IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE **No. 6192 of 2010**

BETWEEN:

ZAKARIA TAHA

Plaintiff

AND

BROADMEADOWS MAGISTRATES' COURT AND OTHERS

Defendants

AND

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Intervener

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

I. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervenes in this proceeding under s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) to make submissions in relation to:

   (a) the interpretation of s 160 of the *Infringements Act 2006* (Vic) in accordance with s 32 of the Charter;

   (b) the obligations of Magistrates exercising powers under s 160 of the *Infringements Act* to act compatibly with relevant human rights, on the basis that:

      (i) the Magistrate was a public authority under s 4(1)(j) of the Charter and therefore bound to comply with s 38(1) of the Charter when exercising the powers conferred by s 160 of the *Infringements Act*; and/or

      (ii) certain relevant human rights applied directly to the Magistrate by virtue of s 6(2)(b) of the Charter.

2. The relevant Charter rights are:

   (a) the right to the equal protection of the law without discrimination in s 8(3);

   (b) the right to liberty of the person in s 21; and

   (c) the right to fair hearing in s 24.

3. In summary, the Commission submits that, having regard to ss 8, 21, 24 and 32 of

the Charter, s 160 of the *Infringements Act* should be interpreted in a manner that requires the Court to consider the circumstances of the individual concerned to determine whether any of the alternatives to imprisonment in subss 160(2) and (3) are available and appropriate before making an imprisonment order under subs 160(1). By failing to do so, the Magistrates Court in this case misconstrued the statutory power which it purported to exercise and fell into jurisdictional error.

4. Further or alternatively, the Commission submits that, in exercising the powers conferred on the Court by s 160 of the *Infringements Act*, the Court was bound by force of s 6(2)(b) or s 38 of the Charter to act compatibly with the right to a fair hearing in s 24. By failing to consider the availability and appropriateness of the alternatives to imprisonment in s 160(2) and (3) prior to making the imprisonment order under s 160(1), the Court has, in the absence of any compelling justification for that failure, acted incompatibly with the right to a fair hearing in s 24 of the Charter and thereby committed jurisdictional error.

II. FACTUAL CONTEXT

5. The facts relevant to these proceedings are set out in the affidavits and submissions filed on behalf of the plaintiff. The following matters are of particular significance:

   (a) the plaintiff suffers from an intellectual disability and receives a disability pension from Centrelink;

   (b) between 2006 and 2008, the plaintiff incurred some 30 infringement notices for minor infringement offences which, with fees and costs, amounted to a substantial total fine of $11,250.20;

   (c) the plaintiff did not invoke, or was unable to invoke by reason of his disability, any of the mechanisms in the *Infringements Act* designed to filter out of the system people in "*special circumstances*" (such as people with mental or intellectual disabilities, the homeless, people with serious addiction) which render them unable to understand or control their offending behaviour;

   (d) accordingly, the infringements registrar at the Magistrates' Court made enforcement orders in respect of the infringement offences and issued an infringement warrant which resulted in the plaintiff being brought before the Court to be dealt with under s 160 of the *Infringements Act*;

   (e) at that hearing, the plaintiff was represented by a Victoria Legal Aid Duty Lawyer;

   (f) no evidence of his intellectual disability was led on behalf of the plaintiff;

   (g) without considering whether any of the alternatives to imprisonment in s 160(2) and (3) of the *Infringements Act* were available and appropriate in the circumstances, the Magistrate made an order under s 160(1) that the plaintiff was to be imprisoned for a total of 100 days in default of payment of the fines and made an instalment order under s 160(4) of the Act, which operated to stay the imprisonment order; and

(h) the plaintiff made some instalment payments but thereafter defaulted and is therefore liable to be imprisoned for a period of 81 or 84 days.[1]

III. THE INFRINGEMENTS ACT

6. The *Infringements Act* introduced a new infringements system in Victoria, replacing the PERIN system that was found in Sch 7 to the *Magistrates' Court Act 1989*. Broadly, the system established by the Act has the following relevant features.[2]

7. A person served with an infringement notice must pay the infringement penalty within the specified period (s 14).

8. Alternatively, a person served with an infringement notice to which the Act applies may:

   (a) have the matter referred to the Magistrates Court to contest the offence (s 16);

   (b) apply to the relevant enforcement agency for internal review on the grounds that the issue of the infringement notice was contrary to law or involved a mistake of identity; that "*special circumstances*" apply to the person; or that the infringing conduct should be excused having regard to any "*exceptional circumstances*" (s 22); or

   (c) apply to the relevant enforcement agency for a payment plan (s 46).

