IN THE SUPREME COURT OF VICTORIA AT MELBOURNE **S CI 2013 03970**
COMMON LAW DIVISION

JUDICIAL REVIEWS AND APPEALS LIST

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
(On behalf of David Watson)

Plaintiff

and

MAGNUS KABA

First Defendant

and

THE MAGISTRATES' COURT OF VICTORIA

Second Defendant

OUTLINE OF SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

A. INTRODUCTION

1. This matter raises two principal issues:

   1.1. Police officers randomly and without cause stopped a vehicle in which the First Defendant was a passenger. Did the officers have power to conduct a random vehicle stop, either under the *Road Safety Act 1986* or at common law? If not, should evidence obtained as a consequence of the police officers' unlawful conduct be excluded pursuant to s 138 of the *Evidence Act 2008*?

   1.2. After he left the car, the officers asked the First Defendant several times to provide his name and address and he declined to do so (using colourful language). The police had no power to require the accused to provide his name and address to police. Were the repeated requests by police for a name and address unlawful and/or improper? And if so should evidence obtained as a consequence be excluded pursuant to s 138?

2. The *Charter of Human Rights and Responsibilities Act 2006* bears on each of these issues and the Victorian Equal Opportunity and Human Rights Commission intervenes, pursuant to s 40 of the *Charter of Human Rights and Responsibilities Act 2006,* to make submissions on the relevance and application of the Charter.

3. The Charter questions in these proceedings,[1] and the Commission's short answers to them, are as follows:

   (a) Whether, interpreted in light of s 32 of the Charter, s 59 of the Road Safety Act 1986 *confers a power on members of the police force to stop a motor vehicle, including for the purpose of checking licence and registration details, without first having cause to suspect the commission of an offence.*

   Answer: No. Section 59 expressly imposes a duty on drivers, but does not expressly confer a power on police officers to stop a motor vehicle. Having regard to principles of statutory interpretation, including s 32 of the Charter, and the Charter rights of freedom of movement (s 12) and freedom from arbitrary detention (s 21(2)), no power to stop ought be implied into s 59.[2]

[1] Set out in the Notice to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission dated 16 August 2013.

[2] Explained at [5]-[84], below. And see First Defendant's submissions at [7.1]. Contrast Plaintiff's submissions at [2(a)], [17]-[33].

(b) Whether it was a breach of the First Defendant's right to privacy and/or unlawful pursuant to s 38 of the Charter for the police to request the driver of a vehicle to consent to a search of the vehicle.

> **Answer: It is not appropriate to answer this question.** This is because the Magistrate made no findings on the search.[3]

(c) Whether it was a breach of the First Defendant's right to privacy and/or unlawful pursuant to s 38 of the Charter for the police to ask the First Defendant for identification when he left the vehicle and proceeded to move off.

> **Answer: Yes**. The repeated demands for the First Defendant's name and identification was not authorised by the Act or by the common law and constituted an unlawful and arbitrary interference with his privacy. That breach was not justified under s 7(2) of the Charter.[4]

(d) Whether the actions of Senior Constable Randall and Constable Andrews in stopping the vehicle unjustifiably breached the right to freedom of movement of the First Defendant and the driver of the vehicle and subjected them to arbitrary detention, contrary to the provisions of s 21(2) of the Charter.

> **Answer: Yes**. The vehicle stop unjustifiably breached the right of the First Defendant (and the driver) to freedom of movement.[5]

(e) Whether the police officers gave proper consideration to the First Defendant's rights in accordance with s 38 of the Charter.

> **Answer: No.** "Proper consideration" of rights required that the officers actively turn their minds to the possible impact of their decisions on the human rights of the First Defendant and the driver. There was no evidence that they did so.[6]

4. The first of these questions requires consideration of s 32 of the Charter (together with the relevant substantive rights). The remaining questions require consideration of s 38 of the Charter (together with the relevant substantive rights).

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[3] Explained at [100]-[102], below. See Plaintiff's submissions at [2(d)]. Contrast First Defendant's submissions at [42]-[43].

[4] Explained at [90]-[102] and [103]-[109], below. See First Defendant's submissions at [7.2], [58]. Contrast Plaintiff's submissions at [2(e)], [39].

[5] Explained at [90]-[102] and [110]-[112], below. See First Defendant's submissions at [7.2], [56]. Contrast Plaintiff's submissions at [2(f)], [38].

[6] Explained at [113]-[114], below. See First Defendant's submissions at [7.3], [63]-[64]. Contrast Plaintiff's submissions at [2(g)], [40]-[42].

B. SECTION 32

5. Section 32(1) of the Charter states: *'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'* Before turning to the application of s 32 in this case it is necessary to make some general points about the operation of s 32.

6. In *Nigro v Secretary, Department of Justice* the Court of Appeal explained that s 32 does not establish a new paradigm of interpretation. Rather, it "applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application".[7]

7. The principle of legality, considered most recently by the High Court in *Lee v New South Wales Crime Commission*, requires that a legislative intention to infringe rights must be expressed with "irresistible clearness", and general words will rarely suffice.[8] Further, where the words of a statute are ambiguous such that two (or more) constructions are open, the principle of legality requires that the construction that least infringes rights ought to be adopted. "A statute said to affect important common law rights and procedural and other safeguards of individual rights and freedoms will be construed 'as effecting no more than is strictly required by clear words or as a matter of necessary implication'."[9]

8. Section 32(1) of the Charter operates in broadly the same way: "irresistible clearness" is required before legislation is construed so as to limit or interfere with Charter rights. And just as "ordinary principles of construction indicate that 'an interpretation should be favoured that "produces the least infringement of common law rights"',[10] s 32(1) of the Charter requires legislation to be construed in a manner that least interferes with the human rights protected by the Charter.[11]

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[7] [2013] VSCA 213 at [85].

[8] *Lee* [2013] HCA 39 at [308] (Gageler and Keane JJ), quoting *Maxwell on the Interpretation of Statutes*, 4th ed (1905) at 122.

[9] *Lee v New South Wales Crime Commission* [2013] HCA 39 at [29] (French CJ), and the authorities cited therein.

[10] *WBM v Chief Commissioner of Police* [2012] VSCA 159.

[11] *WBM v Chief Commissioner of Police* [2012] VSCA 159 at [94]: "As a consequence of s 32(1) of the Charter, if a statutory provision interferes with an identified human right, then an interpretation must be preferred that does not interfere with that right or least interferes with that right, provided it is not contrary to statutory intent." See also *Slaveski v Smith* (2012) 34 VR 206 at [24]: "If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question."

9. However, the application of s 32(1) is not without difficulty. The decision of the High Court in *Momcilovic v The Queen*[12] did not "yield a single or majority view as to what is meant by interpreting a statutory provision in a way that is compatible with human rights".[13] In particular, as explained in *Slaveski,* the High Court's decision in *Momcilovic* yields no *ratio* in relation to whether, in applying s 32(1), s 7(2) of the Charter has any role to play.[14]

   9.1. Three justices held that s 7(2) has no role to play in relation to s 32(1).[15]

   9.2. Three justices held that s 7(2) informs the task mandated by s 32(1).[16]

   9.3. Heydon J (in dissent) held that ss 32(1) and 7(2) were invalid; but stated that, if valid, s 7(2) would inform the interpretative task under s 32.[17]

10. The Court of Appeal in *Momcilovic* had taken the same view as French CJ, Crennan and Kiefel JJ. However, the decision of the Court of Appeal was set aside by the High Court and thus the Court of Appeal's judgment is not binding.[18] Although the Court of Appeal has noted the lack of binding authority on the s 7(2) – s 32 issue, it has not yet resolved the issue.[19] The matter is thus at large.

Question (a) Whether, interpreted in light of s 32 of the Charter, s 59 of the Road Safety Act confers a power on police to stop a vehicle, including for the purpose of checking licence and registration details, without cause.

