come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both rights.

II SECTION 7 OF THE *CHARTER*: GENERAL APPLICATION

a) Does section 7 of the *Charter* apply to complainants and respondents in human rights proceedings?

23. This Court has clearly stated that government actors exercising administrative authority are subject to *Charter* scrutiny, and that section 7 applies in the non-criminal context. The Court

of Appeal made no error in concluding that section 7 applies to human rights proceedings.

G.(J.), supra

24. This Court has also confirmed that section 7 includes the protection of psychological and physical integrity, including privacy and dignity, under the security (Lamer C. J.) and liberty interests (Madam Justice L'Heureux-Dubé) of section 7. It is therefore submitted that the majority made no error in its conclusion that section 7 applies to protect the dignity and privacy interests of individuals engaged in human rights proceedings: *G. (J.)*, supra at pp. 16-18; pp.27-28.

25. However, the majority erred in limiting the scope of s. 7 in the instant case to address **only** the interests and rights of the respondent. It is submitted that s. 7 protects the liberty and security rights of **all** parties involved in human rights proceedings.

Appellants' Record, Vol IV, pp. 702-703

26. The s.7 right to liberty and security of person should be interpreted liberally. Any limiting factors are more appropriately considered under the principles of fundamental justice or under s.1.

27. A liberal interpretation of liberty and security of the person should acknowledge the complainants' rights to a legal remedy to address harassment and discrimination and constitutionally protect these interests subject to the principles of fundamental justice. While the majority decision held that liberty and security of the person applies to respondents, it erred in failing to consider the complainants rights to dignity and security of person under s.7.

28. In determining the scope of s.7, the majority relied on the reasoning of Madame Justice L'Heureux-Dubé in *R. v. O'Connor* [1995] 4 S.C.R. 411, (which recognized that complainants have protections under s.7 in the criminal process) to support the respondent's legal rights. With respect, it is inconsistent to adopt this reasoning and, at the same time,

dismiss any notion that the complainants in human rights proceedings have any legal rights at issue. Professor Bryden, supra, at p.225 comments in this regard:

> It is not obvious why Chief Justice McEachern refers to the interests of the complainants as "concerns" rather than as "rights". The complainants were, after all, asserting claims to legal rights protected under human rights legislation. Moreover, it seems strange that the Chief Justice was willing to rely on Madam Justice L'Heureux-Dube's findings in O'Connor that complainants in sexual assault proceedings have interests protected by section 7 for the proposition that the respondent in a sexual harassment proceeding enjoyed similar protection, while ignoring the possibility that parallel reasoning should lead to the conclusion that the interests of complainants in sexual harassment proceedings were also encompassed in the protection of human dignity offered by section 7.

b) Did the majority decision err in its analysis of the principles of fundamental justice under s.7?

29. The legal rights of complainants in human rights proceedings arise in the s.7 analysis on two additional levels: as necessary considerations both under the principles of fundamental justice and under section 1 of the *Charter*.

30. The Coalition does not dispute that the respondent's s.7 rights have been triggered in the instant case. However, it is the Coalition's position that any violation suffered by the Respondent in relation to liberty or security of the person is justified under proper consideration of the principles of fundamental justice. It is respectfully submitted that the majority erred in the analysis and application of these principles to the case at bar.

31. The question of whether the principles of fundamental justice have been violated in the context of quasi- constitutional administrative proceedings is complex, and requires a textured analysis. With respect, the majority failed to conduct an inquiry which fully considered and balanced the range of interests raised..

32. Further, the Coalition submits that the majority erred in collapsing the two aspects of the s. 7 analysis into one - when it determined that the degree of stress suffered by the Respondent, which justified meeting the first arm of the test, also could not be in accordance with fundamental justice. MacEachern C.J. stated:

> "In my view, however, undue delay and the continued prejudice to privacy and human dignity already described cannot be in accordance with the principles of fundamental justice."
>
> Appellant's Record, Vol. IV p.674

33. The majority erred in focussing its consideration of the analysis of the principles of fundamental justice purely on the individual circumstances of Mr. Blencoe. It is well established that the principles of fundamental justice reflect a broader interest than the rights of the individual. Even within the criminal justice system, these principles include consideration of the protection of the public interest, the judicial system, and of complainants themselves:

> ...the principles of fundamental justice, including the "fairness of trial", necessarily reflect a balancing of societal and individual interests. As such, they reflect both individual and societal interests. In my view, it is undisputable that the preservation of the integrity of the judicial system is one of these interests.
>
> Per Madame Justice L'Heureux-Dubé in *O' Connor, supra, at pp.458-459.*
>
> It has been suggested that s.7 should be viewed as concerned with the interest of complainants as a class of security of the person and to equal benefit of the law...such an approach is concerned with the view that s. 7 reflects a variety of societal and individual interests.
>
> per Madame Justice McLachlin in *R. v. Seaboyer [1991] 2 S.C.R. 577* at pp.603-604.