Special circumstances and exceptional circumstances

9. The term "*special circumstances*" is defined in s 3 of the Act to mean either:

   (a) a mental or intellectual disability, disorder, disease or illness;

   (b) a serious addiction to drugs, alcohol or a volatile substance within the meaning of s 57 of the *Drugs, Poisons and Controlled Substances Act 1981*; or

   (c) homelessness, determined in accordance with the prescribed criteria (if any)[3]

   which must be such as to result in the person being unable, in the case of (a) and (b), to understand that conduct constitutes an offence or, in any case, to control conduct which constitutes an offence. Nothing in the definition "*is to be taken as limiting any power of the Court to consider the circumstances of any person in a proceeding before the Court under this Act or any other Act*": par (3) of the definition.

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1 The plaintiff's submissions say 81 days: see par 3; the second, third and fourth defendant's submissions say 84 days: see par 4(f).

2 The following summary is taken from version 21 of the Act, incorporating amendments to 1 January 2009, which was the most recent version at the time of the hearing in the Magistrates' Court on 26 February 2009.

3 Homelessness is defined, for the purposes of the *Infringements Act*, in the *Infringement (General) Regulations 2006*.

10. The term "*exceptional circumstances*" is not defined in the Act.

Payment plans

11. Where a person applies for a payment plan, s 46(3) of the Act obliges the enforcement agency to offer a payment plan to a person who meets the elibigility criteria set out in the guidelines issued by the Attorney-General under s 5 of the Act. In their current form, those guidelines state that this automatic entitlement to a payment plan applies to a person who is in receipt of a Centrelink or Veterans' Affairs Pensioner Concession Card or a Centrelink Health Care Card.[4] In other cases, the agency has a discretion to offer a payment plan. The guidelines state that enforcement agencies should take into account matters such as the financial hardship to the applicant.[5]

The making of an enforcement order

12. If the person does not pay the infringement penalty and none of the other options referred to above are put into effect, the enforcement agency may lodge details of any outstanding amount of an infringement penalty with the infringements registrar at the Court (s 54).

13. The infringements registrar may then make an enforcement order which requires that the person pay the infringement penalty and any prescribed costs in respect of a lodgeable infringement offence (s 59(1)). An enforcement order notice is then sent to the person (s 60). An enforcement order is deemed to be an order of the Court (s 59(2)), but the person is not to be taken to have been convicted of the offence (s 61(1)(a)).

14. A person against whom an enforcement order is made may apply to have the order revoked or for a payment order to be made in respect of the outstanding fines.

Revocation of an enforcement order

15. An enforcement order may be revoked by an infringements registrar and the matter of the infringement offence referred to the Court. This may be done on the infringement registrar's own motion (s 64) or on the application of an enforcement agency (ss 65, 66(1)), the person against whom an enforcement order is made or, in the case of a person to whom special circumstances apply, a person acting on his or her behalf (ss 65, 66(2)).

16. Where an application for revocation is refused, the person may apply to the infringements registrar to have the application for revocation referred to the Court. The infringements registrar may refer the matter to the Court and must do so if the application is made within 28 days of receipt of notice of the refusal of the initial application to the registrar (s 68).

17. If a matter has been referred to the Court under s 68, the Court may revoke the enforcement order and proceed to hear and determine the matter of the infringement

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4 Attorney-General's Guidelines to the Infringements Act 2006, page 5.

5 Ibid.

offence (s 72(1)) or refer the matter back to the infringements registrar for enforcement in accordance with the Act (s 72(2)). There is an opportunity for the re-hearing of such an application where the person did not appear at the first hearing (ss 74-75).

Payment orders

18. A person against whom an enforcement order has been made may also apply to the infringements registrar for a payment order, which may take the form of allowing additional time for payment or payment by instalments or a combination of those options (ss 76, 77).

Infringement warrants

19. If a person to whom an enforcement order notice is sent does not pay the outstanding amount of the fine, or defaults on a payment under a payment order, the infringements registrar must issue an infringement warrant (s 80).