11. Both the Charter Questions and the Plaintiff's submissions are addressed generally to s 59 of the *Road Safety Act*. However, s 59 contains various sub-sections, most of which clearly do not confer a power on police to stop a vehicle randomly and without cause. The Commission contends that the only sub-sections possibly capable of being interpreted as conferring such a power are s 59(1)(a) and s 59(5). It is thus those sub-sections that are to be construed, in light of their context and purpose, the Charter and the principle of legality.

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[12] (2011) 245 CLR 1.

[13] *WK v R* (2011) 33 VR 516 at [55].

[14] (2012) 34 VR 206 at [21]. See also *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91, [29]-[30].

[15] (2011) 245 CLR 1 at [35] (French CJ), [572]-[574] (Crennan and Kiefel JJ).

[16] (2011) 245 CLR 1 at [166] (Gummow J, with whom Hayne and Bell JJ agreed on this issue).

[17] (2011) 245 CLR 1 at [408]-[409], [439].

[18] *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320 at [32], [70]. The Court of Appeal has left open the question whether it is bound to follow its earlier judgment in *Momcilovic* following the High Court's decision. In *Noone* Nettle J expressed the view the Court of Appeal ought to follow its earlier decision in *Momcilovic*, whereas Warren CJ and Cavanough J doubted that proposition.

[19] *WBM* [2012] VSCA 159 at [122]; *Slaveski* [2012] VSCA 25 at [22]; *Noone* [2012] VSCA 91, [31].

12. Section 59(1) is directed at requiring certain behaviour from drivers of motor vehicles, namely to stop the vehicle (see s 59(1)(a)) and to obey directions given under s 59(5) (see s 59(1)(b)). Section 59(1)(a), when engaged, limits the freedom the driver of the vehicle otherwise has to continue driving (ie to move along the road). And the directions that may be given under s 59(5) may also limit the driver's freedom of movement, potentially to a greater degree than s 59(1)(a) (for example, a direction to remain in the vehicle once it has stopped). As a consequence, the Commission contends that the following Charter rights are engaged and hence relevant to the construction of s 59(1) and 59(5):

    12.1. the right to freedom of movement, protected by s 12 of the Charter; and

    12.2. the right to liberty, including a right not to be arbitrarily detained, protected by s 21(1), (2) and (3) of the Charter.

13. There is some degree of overlap between these rights, in that where a person is detained his or her freedom of movement is necessarily also limited; however, the overlap is not complete — it is possible for a person's freedom of movement to be limited in circumstances not amounting to deprivation of liberty or detention.

C. NATURE AND SCOPE OF RIGHTS UNDER ss 12 AND 21

14. Section 12 of the Charter provides that:

> Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

15. Section 21 of the Charter relevantly provides:

> (1) Every person has the right to liberty and security.
> (2) A person must not be subjected to arbitrary arrest or detention.
> (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

16. The scope of the rights protected by the Charter is to be identified "broadly and in a non-technical sense".[20]

Victorian authorities on ss 12 and 21

17. Sections 12 and 21 were considered by Bell J in *Re Kracke and Mental Health Review Board*, a case concerned with detention of persons with a mental illness. He explained the right to freedom of movement protected by s 12 as follows:[21]

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[20] *DPP v Ali (No 2)* [2010] VSC 503 at [29]. See also *Antunovic v Dawson* (2010) 30 VR 355 at 71; *Re Application under the Major Crimes (Investigative Powers) Act* (2009) 24 VR 415 at 434.

[21] (2009) 29 VAR 1 at [588] (emphasis added).

> The purpose of the right to freedom of movement in s 12 is to protect the individual's right to liberty of movement within Victoria and their right to live where they wish. **It is directed to restrictions on movements which fall short of physical detention coming within the right to liberty in s 21.** The fundamental value which the right expresses is freedom, which is regarded as an indispensable condition for the free development of the person and society.

18. In relation to the right to liberty protected by s 21, after analysing relevant case law from comparative jurisdictions, his Honour described the right as follows:[22]

> The purpose of the right to liberty and security is to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. It is directed at all deprivations of liberty, but not mere restrictions on freedom of movement. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc. The difference between a deprivation of liberty and a restriction on freedom movement is one of degree or intensity, not one of nature and substance.

19. Consistently with those remarks, Tate JA said this in *Victoria Police Toll Enforcement v Taha*:[23]

> The right to liberty has long been recognised at common law as one of a person's most fundamental rights. It has been described as 'the most elementary and important of all common law rights.' The right is engaged in any case in which a person is at risk of imprisonment.

20. In *Antunovic v Dawson*[24] Mrs Antunovic (who had a mental illness) was required to live at a community care unit and was required to spend the night at the unit, although she could go out during the day. Bell J held that her freedom of movement was limited, and found it unnecessary to decide whether that form of restraint amounted to a restriction on liberty within the meaning of s 21.

21. In *DPP (Vic) v Piscopo*[25] a driver had refused to accompany police to a police station for a breath test when required to do so under s 55 of the *Road Safety Act*. Kyrou J held that he was bound by the authorities to the effect that the requirement in s 55 did not amount to detention for the purposes of s 21(2) of the Charter.[26] In so holding he expressly declined to follow Canadian authorities on detention (which are discussed in greater detail below).[27] However, he held that a requirement under s 55 did involve a "deprivation of liberty" within the meaning of s 21(3), again following *Hrysikos* and *Mastwyk*. He further concluded that the interpretation of s 55

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[22] Ibid at [664].

[23] [2013] VSCA 37 at [197] (footnotes omitted).

[24] (2010) 30 VR 355 at [76].

[25] (2010) 201 A Crim R 429.

[26] Ibid at [83]. The Court of Appeal authorities to which His Honour referred were *Hrysikos v Mansfield* (2002) 5 VR 485 — decided before the Charter was enacted — and *Mastwyk v DPP (Vic)* (2010) 200 A Crim R 563, where the majority did not refer to the Charter.

[27] Ibid.

that he adopted — which required the motorist to be informed of the temporal limitation in s 55 — was compatible with the right in s 21(3).

22. His Honour's judgment was overturned on appeal, with limited consideration of the Charter issues. The Court of Appeal found it unnecessary to decide whether s 55 involved a deprivation of liberty for the purposes of s 23(1) because it concluded that both the possible constructions of s 55 were compatible with human rights.[28]

Use of comparative material in interpreting and applying Charter rights

ICCPR Jurisprudence

23. Section 32(2) of the Charter expressly countenances the use of comparative material in the interpretation of statutory provisions, including the Charter itself. The rights protected by the Charter were in large measure modelled on the rights protected by the International Covenant on Civil and Political Rights (**ICCPR**); and thus that instrument, and decisions relating to that instrument, can be of particular assistance in construing Charter rights and s 59.

24. Section 12 is modelled on Article 12(1) of the ICCPR, which provides that:

> Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. …

25. Subsections 21(1)-(3) are modelled on Article 9(1) of the ICCPR, which provides (in near identical terms):[29]

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

26. Because ss 12 and 21 are framed in substantially the same terms to equivalent Articles in the ICCPR, the views of the UN Human Rights Committee can assist in understanding the nature and scope of the rights protected by ss 12 and 21.[30]

27. The Committee's jurisprudence and commentary draws a distinction between restrictions that limit a person's movement and those that deprive a person of liberty, stating that:[31]

> Liberty of person in Article 9 refers to freedom from physical confinement, not a general freedom of action. Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under Article 12.

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[28] (2011) 210 A Crim R 126 at [62]-[63].

[29] Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill*, 16.

[30] *Slaveski v Smith* (2012) 34 VR 206 at [52].

[31] Draft General Comment No 35 (2013), [5].

28. This distinction is illustrated by *Karker v France*,[32] where a recognised political refugee suspected of supporting a terrorist movement was subject to residence restrictions under a lawful order for national security reasons. The Committee held that an Article 9 complaint was inadmissible because the residence restrictions did not amount to a deprivation of liberty. However the Article 12 complaint was admissible (though it was dismissed on the basis of Article 12(3).[33]

29. The Committee has not considered Articles 9 or 12 in the context of vehicle stops by the police or other state agents.