34. The above comments arise in the context of criminal law. It is submitted that where, as here, the principles of fundamental justice are considered in the context of human rights proceedings, the rights of society and the rights of complainants (as full parties to the process) take on heightened importance, and should weigh heavily into the analysis.

35. Thus the Coalition fundamentally disagrees with the respondent's assertion that, in any case involving delay, once a breach of life, liberty or security is found, the inquiry is simply one into the reasons for the delay. The Respondent relies on principles developed in the criminal context for s. 11(b) violations (per respondent's factum Paras 11, 26). This Court has always

cautioned against importing criminal considerations into other contexts when determining the principles of fundamental justice.

Mooring v. Canada (National Parole Board) [1996] 1 S.C.R. 75 at pp.97-98.
Pearlman v. Manitoba Law Society [1991] 2 S.C.R. 869 at pp. 884-884.
R. v. Wholesale Travel Group Inc. [1991] 3 S.C.R. 154 at pp.224-227.

36. It is submitted that a breach arising from stigma and delay under s. 7 in the context of remedial legislation cannot properly be determined under criminal principles. Bayda J. states in his dissenting reasons in *Saskatchewan Human Rights Commission v. Kodellas* (1989) 60 D.L.R. (4th)143 (Sask. C.A.) at p. 158 in this regard:

> In any event the *Mills* test by Lamer J. was designed for a criminal case and for an assessment of unreasonable delay in the context of 11(b) of the *Charter*. It was not designed for a case of remedial proceeding under a Human Rights Code and for an assessment of unreasonable delay in the context of s. 7

37. The principles of fundamental justice applied in the context of human rights legislation include, *inter alia,* consideration of the rights of all parties, as well as the purpose, intent, and nature of the statute. By collapsing the analysis into one step, and only considering the impact on the individual rights of Mr. Blencoe, the appeal court failed to properly apply the full consideration of the principles of fundamental justice.

38. Other social and individual rights at issue under the principles of fundamental justice include the following: the legislative intent to protect the equality and security rights of disadvantaged individuals, and the legal rights of innocent parties to pursue their statutory rights in the only forum available to them.

Seneca College v. Bhadauria [1981] 2 S.C.R. 181

39. It is submitted that the legal rights of complainants and the public interest in seeing human rights legislation fulfill its purpose are important basic tenets of our legal system which outweigh any prejudice suffered by the respondent under the principles of fundamental justice due to delay, **unless** the prejudice suffered would render the proceedings unfair: per La Forest J. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315 (hereinafter "*B. (R.)*") at pp. 374-381.

c) Did the Court of Appeal err in failing to consider the rights of complainants and the public interest in its section 1 analysis of the respondent's Section 7 application?

40. It is respectfully submitted that any s. 7 violation is justified both under the principles of fundamental justice and under s.1. However, even if the s. 7 violation was not justified under the principles of fundamental justice, it is submitted that, given the third party rights in issue, and the nature of the legislative scheme, this is one of the rare cases where such violation would be upheld under s. 1.

G.(J.) , supra, at p.23.

41. While this court has continually affirmed the *Oakes test*, it has been obliged to caution against a mechanistic application of its components. It must be applied flexibly so as to achieve a proper balance between individual rights and community needs. This application involves close attention to context: *Ross v. School District No. 15* [1996] 1 S.C.R. 826 at p.872

42. It is submitted that the majority of the appeal court erred in failing to apply s. 1 contextually with full consideration of the other rights and values in issue. Rather, the majority dealt with the s. 1 analysis in one brief sentence, which again focussed only on the particular circumstances of Mr. Blencoe:

> In my view, however, undue delay and the continued prejudice to privacy and human dignity already described cannot be in accordance with the principles of fundamental justice. The same may be said for any reasonable application of s. 1 to the facts of this case.
>
> Appellants' Record, Vol IV, p.704

43. It is submitted that promoting discrimination free environments, and having a legal system that can determine human rights, and remedy discriminatory conduct, are pressing and substantial objectives under s. 1.

44. Further, this court has stated that the *Charter* should not be used by more advantaged groups to roll back the hard won gains of disadvantaged groups. In the instant case, the whole

purpose of the legislation is to eradicate inequality suffered by disadvantaged groups. The Court of Appeal failed to consider and balance this important aspect in its s. 1 analysis.

Ross, supra, p.875.

45. It is submitted that had the Court of Appeal applied the full and proper analysis, it would have found that any infringement on the respondent's individual rights is justifiable under the minimal impairment and proportionality analysis of s. 1.

d) Did the B.C.Court of Appeal err in failing to consider the rights of complainants in determining that a stay was a just and appropriate remedy under s. 24 (1) of the *Charter*?