20. Section 82 provides that the making of an infringement warrant authorises the sheriff or the police (after the prescribed notice has been given to the person named in the warrant (s 88)) to seize and sell the personal property of the person named and, if there is not sufficient personal property to pay off the outstanding amount (plus the costs of execution), to arrest the person named in the warrant and:

    (a) deal with that person in accordance with Div 1 of Pt 12 of the Act (that is, by issuing a community work permit), if appropriate;

    (b) admit the person to bail; or

    (c) if the person cannot be dealt with under Div 1 of Pt 12 and refuses to enter an undertaking of bail, to take the person to a prison or police gaol for the purposes of being dealt with under Div 2 of Pt 12.

21. A person arrested under an infringement warrant is an "*infringement offender*" (s 3).

Community work permits

22. Division 1 of Pt 12 of the Act confers a discretionary power on the sheriff to release an infringement offender, subject to certain criteria, on a community work permit (ss 147 and 148). A community work permit must not be issued:

    (a) if the amount of the outstanding fines under the infringement warrant exceeds an amount equivalent to the value of 100 penalty units (s 147(2)); and

    (b) unless the sheriff is satisfied that the offender has the capacity to perform community work and is reasonably unlikely to breach the conditions of a community work permit (s 147(3)).

Imprisonment and other powers of the Court

23. Division 2 of Pt 12 (containing ss 158-161) applies to an infringement offender who is

not eligible for a community work permit, is not issued with a community work permit within 48 hours of being arrested or who fails to comply with a community work permit or has had such a permit cancelled (s 158). The Explanatory Memorandum to the Infringements Bill 2005 stated that Div 2 of Pt 12 would replace the provisions currently found in Pt 4 of Sch 7 to the *Magistrates' Court Act 1989* and that it "*expands the options available to the Court in considering the personal circumstances of infringement offenders brought before it under an infringement warrant.*"

24. Section 160 of the Act sets out the powers of the Court in a case to which Div 2 of Pt 12 applies. It provides:

> *(1) The Court may order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount.*
>
> *(2) If the Court is satisfied—*
>
> *(a) that an infringement offender has a mental or intellectual impairment, disorder, disease or illness; or*
>
> *(b) without limiting paragraph (a), that special circumstances apply to an infringement offender—*
>
> *the Court may—*
>
> *(c) discharge the outstanding fines in full; or*
>
> *(d) discharge up to two thirds of the outstanding fines; or*
>
> *(da) discharge up to two thirds of the outstanding fines and order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the remaining undischarged amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount; or*
>
> *(e) adjourn the further hearing of the matter for a period of up to 6 months.*
>
> *(3) If the Court is satisfied that, having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh the Court may—*
>
> *(a) order the infringement offender to be imprisoned for a period that is up to two thirds less than one day in respect of each penalty unit, or part of a penalty unit, of the penalty units to which the amount of the outstanding fines is an equivalent amount; or*
>
> *(b) discharge the outstanding fines in full; or*
>
> *(c) discharge up to two thirds of the outstanding fines; or*
>
> *(ca) discharge up to two thirds of the outstanding fines and order that the infringement offender be imprisoned for a period that is up to*

two thirds less than one day in respect of each penalty unit, or part of a penalty unit, of the penalty units to which the undischarged amount of the outstanding fines is an equivalent amount; or

(d) adjourn the further hearing of the matter for a period of up to 6 months; or

*(e) make a community based order under Division 4 of Part 3 of the **Sentencing Act 1991**.*

(4) If the Court has made an order under subsection (1), (2)(da), (3)(a) or (3)(ca) for imprisonment in default of payment of outstanding fines—

*(a) a warrant to imprison may be issued under section 68 of the **Magistrates' Court Act 1989**; and*

*(b) the Court may make an instalment order under the **Sentencing Act 1991** in respect of the payment of the outstanding fines.*

25. There is no provision for review by the Magistrates' Court of an order made under s 160 of the Act and no provision for appeal from such an order.[6]

IV. INTERPRETATION: SECTION 32 OF THE CHARTER

26. Section 32(1) of the Charter provides:

> *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.*

27. That interpretive exercise must now be approached in the manner set out in *R v Momcilovic*,[7] where the Court of Appeal stated several principles concerning the nature of the interpretive obligation in s 32 of the Charter and the proper approach to the interpretation of a statutory provision which engages a Charter right. Those principles were summarised by Hargrave J in *Director of Public Prosecutions v Ali (No 2)*[8] as follows:

> "*(1) Section 32(1) does not create a "special" rule of interpretation permitting the Court to depart from the purpose of the provision in question, but instead "forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision".*[9]
>
> *(2) "Compliance with the s 32(1) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights".*[10]
>
> *(3) In determining what interpretations are possible, the Court should apply*

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6 Plaintiff's submissions, par 27; Second, Third and Fourth Defendants' submissions, par 4(g).