The European Convention on Human Rights

30. Article 2 of Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a right to freedom of movement in the following terms:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
> 3. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

31. Article 2(1) is in materially similar terms to s 12 of the Charter. And Articles 2(2) and 2(3) resemble, to some extent, s 7(2) of the Charter.

32. However, the right to liberty and security in Article 5(1)(a)-(f) of the European Convention is in materially different terms from s 21 of the Charter:

> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; …

[32] Communication No 833/98 (CCPR/C/70/D/833/1998). See also *Celepli v Sweden* Communication No 456/1991 (CCPR/C/51/D/456/1991).

[33] Communication No 833/98 (CCPR/C/70/D/833/1998) at [8.5]-[8.6], [9.2].

33. Thus while broad statements of principle in the Article 5(1) authorities are useful in understanding the nature of s 21, the interpretation of the scope of Article 5(1) in these cases is less helpful — and must be treated cautiously — because of significant distinctions between the protections.

    33.1. First, unlike s 21 of the Charter, Article 5(1) of the Convention does not contain an express protection against arbitrary detention.

    33.2. Second, Article 5(1) specifies an exhaustive list of justifiable limitations on the right not to be deprived of liberty; and the European Convention has no general limitation provision equivalent to s 7(2). This has led to some Article 5(1) decisions (from both Strasbourg[34] and the UK courts[35]) addressing proportionality issues in the assessment of the scope of the right to liberty, an approach that has led to a narrow interpretation of the right. This approach is inappropriate in the Victorian context where proportionality issues are not relevant in determining the scope of the right; rather, they are relevant later in the analysis, at the s 7(2) stage.[36] The Article 5(1) decisions that do not consider the proportionality of the limit in determining the scope of the Article 5(1) — such as *Gillan and Quinton v United Kingdom*[37] — are more relevant in understanding the scope of s 21 of the Charter.

34. Article 5(1), like Article 9 of the ICCPR, is concerned with the deprivation of liberty rather than "mere restrictions on freedom of movement", which is dealt with by Article 2 of Protocol No 4 to the European Convention.[38] As is the case with Articles 9 and 12 of the ICCPR, the difference between Article 5(1) and the right to freedom of movement in Article 2 of the Fourth Protocol is one of degree, not of nature or substance.[39] There is "no bright line separating the two".[40]

35. The House of Lords in *R (Gillan) v Commissioner of Police of Metropolis* accepted the starting point to be an individual's concrete situation and the need to take into account the type, duration, effects and manner of the measure. It emphasised the

[34] *Austin v United Kingdom* (2012) 55 EHRR 14.

[35] See, eg, *Gillan v Commissioner of Police of the Metropolis* [2006] 2 AC 307; *R (Roberts) v Commissioner of the Metropolitan Police* [2012] EWHC 1977.

[36] As noted in *Re Kracke* at [660].

[37] (2010) 50 EHRR 45.

[38] *Guzzardi v Italy* (1980) 3 EHRR 333, [92]. See also *Gillan v United Kingdom* [2010] 50 EHRR 45 at [56]; *Austin v United Kingdom* at [57].

[39] *Guzzardi v Italy* (1980) 3 EHRR 333, [93]. See also *Gillan v United Kingdom* [2010] 50 EHRR 45 at [56]; *Austin v United Kingdom* at [57].

[40] *Home Secretary v JJ* [2008] 1 AC 385, [17].

duration of the measure as the basis to hold that a person subject to a police stop and search pursuant to the *Terrorism Act 2000* (UK) was not deprived of their liberty, even though the person had no effective choice but to submit for as long as the procedure took.[41]

36. A similar approach was adopted in *R (Roberts) v Metropolitan Police*,[42] where the duration of the stop and search without reasonable suspicion under the *Criminal Justice and Public Order Act 1994* (UK) was determinative in the Court finding no deprivation of liberty within the meaning of Article 5(1).[43]

37. The *Gillan* case was taken to the European Court of Human Rights. In *Gillan v UK*[44] the European Court adopted a broader approach to the Article 5(1) right than that adopted by the House of Lords. While not finally determining whether there had been a deprivation of liberty, the Court considered that the duration of the stop was not decisive and the coercive restriction on freedom of movement in that case was indicative of a deprivation of liberty within the meaning of Article 5(1).[45]

38. The Plaintiff submits that these different approaches to the scope of Article 5(1) have "arguably been resolved by the Grand Chamber decision in *Austin v United Kingdom*".[46] That submission should be rejected. *Austin* concerned a police cordon that restricted the movement of protestors and others for seven hours. The House of Lords had held that that restriction involved no infringement of Article 5(1).[47] A majority of the European Court of Human Rights agreed, concluding that there was no deprivation of liberty. It observed that the coercive nature of the containment, its duration and its effect on the applicants pointed towards a deprivation of liberty. However, it went on to hold that the type and manner of the implementation, which was the least intrusive and most effective means to prevent serious injury or damage, meant that those within the cordon could not be said to have been

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[41] [2006] 2 AC 307 at 342-343 [24]-[25].

[42] [2012] EWHC 1977.

[43] [2012] EWHC 1977 at [14]: "[T]he claimant was not confined, nor required to move to a police station, handcuffed or restrained. This claimant was only restrained when she sought to resist the exercise of the police power under s 60. Had she not sought to escape, then the detention would have been brief … probably … as short as three minutes. … It was, accordingly, far shorter than the detention considered in *Gillan* and in *Austin*. I conclude that there was no deprivation of liberty within the autonomous meaning of Article 5(1)."

[44] (2010) 50 EHRR 45.

[45] *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45 at [57]. It was unnecessary for the Court to finally determine the Article 5(1) question because it held there had been a violation of the right to private life in Article 8.

[46] See Plaintiff's submissions at fn 22.

[47] [2009] 1 AC 564.

deprived of their liberty within the meaning of Article 5(1).[48] In effect, the majority adopted a proportionality approach to the determination of whether there had been a deprivation of liberty — an exercise that, under the Victorian Charter is a distinct and separate step from ascertaining the scope of the right. For this reason, as noted above in paragraph [33.2], the decision in *Austin* is of limited assistance in construing s 21 of the Charter.

39. Further, the majority in *Austin* emphasised that its conclusion was "based on the specific and exceptional facts" of the case,[49] and noted too that the application did not include any complaint under Article 2 of the Protocol 4 (freedom of movement), because the United Kingdom has not ratified Protocol 4.[50] Finally, the European Court concluded that "had it not remained necessary" for the police to maintain the cordon, "its coercive and restrictive nature might have been sufficient to bring it within Article 5".[51] Notably, the majority in *Austin* did not refer to *Gillan v UK*. For these reasons, *Austin* ought not be regarded as departing from the approach adopted in *Gillan v UK*.[52]

40. The Article 5(1) jurisprudence cannot be relied upon, as the Plaintiff seeks to do, to support the contention that a restriction of movement that is of short duration is necessarily not a deprivation of liberty within the meaning of s 21.[53] The general principles emerging from the European jurisprudence reveal that whether a restriction amounts to detention is ultimately based on the particular facts of the case taking into account all relevant factors.

Canadian Charter of Rights and Freedoms

41. Section 7 of the Canadian Charter of Rights and Freedoms — the equivalent to s 21(1) of the Charter — provides as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

42. Section 9 is expressed in almost identical terms to s 21(2) of the Charter. It states: *'Everyone has the right not to be arbitrarily detained or imprisoned.'* Section 10 then provides for certain rights on arrest or detention.

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[48] *Austin v United Kingdom*, (2012) 55 EHRR 14 at [64]-[67].
[49] Ibid at [68].
[50] Ibid.
[51] Ibid (emphasis added).
[52] Cf *R (Roberts) v Metropolitan Police* [2012] EWHC 1977 at [13].
[53] Plaintiff's Submissions at [24].