46. In the event this Court determines that the Respondent has suffered a violation which is not justifiable, we submit that a stay of proceedings is not a just and appropriate remedy pursuant to s. 24 of the *Charter*. Again it is our position that the determination of remedy is a textured and complex process, particularly in the context of human rights legislation which governs the rights of other parties. Again it is respectfully submitted that the majority failed to apply a proper analysis to the complex issue before it. In determining remedy the majority imported considerations more appropriate in a criminal context into a civil matter. In doing so, it failed to give proper (or any) consideration to the legal rights of third parties.

47. There is no dispute in the instant case that the complainants were innocent third parties whose actions did not contribute to the delay. The draconian step of staying proceedings completely deprives them of the only legal remedy available to them. Bayda J.'s comments have equal application to the facts of this case:

> It is axiomatic that a remedy which 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,. The complainants are, therefore, the first class of person who must be considered in any assessment of the justness of the remedy.
>
> *Kodellas,* supra at p.165

48. Remedies, like rights, must be construed contextually. What is appropriate to the analysis of remedy in the criminal context is not appropriate in the context of this legislation. In the instant case the contextual considerations that the court failed to address included the following: the legal rights of complainants; the nature and purpose of the legislation; the public interest in seeing the purpose fulfilled; and the ultimate consequences to the Respondent of submitting to the process. This Court has recognized that the latter point is relevant to the determination of whether a stay is the appropriate remedy in the non-criminal context:

> Perhaps the first thing to notice is that what is at stake for the appellants in this case is arguably different from what is at stake for the typical accused in the typical criminal case. The state is trying to deprive the appellants of their citizenship and not for their liberty. Canadian citizenship is undoubtably a very "valuable privilege"....For some, it may be valued as highly as liberty. Yet for most, liberty is more valuable still. **Therefore, the interests on the appellants side of the balance do not weigh so heavily as they would if the proceedings were purely criminal in nature.**
>
> *Canada (Ministry of Citizenship and Immigration) v. Tobiass* [1997] 3 S.C.R. 391 at. P. 435.

49. Further, this Court has consistently refused formalistic application of legal principles (such as the doctrine of *functus officio*) to administrative tribunals. Flexibility is the key. It is submitted that this Court should apply the same flexibility when considering *Charter* remedies within the administrative context.

> *Chandler v. Alta. Assoc. of Architects* [1989] 2 S.C.R. 848 at p.862.

50. Moreover, this Court has determined that s. 11 principles do not automatically apply in s. 7 delay cases, even **within** the criminal context.

> *R. v. Potvin*, [1995] 2 S.C.R. 60
> See also *Kodellas,* supra at p. 169

51. It is submitted that this Court is not constrained to follow the reasoning of criminal cases (whereby the minimal remedy is a stay) in the context of a human rights case. As above, there are critical distinctions between human rights and criminal cases, not the least of which is the legal rights of the complainant to access the system. The Court must have the flexibility to make a determination which takes into account (and does not undermine) those

rights and the purpose of the legislation. Remedy must be approached sensitively and fairly, with full consideration of all interests:

> It is important to recognize that the *Charter* has now put into judge's hands a scalpel instead of an axe – a tool that may fashion more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual , societal interests, and the integrity of the judicial system;
>
> Madame Justice L'Heureux-Dubé in *O'Connor,* supra at p.461

52. As a general principle, this Court should be extremely reluctant to fashion a remedy which comes at the expense of the rights of other parties. This general principle should have heightened application in the context of quasi-constitutional remedial legislation which impacts the statutory rights of disadvantaged groups. This impact is described by Bayda J. p.166 in *Kodellas,* supra, at p.166:

> An order preventing the inquiry leaves the complainants entirely out in the cold despite their innocence. The remedy from their standpoint creates a stark, implacable injustice.

53. Further, this Court recently stated that a stay for a section 7 violation will **not** be the appropriate remedy where granting it could affect the rights of vulnerable third parties. It is respectfully submitted that the same considerations arise here: *G.(J.)* , supra, at p.23.

54. The flexible approach taken to the issue of remedy by Bayla J. in *Kodellas*, supra, should be preferred in this case. The determination of a just and appropriate remedy in the context of human rights must include consideration of justice for the complainants and the general public, as well as the respondent:

> The remedy under this section must possess both of the specified qualities; appropriateness and justness. Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself–a remedy "to fit the offence" as it were. I suggest remedy that, from the perspective of the person whose rights was violated, will effectively redress the grievance brought about by the violation. The quality of justness, on the other hand, has a broader scope of operation. It must fill a more extensive set of criteria than the quality of appropriateness. To be just a remedy must be fair to all who are affected by it. *Kodellas*, supra at p..762

55. The above analysis accords with a purposive analysis of *Charter* rights, particularly as these arise in a civil multi-party context.