7 (2010) 25 VR 436. An appeal to the High Court was heard on 8-10 February and 7 June 2011. Judgment is reserved.

8 [2010] VSC 503.

9 *Momcilovic* (2010) 25 VR 436 at [35(1)].

10 Ibid, at [103].

"the existing framework of interpretative rules, including of course the presumption against interference with rights" in the absence of express language or necessary implication in the provision at issue.[11] *Where Charter rights are engaged, s 32(1) elevates this common law presumption to a statutory requirement in interpreting Victorian Statutes.*[12]

(4) When the meaning of the relevant provision has been ascertained in accordance with the body of interpretative rules, including s 32(1), the Court must then consider whether the relevant provision, so interpreted, breaches or limits a human right protected by the Charter. It is only if such a breach or limit is identified that the Court has occasion to apply s 7(2) and consider whether the limit on the relevant human right is justified.[13]"

28. The Commission submits that s 160 of the *Infringements Act* should be interpreted in a manner that permits the power to make an imprisonment order under subs 160(1) to be exercised only after proper consideration has been given to the individual circumstances of the person concerned, to determine whether an order under s 160(1) is appropriate in all the circumstances or whether, instead, any of the alternatives to imprisonment in subss 160(2) and (3) are available and appropriate.

29. That construction is to be preferred to a construction which required consideration of the individual circumstances of the person concerned only if the person seeks to make out a positive case under subss 160(2) or (3).

30. The Commission's construction should be preferred for the following reasons:

(a) it is consistent with the text and context of s 160, read as a whole;

(b) it gives effect to the purpose of s 160 and of the *Infringements Act* as a whole;

(c) it is consistent with the common law presumption against interference with fundamental rights, in this case the individual's right to be at liberty; and

(d) having regard to those matters, it is mandated by s 32 of the Charter.

31. Each of these points is discussed below.

(a) Text of s 160

32. Section 160 of the *Infringements Act* is to be read as a whole and in the context of the *Infringements Act* as a whole. It confers upon the Court a number of options in subs (1), (2) and (3) which may be exercised depending upon the circumstances of the individual infringement offender.

33. Although an order for imprisonment for the full potential term under subs (1) appears

11 Ibid.

12 Ibid, at [104].

13 Ibid, at [35(2)].

first in the section, this should not be understood as establishing imprisonment as the primary or default option unless the infringement offender seeks to make out a positive case under subs (2) or (3). Such a construction would be inconsistent with the purpose of the Act and the purpose of s 160 itself (as discussed below), with the general principle of proportionality in sentencing,[14] and with the sentencing guidelines in the *Sentencing Act 1991* which provide, in s 5(3) and (4):

> "*(3) A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.*
>
> *(4) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.*"

34. It should also be noted that Pt 12 Div 2 of the Act, in which s 160 appears, replaced Pt 4 of Sch 7 to the *Magistrates' Court Act 1989*.[15] As it was in force immediately before the enactment of the *Infringements Act*, clause 25 in Pt 4 of Sch 7 provided that "*[a] person brought before the Court under this Part bears the onus of satisfying the Court with respect to any matter before the Court.*" That provision was not reproduced in Pt 12 Div 2 of the *Infringements Act*.

(b) Purpose of s 160 of the *Infringements Act* and the Act as a whole

35. Section 1(a) of the *Infringements Act* states that one of the main purposes of the Act is to provide for a new framework for the issuing and serving of infringement notices for offences and the enforcement of infringement notices.

36. The purposes for which the new framework was introduced were more fully described in the Second Reading Speech to the Infringements Bill 2005, in which the then Attorney-General said:[16]

> "*Its primary purpose is to improve the community's rights and options in the process and to better protect the vulnerable who are inappropriately caught up in the system. A second objective is to provide additional enforcement sanctions to motivate people to pay their fines in order to maintain the integrity of the system.*
>
> *Broadly, the new elements of the system are:*
>
> > *overarching legislation to cover infringements law and process,*
> >
> > *a fairer infringements process based on early intervention and improved information to the public,*
> >
> > *process improvements which include a right of internal review by the issuing agency,*

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14 See eg *Hoare v The Queen* (1989) 167 CLR 348 at 354.