43. However, the Canadian Charter has no right to freedom of movement equivalent to s 12 of the Charter.[54]

44. As the First Defendant submits, "it is well established that 'a random vehicle stop… is, by definition, an arbitrary detention'' within the meaning of s 9 of the Canadian Charter".[55] In cases involving police vehicle stops, the Supreme Court of Canada has defined "detention" broadly, holding that the term extends to restrictions of brief duration and may result from psychological compulsion as the result of a police demand or direction as well as physical constraint.[56]

45. *R v Hufsky* involved a person stopped randomly by police at a fixed police checkpoint. The stop was authorised by s 189a(1) of the *Highway Traffic* Act (RSO 1980). The Supreme Court of Canada held, following *Therens* and *Thomsen*, that the stop amounted to detention. The Court observed that, although the stop was of relatively brief duration, "the police officer assumed control over the movement of the appellant by a demand or direction that might have significant legal consequence, and there was penal liability for refusal to comply with the demand or direction".[57]

46. The Court further held that the detention was arbitrary because, although it was authorised by law, there were no express or implied criteria governing the police exercise of discretion to stop the vehicle.[58] Finally, however, the Supreme Court held that the limitation on the s 9 right imposed by s 189a(1) was justified in accordance with s 1 of the Canadian Charter (equivalent to s 7(2) of the Charter).

47. In the subsequent case of *R v Ladouceur*,[59] in which police stopped the appellant's car at random and requested his documentation, the Supreme Court again held that the random vehicle stop amounted to arbitrary detention so as to infringe s 9, however the court was divided 5:4 as to whether the arbitrary detention in those circumstances could be justified under s 1.[60]

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[54] The mobility rights provided for by s 6 of the Canadian Charter are more confined and do not include a right to freedom of movement.

[55] First Defendant's submissions, [53], citing *R v Nolet* [2010] 1 SCR 851 at 867 [22] and the authorities referred to therein.

[56] *R v Therens* [1985] 1 SCR 613; *R v Thomsen* [1988] 1 SCR 640; *R v Hufsky* [1988] 1 SCR 621.

[57] [1988] 1 SCR 621 at 632.

[58] [1988] 1 SCR 621 at 632-3.

[59] [1990] 1 SCR 1257.

[60] Section 1 of the Canadian Charter was explained in *R v Oakes* [1986] 1 SCR 103 as follows:

> 'There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the

48. The majority observed that the legislation in question dealt with a pressing and substantial concern, namely the "potential for killing, for injury and for material destruction which is associated with the operation of automobiles".[61] The majority concluded that the random stop was rationally connected to achieve safety on the highways and impaired as little as possible the rights of the driver.[62]

49. However, the minority took a different view:[63]

> This case may be viewed as the last straw. If sanctioned, we will be agreeing that a police officer can stop any vehicle at any time, in any place, without having any reason to do so. For the motorist, this means a total negation of the freedom from arbitrary detention guaranteed by s 9 of the Charter. This is something that would not be tolerated with respect to pedestrians in their use of the public streets and walkways. It is in this light that the efforts of the Crown to discharge its s 1 onus must be viewed.

50. As noted above, the Canadian Charter has no equivalent to s 12; and this may in part explain its broad approach to the concept of "detention" in articles 9 and 10.

New Zealand Bill of Rights Act

51. The New Zealand Bill of Rights Act (**NZBORA**) contains provisions similar to ss 12 and 21:

    51.1. Section 18 provides that "Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand".

    51.2. Section 22, headed "Liberty of the person", provides that "Everyone has the right not to be arbitrarily arrested or detained".

    51.3. Section 23 confers certain rights on persons who are arrested or detained, including a right to consult and instruct a lawyer, which is not found in the Victorian Charter.

52. *Kerr v Attorney-General,*[64] relied upon by the Plaintiff, concerned a member of a motorcycle gang stopped at a police roadblock set up to conduct breath tests. The police, believing Mr Kerr would warn other gang members of the roadblock, told him he could not travel further south for approximately 10 minutes or he would be arrested. He travelled back from the direction he came. He alleged breaches of his rights to liberty and freedom of movement. Ryan J in the District Court held that Mr

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> objective in this first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".'

[61] [1990] 1 SCR 1257 at 1279-80.

[62] Ibid at 1283.

[63] Ibid at 1262.

[64] (1996) 4 HRNZ 270. See Plaintiff's Submissions at fn 22.

Kerr was not detained beyond "such detention as was involved in administering a breath-screening test" and that, on authority, that detention did not amount to detention as to infringe against s 22 or activate any consequential rights.[65]

53. However his Honour concluded that, in preventing Mr Kerr from proceeding as he wished, the officer had breached Mr Kerr's freedom of movement.[66]

54. Ryan J did not cite the authority to which he referred in relation to detention, and his statement appears to be contrary to remarks in *Temese v Police*.[67] In that case the New Zealand Court of Appeal appeared to consider that a person "briefly intercepted to provide information" under s 66 of the *Transport Act 1962* (NZ) was not detained; but that once a person is required to remain until a breath test is carried out then he or she is detained. The Court held, however, that such detention was a justified limitation on rights.

55. In *Police v Smith and Herewini*,[68] the New Zealand Court of Appeal considered the question of whether Mr Smith and Mr Herewini were "detained" within the meaning of s 23(1) of the NZBORA.

    55.1. Mr Smith had been in an accident and taken to hospital where a police officer requested a doctor take a blood sample pursuant to s 58D of the *Transport Act 1962* and a sample was taken.

    55.2. Mr Herewini had been in an accident and taken to hospital but refused the taking of a sample and, following a repeated request by the traffic officer, left the hospital. He was charged with the offence of refusing to permit a sample to be taken.

56. The Court held 3:2 that a person from who a blood sample was taken or requested pursuant to powers in the *Transport Act 1962* was not detained within the meaning of s 23(1) of the NZBORA. The majority held that detention is concerned with "a substantial deprivation of liberty"[69] and because the process of taking blood imposed no more than a temporary restraint on a person's liberty it did not amount to detention.[70] The majority rejected the approach that had been adopted in Canada in

[65] (1996) 4 HRNZ 270 at 274.
[66] Ibid at 275.
[67] (1992) 9 CRNZ 425.
[68] [1994] 2 NZLR 306.
[69] Ibid at 327; and see 316.
[70] See 316-317.

Therens, Thomsen and *Hufsky*.[71] In contrast, the minority found the Canadian reasoning persuasive.[72]

57. Richardson J, in the majority described the approach to s 23 of the NZBORA in terms akin to the approach adopted in relation to the ICCPR and the European Convention, discussed above:[73]

> What then is the concept of detention underlying s 23(1)? The *Oxford English Dictionary* (2nd ed, 1989) defines "detain" variously as "To keep from proceeding or going on; to keep waiting; to stop" and "To keep in confinement or under restraint; to keep prisoner". Clearly in the context of s 23(1) **something more than merely keeping a citizen waiting is necessary. Equally the threshold should not be set as high as keeping a citizen prisoner before there will be a detention.** A distinction must be drawn between deprivation of liberty on the one hand, and a mere temporary restraint on liberty on the other. Whether a person has been detained … will depend on a close examination of the particular empowering statutory provision and its exercise in the particular circumstances….
>
> A commonsense and practical approach is called for. Thus it will be important to consider the nature, purpose, extent and duration of the constraint. For example the assumption of control over a citizen's movements is very different from a pause while particulars are provided. … [T]he answer may involve considerations of fact and degree.

United States

58. There is no equivalent right to freedom from arbitrary detention in the US; and, in light of the different constitutional context, US authorities are of less relevance than those concerning the ICCPR and the European Convention. However, the values underpinning ss 12 and 21(2) of the Charter are reflected in the Fourth Amendment to the US constitution, that: "*The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated…*". The US Supreme Court has observed that the Fourth Amendment was intended to limit the "arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals'.[74]

59. In *Brendlin v California*[75] the US Supreme Court held that both a driver and a passenger were "seized" for the purpose of the Fourth Amendment because their freedom of movement was interfered with.[76] In finding there is a "seizure" and that

[71] Ibid at 314-5, 326-7, 329.