56. It is submitted that in the context of human rights legislation that a stay should be the result only in the clearest of cases, where no lesser steps can be taken to minimize the prejudice: *O' Connor*, supra.. This Court considered this criteria in the regulatory context in *Tobiass*, supra at pp. 428-429 as follows:

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>
> > (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome, and
> >
> > (2) no other remedy is reasonably capable of removing that prejudice.
>
> .....
>
> After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dube J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings."..... We take this statement to mean that there may be instances in which it will be appropriate to balance the interest that would be served by the granting of a stay against the interest society has in having final decision on the merits.

57. *Tobiass,* supra, dealt with citizenship proceedings under the *Citizenship Act*. As such, there was no *lis* between private parties. Further, the legislative context was ordinary, not quasi-constitutional. The case at bar raises the additional important considerations of the quasi-constitutional nature of the process, the public interest, and the legal rights of other parties to the process. It is submitted that the appropriate test for considering remedy in the context of human rights proceedings should be as follows. The onus will be on the respondent to establish **all** of the following:

a) The prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated through the conduct of the trial, or by its outcome;

b) No other remedy is reasonably capable of removing that prejudice;

c) The interest served by granting the stay outweighs the interest that society has in having the matter proceed; and

d) The interest served by granting a stay outweighs the interest of the complainants in having their legal rights determined.

58. It is submitted that a stay will rarely be an appropriate or effective remedy to cure stigma in the human rights context. In the instant case, Mr Justice Lambert questioned whether the stigma suffered by the respondent in the instant case could ever be relieved, regardless of the outcome of the matter: Appellant's Record, Vol. 4, p.670. And Professor Bryden, supra questions the effectiveness a stay of proceedings will have on curing stigma. At pp. 425-426:

> It seems to me that both of these approaches to the remedial issues the Blencoe case raises are problematic. While delay undoubtably contributed to the stresses that Mr. Blencoe and his family experience as a result of the proceedings, I believe that much of the difficulty (and media interest) also arose from the uncertainty about whether the harm to his reputation that flowed from the complaints was justified. Mr. Blencoes' choice of remedy (and the majority's acceptance of his choice) does nothing to address this issue.

59. A further important consideration in relation to remedy in human rights cases, is that the complaint will often (as it will here) proceed against the employer, even if it is stayed against the individual. Again one has to question what the individual gains by a stay in such case, as he will likely be called to give evidence in the public proceeding in any event. Staying the proceedings in such circumstances is no guarantee that the prejudice to the individual (in terms of media coverage, loss of privacy, and stress pending the hearing) will end.

i) Damages are an appropriate remedy.

60. It is submitted that other lesser remedies more appropriate and just can be applied to address the prejudice. As above, the onus should be on the respondent to establish that a stay is the

only remedy capable of removing the prejudice.

Per Bayda J. in *Kodellas*, supra..

61. In the instant case, for example, damages would go much further to addressing the harm suffered by Mr. Blencoe than staying the proceedings would. As above, a stay is unlikely to remove the stigma Mr. Blencoe suffers. Any loss of reputation which may be determined to accompany the stigma cannot be remedied at law. The reputation of an individual once lost, can never be regained through legal remedy.

62. However, an award of damages could compensate the respondent for the stigma suffered as well as for any financial loss incurred as a direct result of the delay. Thus an award of costs would be fairer to the complainants, and fairer to putting the respondent back on even footing.

63. In addition, damages would put the blame squarely where it should lie– on the government actors who caused the delay. It would not penalize innocent third parties.

P. Bryden, supra at p.236;
K.Roach, *Constitutional Remedies In Canada* (Aurora, Ontario: *Canada Law Book Inc.*,1998) at pp.11-1 to 11-44.
Kodellas, supra, p.163

ii) Other lesser remedies.

64. In addition to damages, and for illustrative purposes only, one or more of the following measures (alone or in combination) could be applied to remedy the violation:

a) An order that the commission pay the costs of seeking out witnesses, or pay other costs attributable to the delay.

b) An order to expedite the hearing.

c) The court might consider a **time limited** publication ban, pending the hearing of the complaint: *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] 2 S.C.R. 97, per Cory J. at p. 169, and Madam Justice L'Heureux-Dubé, at pp. 123-126.

65. It is submitted that remedies must be approached flexibly to ensure that human rights legislation is allowed to fulfill its statutory purpose, and to ensure that the rights of innocent third parties are protected. Thus a stay should only be given in the clearest of cases, where lesser remedies have been exhausted, and unfairness would result if the matter proceeded. This would be just and appropriate to all concerned.

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PART IV
NATURE OF ORDER REQUESTED

66. The intervener takes no position on the disposition of this matter.

All of which is respectfully submitted this 27th day of October, 1999.

Frances Kelly & James Pozer
Counsel for the Intervener,
British Columbia Human Rights Coalition

PART V

TABLE OF AUTHORITIES

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