[72] Ibid at 309, 322.

[73] Ibid at 316. See also *Everitt v Attorney-General* [2002] 1 NZLR 82.

[74] See *Brendlin* (2007) 551 US 249 at 143.

[75] (2007) 551 US 249.

[76] See First Defendant's Submissions at [57].

the Fourth Amendment applies, *Brendlin* referred to the "arbitrariness" of a random stop[77] and the temporary "detention" of the individuals during a police vehicle stop.[78]

60. Relevantly in *Brendlin*, the detention or, at the least, the restriction of movement, resulting from the stop was held to affect the passengers in the vehicle as well as the driver. In finding that the passenger was "seized", the Supreme Court rejected the submission that the passenger needed to be "the motivating target of the officer's show of authority". Rather, it saw the issue to be "whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him and that he was thus not free to ignore the police presence and go about his business."[79]

Conclusion on approach to ss 12 and 21(2)

61. The comparative jurisprudence reveals that a generally consistent distinction is drawn between restrictions on freedom of movement on the one hand, and detention or deprivation of liberty on the other. The exception to that distinction is Canada, where there is no right to freedom of movement, and so detention has been interpreted more broadly.

62. The principles emerging from the Victorian, European, UK and New Zealand jurisprudence that are relevant to ss 12 and s 21 are as follows:

62.1. Section 21 of the Charter, like Article 9 of the ICCPR and Article 5(1) of the European Convention, is concerned with the deprivation of liberty rather than "mere restrictions on freedom of movement", which is dealt with by s 12. The difference between detention in s 21 and freedom of movement in s 12 is one of degree, not of nature or substance.[80] There is "no bright line separating the two".[81]

62.2. In determining whether a measure amounts to detention, the starting point is the individual's concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. There may be no detention if a single feature of an individual's situation is taken on its own but the

[77] *Brendlin* (2007) 551 US 249 at 143.

[78] Ibid at 139.

[79] Ibid at 142.

[80] *Guzzardi v Italy* (1980) 3 EHRR 333 at [93]. See also *Gillan v United Kingdom* [2010] 50 EHRR 45 at [56]; *Austin v United Kingdom* [2012] 55 EHRR 14 at [57].

[81] *Home Secretary v JJ* [2008] 1 AC 385, [17].

combination of measures considered together may have that result.[82] Coercion — including psychological coercion — is an important factor.

62.3. Section 21 protects individual liberty in the sense of physical liberty, but the jurisprudence recognises that detention "may take numerous forms other than classic detention in prison or strict arrest. The variety of such forms is being increased by developments in legal standards and attitudes and the Convention must be interpreted in light of notions prevailing in democratic states."[83]

62.4. The authorities "must be used in the same way as other authority is to be used, as laying down principles and not mandating solutions to particular cases. It is… perilous to transpose the outcome of one case to another where the facts are different."[84]

63. The Commission contends that the distinction drawn in the authorities — between detention on the one hand and lesser restrictions on movement on the other — is correct; and that an interference with liberty may, depending on the circumstances, fall short of detention but constitute an interference or limit on the right to freedom of movement. However, there may equally be circumstances where an interference with freedom of movement is such that it <u>also</u> constitutes detention within the meaning of s 21(2) of the Charter.

64. The Victorian, UK, European and New Zealand authorities support the proposition that a brief road traffic stop will not necessarily result in detention within the meaning of the right to be free from arbitrary detention, but will involve an interference with freedom of movement.

B.3 Interpretation of s 59 in light of the Charter

65. Consistently with the authorities summarised above, the Commission contends that s 59 of the *Road Safety Act*, in so far as it requires a person to stop a motor vehicle if requested to do so by a police officer, <u>necessarily</u> involves an interference with or limitation on the right to freedom of movement of the driver and the occupants of the vehicle. However, s 59 will <u>not necessarily</u> result in the detention of those persons — that will depend upon the circumstances of the particular case and, in particular, the exercise of power (if any) under s 59(5).

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[82] *Guzzardi* (1980) 3 EHRR 333 at [95]. See also *Home Secretary v JJ* [2008] 1 AC 385 at [16].
[83] *Home Secretary v JJ* [2008] 1 AC 385 at [15], citing *Guzzardi* at [95].
[84] *Home Secretary v JJ* [2008] 1 AC 385 at [13].

66. The right to freedom of movement is not lost simply because a person has chosen to exercise that right by use of a motor vehicle. This, however, appears to be the position of the Plaintiff, who contends that the right to freedom of movement is not engaged because the "Charter does not confer or recognise a right to drive a motor vehicle on a highway"; the use of a vehicle on a highway, it is asserted, is a privilege not a right.[85] This submission is misguided and should not be accepted. Charter rights are necessarily conferred at a high level of generality and it is inappropriate to ask whether the Charter confers a right to engage in specific conduct and, because it does not, to conclude that no Charter rights are engaged.[86]

67. Further, as explained below, and if necessary for the application of s 32(1), the Commission contends that an interpretation of s 59 that implies a power to conduct a random vehicle stop (as opposed to a stop for a specified purpose or for probable cause, the powers for which are found elsewhere), is a limitation on freedom of movement that is not justified under s 7(2) of the Charter.

68. Thus s 59 must be construed, if possible, so as to impose the least limit on the right to freedom of movement and freedom from arbitrary detention.

Section 59(1)(a)

69. The principal focus of the parties' submissions is s 59(1)(a) of the *Road Safety Act*, thus it is this sub-section that the Commission addresses first. Section 59(1)(a) does not in terms confer any power on police officers.[87] Rather, it imposes a duty on a driver to stop a vehicle in certain circumstances. If it confers a power on police officers to require a driver to stop a vehicle, that power is conferred by implication. For the reasons that follow, the Commission contends that no such power should be implied into s 59(1)(a).

70. The Commission agrees with the submissions of the First Defendant at [24]-[31] in relation to the text of s 59(1)(a). The Commission also agrees with the First Defendant's submission at [37] that the fact that Parliament has curtailed rights "*to*

[85] Plaintiff's submissions at [17(a)], [26].

[86] So, for example, simply because the Charter does not expressly recognize a right to engage in same-sex sexual activity would not mean that the right to privacy and/or the right to equality have no operation in relation to laws that regulate such activity. See, eg, discussion in *Lawrence v Texas* 539 U.S. 558 (2003), overruling *Bowers v Hardwick* 478 U.S. 186.

[87] Section 59(1)(a) is in marked contrast to the equivalent provision in New Zealand, s 114(1) of the *Land Transport Act 1998* (NZ), which expressly confers a power on a police officer to direct a vehicle to stop. The predecessor to s 114, s 66(1) of the *Transport Act 1962* (NZ), was framed in similar terms to s 59(1)(a). It had been held to authorize a vehicle stop, but only for "road transport purposes", that is the enforcement and administration of the Act: *Jones v Attorney-General* [2004] 1 NZLR 433 (PC); *R v Bainbridge* [1999] NZCA 180 at [27].

an extent by imposing the duty in s 59(1)(a) does not answer the question of construction … which concerns the extent of that curtailment".

71. Section 32(1) of the Charter supports the contention that a power to conduct a random vehicle stop should not be implied into s 59(1)(a). Assuming that the construction urged by the Plaintiff is open, it nonetheless should not be preferred where a construction that does not limit rights (or is less restrictive of rights) is available, as it is here. Conferring a broad power on police officers to conduct random vehicle stops, coupled with the express duty on the driver to stop the vehicle when requested or signalled, involves a greater restriction on freedom of movement than a narrower construction that denies such a broad power to police. Thus the latter construction is to be preferred.

72. Further, the Commission contends that, in light of the statutory mandate in s 32(1), a court should not lightly imply into a statutory provision a power that interferes with Charter rights.

Section 59(5)

73. It is not clear whether the Plaintiff relies upon s 59(5) as a discrete power for police officers to conduct the vehicle stop in this case.[88] For completeness, the Commission's submissions address s 59(5) because, in contrast to s 59(1)(a), s 59(5) expressly confers a power on police.

74. The Commission contends that s 59(5) is not the source of the power purportedly exercised in this case, namely a power to conduct random vehicle stops without cause. That section in terms confers a power on police to give directions to a person driving a motor vehicle (such power being coupled with a duty on drivers to obey such directions). However, it does not confer a power to direct a driver to stop a vehicle without cause because:

    74.1. in contrast to s 59(1)(a), s 59(5) does not refer to stopping a vehicle;

    74.2. sections 59(1)(a) and (b) draw a distinction between the duty to obey a request to stop and the duty to obey a lawful direction given under s 59(5), suggesting that s 59(5) does not include a power to direct a person to stop;

[88] The Plaintiff describes the power in s 59(5) as a "further power" (to s 59(1)) and gives the example of a direction to remain in the vehicle while checks are carried out. No express claim is made that s 59(5) confers a power to direct a person to stop a vehicle. Nor is an express claim made that the request to stop in this case was, in the officers' opinion, *necessary* to give effect to the Act or the Regulations.

74.3. in any event, even if it empowered an officer to direct a vehicle to stop, s 59(5) is relevantly fettered by the requirement that directions given are, in the opinion of the officer, "*necessary for carrying into execution the provisions of this Act or the Regulations*" (emphasis added), a requirement that does not encompass random vehicle stops.

75. These textual indicia are supported by recourse to the Charter. The power to give a direction in s 59(5) is expressed in general terms (albeit with a qualification). But general words will generally be construed so as not to limit fundamental common law rights and — by reason of s 32(1) — rights protected by the Charter. A construction of s 59(5) that empowers police to conduct random vehicle stops, without cause, would limit or interfere with the right to freedom of movement and, in some circumstances, the right to be free from arbitrary detention. Such a construction ought not be preferred where another construction is open.

Construction of ss 59(1)(a) and 59(5) and statutory purpose

76. The construction of each of s 59(1)(a) and 59(5) urged by the Commission and the First Defendant is consistent with the purposes of the legislation as a whole and each of those sub-sections.

77. The purposes of the *Road Safety Act* are directed at ensuring the "safe, efficient and equitable road use" and setting out the "responsibilities of road users".[89] However, in light of the scheme of the Act, those purposes are not to be achieved without regard to the common law and Charter rights and freedoms of drivers and others using the roads. As Gleeson CJ observed in *Carr v Western Australia*:[90]

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. … That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

78. The fact that the *Road Safety Act's* purposes are balanced against other rights and interests is reflected throughout the Act, which in various places confers powers on police that limit rights of road users, subject to qualifications and limitations designed

[89] *Road Safety Act*, ss 1(a), 1(ab).
[90] (2007) 232 CLR 138 at [5].

to protect rights.[91] Construing ss 59(1)(a) by reference to the Charter so that it confers no power on officers to conduct random vehicle stops, and construing 59(5) by reference to the Charter so that the power it confers is limited, is consistent with the overall purposes of the Act.

Construction of s 59 and justification under s 7(2) of the Charter

79. As noted above at paragraphs [9]-[10], it is presently unclear whether it is necessary, in applying s 32(1) of the Charter, to bring s 7(2) into the analysis. The Commission contends that if s 7(2) is relevant, it nonetheless makes no difference to the outcome because an interpretation of either s 59(1)(a) or s 59(5) that implies a power for police to conduct random vehicle stops is not "demonstrably justified in a free and democratic society", by reference to the factors set out in s 7(2).

80. Once a right is limited, the onus of demonstrating that an infringement of the right is justified in accordance with s 7(2) falls on the party seeking to uphold the limitation.[92] Further, as Warren CJ explained in *Re Major Crimes Act*:[93]

> [I]n light of what must be justified, **the standard of proof is high**. It requires a "degree of probability which is commensurate with the occasion". … [T]he issue for the court is to balance the competing interests of society, including the public interest, and to determine what is required for the accused to receive a fair hearing. … [T]he evidence required to prove the elements contained in s 7 should be "cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit."

81. Before the Magistrate it was asserted by the Crown that any limitation of rights is justified under s 7(2).[94] However no evidence was put before the Magistrate — and no evidence has been put before this Court — in relation to the matters set out in s 7(2). Thus the Commission contends that the Crown has not discharged its onus in relation to s 7(2), should that section be relevant.

82. Further, the Commission contends that if one considers the factors in s 7(2), the limitation on freedom of movement imposed by implying into s 59 an unfettered discretion to conduct random vehicle stops cannot be justified under s 7(2).

    82.1. *The importance of the right*: freedom of movement is a fundamental and important right. As Bell J observed in *Kracke*, "[t]he fundamental value which the right expresses is freedom, which is regarded as an indispensable condition for the free development of the person and

[91] For example, *Road Safety Act*, ss 53, 54, 55, 55A, 62, 63.

[92] *Re Application Under the Major Crimes (Investigative Powers) Act* [2009] VSC 381 at [147.

[93] [2009] VSC 381 at [147] (footnotes omitted, emphasis added).

[94] Prosecution Submissions at [16].

society".[95] This is particularly so in relation to interferences with the right by police officers.

82.2. *The purpose of the limitation*: It may be accepted that, at a high level of generality, the limitation on rights is asserted for a legitimate and important purpose, namely the safe use of the roads.

82.3. *The nature and extent of the limitation*: The nature and extent of the limitation on freedom of movement effected by random vehicle stops is significant. Although the duration of a stop may be temporary, it nonetheless brings a person's movement to an end. And once a stop has occurred it may be accompanied by directions under s 59(5) that both prolong the limitation on freedom of movement and amount to detention. Further, the nature of the limitation is arbitrary because the asserted power is one to conduct random stops without cause; the discretion is relevantly unfettered. As the minority observed in *Ladouceur*:[96]

> [T]he roving random stop would permit any individual officer to stop any vehicle, at any time, at any place. The decision may be based on any whim. Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on. … [R]acial considerations may be a factor too. My colleague states that in such circumstances, a Charter violation may be made out. If, however, no reason need be given nor is necessary, how will we ever know? **The officer need only say, "I stopped the vehicle because I have the right to stop it for no reason. I am seeking unlicensed drivers."** … Moreover, the unlimited power has the potential of being much more intrusive and occasioning a greater invasion of privacy. Any perfectly law-abiding citizen travelling late at night on a lonely country road must be prepared to have a police car approach, perhaps, from the rear, siren blaring, lights flashing, and must then and there come to a stop to prove his or her legitimacy on the roadway. How many innocent people will be stopped to catch one unlicensed driver?

82.4. The relationship between the limitation on freedom of movement and its purpose — road safety — is tenuous and unarticulated. There was no evidence before the Magistrate, and there is no evidence before this Court, that a power to conduct random vehicle stops is necessary for road safety. The Plaintiff relies upon decisions from the Supreme Court of Canada, but in those cases the Court was presented with relevant and admissible evidence about the need for the powers there under consideration. That evidence was specific to Canada and cannot be relied upon by the Plaintiff in this case.

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[95] *Kracke* at [588].

[96] *Ladouceur* [1990] 1 SCR 1257 at 1267. And see paragraph 49, above. Canadian authorities are of course not binding; and the Court should prefer the minority view in *Ladouceur*.

82.5. Finally, there are less restrictive means to achieve the purpose sought to be achieved. Registration checks can be carried out without requiring a vehicle to stop. Further, vehicle stops for cause or under an express power conferred by the *Road Safety Act* permit police officers to stop a vehicle in various circumstances, for example where they have a reasonable belief that an offence has been committed. These existing powers offer less restrictive means for the police to carry out necessary checks on drivers directed to ensuring road safety.

83. Thus, if s 7(2) has any role to play in relation to s 32(1), the Commission contends that the Plaintiff has not discharged his onus of demonstrating that the limitation on freedom of movement that would flow from the construction of s 59 he urges is justified. It is not.

Conclusion on interpretation

84. Section 59 does not confer power on police officers to conduct random vehicle stops such as occurred in this case. Charter Question (a) should be answered "No".

D. SECTION 38

85. Charter Questions (b)-(e) concern the application of s 38 of the Charter in this case. Section 38 of the Charter provides as follows:

> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made under an Act of the Commonwealth or otherwise under law, the public authority could not have acted differently.

86. Victoria Police is a public authority for the purposes of the Charter (s 4(1)(d)).

87. Section 38(1) imposes two distinct obligations on public authorities: a substantive obligation to act compatibly with human rights; and a procedural obligation to give proper consideration to human rights in making decisions. A breach of either obligation renders conduct unlawful unless, under s 38(2), the public authority *could not* have acted differently as the result of a statutory provision.

88. The Commission agrees with the Plaintiff's submission at [37] that "the uncertainty surrounding the relationship between s 7(2) and 32 does not extend to the public authority obligations under s 38 of the Charter." An act of a public authority will be incompatible with a human right if it limits a right and if the limitation is not a

reasonable limit that is demonstrably justified in a free and democratic society under s 7(2) of the Charter.[97]

89. Thus whether the police officers complied with s 38(1) depends on the scope of the relevant rights and the reasonable limits provision in s 7(2).

Question (b) Whether it was a breach of the First Defendant's right to privacy and/or unlawful pursuant to s 38 of the Charter for the police to request the driver of a vehicle to consent to a search of the vehicle

Question (c) Whether it was a breach of the First Defendant's right to privacy and/or unlawful pursuant to s 38 of the Charter for the police to ask the First Defendant for identification when he left the vehicle and proceeded to move off.

90. Charter Questions (b) and (c) both concern the right to privacy. They also each concern conduct of the police not authorised by statute. These commonalities mean that it is convenient to deal with these questions together.

Section 13: the right to privacy

91. Section 13(a) of the Charter provides that a person has the right "*not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with*".

92. Privacy is a concept that is not susceptible to exhaustive definition.[98] However, the collection of information about an individual — including their name and other identifying information — by officials of the State without the individual's consent is a classic interference with privacy.[99]

Internal Limits

93. For the purposes of determining whether the privacy right has been engaged the internal qualifications of "unlawful and arbitrary interference" should not be taken into account. As Bell J explained in *Kracke*:[100]

> Where rights are expressed in terms that contain a specific limitation, the nature and content of the rights in their plain state are not … reduced by the specific limitation. Rather, the specific limitation is seen as an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in s 7(2).

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[97] *Patrick's Case* [2011] VSC 327 at [304]-[306]; *Sabet v Medical Practitioners Board* (2008) 20 VR 414 at [108]. See also *Momcilovic* (2011) 245 CLR 1 at [165]-[168] (Gummow and Hayne JJ), at [416] (Heydon J), at [681] (Bell J); but cf [32]-[34] (French CJ), rejecting a role for s 7(2) in the assessment of compatibility under s 38(1); Crennan and Kiefel JJ did not take a view on the issue.

[98] See *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 at [9]; *Pretty v United Kingdom* (2002) 35 EHRR 1, at [61]; *Kracke* [2009] VCAT 646 at [593], [599].

[99] *S and Marper v United Kingdom* [2008] ECHR 1581 at [66]; UN Human Rights Committee, General Comment No 16, *The right to respect for privacy, family, home and correspondence, and protection of honour and reputation – Art 17* (1988) at [10]; Jacobs, White and Ovey, *The European Convention on Human Rights* (5th ed, 2010) at 374.

[100] (2009) 29 VAR 1 at [109]-[110].

> Thus, when identifying the scope of the right at the engagement stage, this is done broadly and purposively, even where the right contains a specific limitation. Such a limitation becomes subsumed in the overall justification analysis which is undertaken in the next stage.

Unlawful or arbitrary interferences

94. Section 13 of the Charter in terms confers a right to be free from "unlawful or arbitrary" interference with privacy. That language is modelled on Article 17 of the ICCPR.[101] A lawful interference is one that is authorised by a positive law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it.[102]

95. Further, even if "lawful" in this sense, an interference may nevertheless be "arbitrary". What amounts to an "arbitrary" interference with the right to privacy was considered by the Court of Appeal in *WBM v Chief Commissioner of Police*.[103] In that case, Warren CJ (Hansen J agreeing) preferred the "human rights meaning" of the concept of arbitrariness in s 13(a) to the narrower "dictionary meaning".[104] The "human rights meaning" is that reflected in the international jurisprudence: "concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought."[105]

96. The Commission contends that, consistently with Warren CJ's approach in *WBM,* the "human rights meaning" of arbitrariness is to be preferred. The terms of s 13(a) should be read as deriving meaning from Article 17(1) of the ICCPR on which the provision is modelled.

Canadian Authority

97. The Canadian Charter contains a right "to be secure against unreasonable search or seizure" (s 8) and it is through this narrower prism that it protects privacy interests. Notwithstanding this textual difference, the Canadian authorities can assist in the interpretation and application of s 13(a) of the Charter.

98. *R v Mellenthin* concerned the lawfulness of a vehicle search after a person had been subject to a random vehicle stop. The Court held that the search was

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[101] Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006 (Vic)* 28-34.

[102] *Sunday Times v UK* (1979) 2 EHRR 245, cited in *Kracke* (2009) 29 VAR 1 at [173]-[174] in relation to the words "under law" in s 7(2) of the Charter.

[103] [2012] VSCA 159.

[104] The "dictionary meaning" was described as being a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim": *WBM* at [99], referring to the decision of the trial judge at [2010] VSC 219 at [51]-[57].

[105] *WBM* at [117]. See also *PJB v Melbourne Health* [2011] VSC 327 at [84]; *Patrick's Case* [2011] VSC 327 at [80]-[84]; *ZZ v Secretary to the Department of Justice* [2013] VSC 267 at [85].

unreasonable and unlawful. The Court said that, although random vehicle stops themselves are lawful, they "must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search".[106] The Court held that the evidence from the search should not be admitted at the trial of the accused:[107]

> It is true that there was not, in this case, any bad faith on the part of the police. … Nonetheless, the violation must be considered a serious one. It was conducted as an adjunct to the check stop and was not grounded on any suspicion, let alone a reasonable and probable cause. **It is the attempt to extend the random stop programs to include a right to search without warrant or without reasonable grounds that constitutes the serious Charter violation**.

99. *R v Pinto*[108] involved a lawful police traffic stop that escalated and resulted in charges being laid against the passenger. The Supreme Court of Ontario held that a request for information or identification from the passenger amounted to a search or seizure within the meaning of s 8 of the Charter. The Court held that the passenger was entitled to sit in the vehicle and be left alone while the driver was processed for the alleged traffic law violation. It said that "as a general rule, a vehicle passenger cannot be subjected to non-consensual dragnet or general investigative questioning or identification production" and the officer "was not engaged in the lawful execution of duty in proceeding as he did to request Pinto's identification".[109]

Was the search of the vehicle a breach of s 38(1)?

100. There can be no real dispute that a search of a person's vehicle *prima facie* engages the privacy right. Further, there appears to be no dispute that the search that in fact occurred did so without any legal basis. To the extent it was coercive, it was thus unlawful. However, the Plaintiff says that "no unlawfulness arose by the police requesting the driver's consent to a search".[110]

101. When considering whether a "request" by police to conduct a search and the subsequent carrying out of the search infringes the right to privacy, consideration must be given to whether the "request" was in fact coercive. There may be an unlawful and/or arbitrary breach of privacy in circumstances where:[111]

    101.1. police are in uniform and conduct themselves in such a way as to indicate to the person that they have no real choice in the matter;

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[106] [1992] 3 SCR 615 at 624; see also 628, 629.
[107] [1992] 3 SCR 615 at 629-30.
[108] (2003) CanLII 11404 (ON SC).
[109] Ibid at [51]-[55].
[110] Plaintiff's submissions at [2(d)] (emphasis added).
[111] See, eg, *Mellenthin* [1992] 3 SCR 615, 622; *R v M* [1995] 1 NZLR 242.

101.2. the person who "consented" to the search was not informed of his or her right not to consent; and

101.3. the person who "consented" to the search could reasonably be expected to feel compelled to permit the search to occur.

102. Ultimately, however, the Magistrate made no findings in relation to the search. Thus the Commission contends that it is not appropriate to answer Question (b).

Were the repeated "requests" for identification a breach of s 38(1)?

103. There can be no real dispute that a requirement that a person provide identification to police *prima facie* engages the privacy right. Further, there is no dispute that the police officers had no power to compel the First Defendant to provide identification or give his name and address. The police officers in evidence, and the Plaintiff in submissions, expressly disavow reliance on 465AA of the *Crimes Act* or any other statutory power. As in the Canadian case of *Pinto*, the First Defendant was a passenger in the vehicle subject to the stop and police powers to require production of documents did not extend to him.

104. Again, the Plaintiff relies on what he characterises as "requests" from police for the First Defendant's identification. He says that it is "not unlawful for police to request a person to give their name" (emphasis in original) and that a "mere request for identification details does not amount to an unlawful or arbitrary interference with a person's privacy".[112] However, that submission fails to take account of the factual circumstances of the case.

105. The so-called "requests" for identification in this case occurred in the following circumstances:[113]

105.1. the police were in uniform and had required the vehicle in which the First Defendant was travelling to stop;

105.2. the police were conducting, or had conducted, a search of the vehicle;

105.3. in response to the first request for identification the First Defendant indicated that he was not willing to provide identification or give his name and address (albeit in intemperate terms);

105.4. the officer again asked the First Defendant for his name or identification, and the First Defendant again refused (again in intemperate terms);

[112] Plaintiff's submissions at [39(a)].

[113] Ruling at pp 2-3.

105.5. the First Defendant then started to walk away from the police, one of whom then approached him and again asked for his name or identification, by saying he needed his name and address — and the First Defendant again refused (again in intemperate terms);

105.6. the First Defendant was then told he had committed the offence of offensive language and again asked for his name and address — and the First Defendant again refused (again in intemperate terms)

105.7. He was then arrested for failing to give his name and address.

106. It is not correct to say that, because the First Defendant chose not to comply with the "requests", there was no interference with privacy.[114] In this case, the consequence of the "requests" was the escalation of events to the point where the First Defendant was arrested and his name and address revealed to police. In those circumstances, the police officers' repeated demands for identification constituted an interference with privacy.[115]

107. The Commission contends that this course of events goes well beyond a mere "request" for a name or identification and amounted to an attempt by police to require the First Defendant to provide identification. In the circumstances this was an unlawful and an arbitrary — in the sense of "unreasonable" and "disproportionate" — interference with the First Defendant's privacy. It was not, as the Plaintiff seems to suggest, "trivial".[116]

108. Further, the interference was not justified under s 7(2) of the Charter. Privacy is an important right; and the interference with the First Defendant's right to privacy is not said to be in further of any legitimate end. The only end for which the police asserted they requested the First Defendant's personal information was the collection and retention of that information by police. (Alternatively, if that be a legitimate purpose under the Charter, is of limited weight and importance). A requirement that a person provide police with their identification in the absence of statutory authority is a significant intrusion on the right to privacy and cannot be justified under s 7(2).

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[114] Cf Plaintiff's submissions at [39(b)].

[115] This submission is consistent with European jurisprudence to the effect that a person may be a victim of a rights violation even if he or she cannot show that an intrusion on his or her right to privacy in fact occurred: see, eg, *Airey v Ireland* (1979) 2 EHRR 305; *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Klass v Germany* (1978) 2 EHRR 214. See also *Police v Smith and Herewini* [1994] 2 NZLR 306: Mr Herewini's case was not decided on the basis that he had refused to comply with a request for a blood sample.

[116] Plaintiff's submissions at [39(a)].

109. It follows that the conduct of the officers breached the First Defendant's right to privacy. That breach is not excused by s 32(2) of the Charter, hence it was unlawful under s 32(1) of the Charter. Question (c) should be answered "yes".

Question (d) Whether the actions of Senior Constable Randall and Constable Andrews in stopping the vehicle unjustifiably breached the right to freedom of movement of the First Defendant and the driver of the vehicle and subjected them to arbitrary detention, contrary to the provisions of s 21(2) of the Charter.

110. For the reasons given in the answer to Question (a), above, the actions of the police officers in stopping the vehicle (a) had no lawful basis and (b) constituted a breach of the right to freedom of movement of the First Defendant and the driver. The breach was not justified under s 7(2); and nor does s 38(2) apply so as to render s 38(1) inapplicable.

111. Thus Question (d) should be answered "Yes. The vehicle stop unjustifiably breached the right of the First Defendant (and the driver) to freedom of movement."

112. The stopping of the vehicle combined with the request for a search may also have amounted to the unlawful and/or arbitrary detention of the driver, who was given no choice to leave the vehicle or the vicinity of the police. However, it is unnecessary to reach a conclusion on this aspect of Question (d) because there was a clear breach of the right to freedom of movement.

(e) Whether the police officers gave proper consideration to the First Defendant's rights in accordance with s 38 of the Charter.

113. The obligation in s 38(1) to give proper consideration to rights in making a decision was explained by Emerton J in *Castles v Secretary, Department of Justice*:[117]

> Proper consideration need not involve formally identifying the "correct" rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> ... **[I]t will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights** and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

114. In this case there is no evidence that the officers "seriously turned their mind to the possible impact" on the First Defendant's rights of either of their decisions to (a) stop the vehicle and (b) demand identification. To the contrary, the evidence and finding

[117] (2010) 28 VR 141 at [185]-[186].

was that they did not turn their mind to his rights. This was a further breach of s 38(1) of the Charter and therefore unlawful.

Should the evidence have been excluded under s 138 of the *Evidence Act*?

115. The Commission makes the following submissions in relation to the exercise of the discretion under s 138 of the *Evidence Act* where breach of Charter rights is a basis for exclusion.

116. One matter a court is required to take into account under s 138(3)(d) is the gravity of the impropriety or contravention of law. The Commission contends that in this case there were at least two distinct breaches of the First Defendant's rights, contrary to s 38 of the Charter, arising from different factual circumstances, namely:

    116.1. the random traffic stop, which breached the First Defendant's right to freedom of movement under s 12 of the Charter; and

    116.2. the repeated demands for the First Defendant's name and identification, which breached the First Defendant's right to privacy 13 of the Charter.

117. As a starting point, violation of a Charter right contrary to s 38 of the Charter is to be regarded as a serious matter.[118] To adapt what Blanchard J of the New Zealand Supreme Court said in *Hamed v R*,[119] the fact of the breach of human rights means that damage has already been done to the administration of justice. The courts must ensure in the application of s 138 that evidence obtained through that breach does not do further damage to the repute of the justice system.

118. In this case, the rights breached were fundamental and the breaches were significant and unjustified. The breaches involved police and caused an escalation of events resulting in the forcible arrest of the First Defendant. The officers admitted that they gave no consideration to the First Defendant's rights. The breaches were not, as the Plaintiff contends, at the "very lowest end of the spectrum" — they were at least in the middle of the spectrum.

119. Further, one breach alone would have been sufficient to warrant the exclusion of the evidence; considered cumulatively, and in the particular circumstances, the conclusion that the evidence ought to have been excluded is almost irresistible.

Dated: 1 November 2013

KRISTEN WALKER

[118] See eg *Shaheed* [2002] 2 NZLR 377*; R v Grant* [2009] 2 SCR 353 at [68]-[69].
[119] [2012] 2 NZLR 305 at [187]; and see *Mellenthin* [1992] 3 SCR 615 at 629.