15 Explanatory Memorandum to the Infringements Bill, page 32.

16 Victorian Parliament, *Hansard*, 16 November 2005, Assembly, at page 2186 (Mr Hulls (Attorney-General)).

> *measures at various stages, including internal review stage, to filter people out of the system who cannot understand or control their offending behaviour (eg, people with mental or intellectual disabilities, the homeless, people with serious addiction),*
>
> *…*"

37. One of the principal means by which the new Act gave effect to the purpose of affording better protection for vulnerable people who cannot understand or control their offending behaviour was by the creation of a right of internal review by the enforcement agency which issued the original infringement notice, particularly on the "*special circumstances*" ground. In the Second Reading Speech, the Attorney-General described those aspects of the Bill in the following terms:[17]

> "*A ground for seeking a review of a notice is that the person has 'special circumstances' that affected the behaviour at the time of the offence. This is a critical change to filter the vulnerable in the community out of the infringements system. People with special circumstances are disproportionately, and often irrevocably, caught up in the system. In a just society, the response to people with special circumstances should not be to issue them with an infringement notice.*
>
> *…*
>
> *This problem has been in part addressed by the implementation of the special circumstances list in the Magistrates Court. People with mental or intellectual disabilities who have infringement fines and enforcement orders are able to have their matters considered by a magistrate, and in most cases the matters are discharged.*
>
> *This bill goes a step further to try to prevent special circumstances matters flowing to the court by having notices withdrawn by the issuing agency.*
>
> *…*
>
> *As an added protection, the bill provides that where a person has their application for review on special circumstances grounds rejected by the agency, the agency can only prosecute the matter to open court. The default cannot be lodged at the proposed Infringements Court. This is another filter to prevent people with special circumstances being channelled into a highly automated enforcement process.*"

38. Nevertheless, it remains possible, and this case provides an example, that the various mechanisms created by the Act fail to filter out people who are "*inappropriately caught up in the system*". Indeed, in the case of people with special circumstances, that very circumstance may render them less likely, perhaps even incapable, of availing themselves of those mechanisms. They may not have had the

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[17] Victorian Parliament, *Hansard*, 16 November 2005, Assembly, at page 2187-2188 (Mr Hulls (Attorney-General)).

wherewithal to seek internal review or to apply for a payment plan.[18] If an enforcement order is made, they may not have been capable of applying to have order revoked and the matter referred to the Court. They may not have been issued with a community work permit under Pt 12 Div 1, despite being eligible.[19] The result may be that such people find themselves being brought before the Court as an "*infringement offender*" without anyone having considered whether it would have been appropriate to exercise any of the mechanisms in the Act designed to filter them out of the system.

39. That possibility is recognised in Pt 12 Div 2 of the Act, and particularly in s 160, which provides the Court with a number of options other than imprisonment. The Explanatory Memorandum to the Infringements Bill stated, in relation to Pt 12 Div 2:[20]

> "*This Division expands the options available to the Court in considering the personal circumstances of infringement offenders brought before it under an infringement warrant.*"

40. In the Second Reading Speech, the Attorney-General described the powers of Magistrates under the new system, which are found in s 160 of the Act, as follows:[21]

> "*In 2000 the Parliament passed amendments to the Magistrates' Court Act to prevent people being arrested on enforcement warrants and automatically taken to prison. Anyone arrested on a warrant must now appear before a magistrate in open court. The policy of avoiding people being imprisoned for infringement fine defaults is continued in this bill and enhanced.*
>
> *The bill gives broader options to magistrates in open court hearings which occur after the execution of an enforcement warrant.*
>
> *By this stage, other enforcement sanctions, instalment payment plans or community work will not have been successful in expiating the fines. These hearings consider whether a person should be imprisoned, and will determine whether the individual has extenuating circumstances.*
>
> *Currently, magistrates' powers include being able to discharge the matter if*

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18 It appears that, had the plaintiff applied for a payment plan, he would have had an automatic entitlement to be offered a plan on the ground that he is in receipt of a Centrelink healthcare benefit: see s 46(3) and the Attorney-General's Guidelines to the Infringements Act 2006, page 5.

19 Indeed, that would seem to have been the case with the plaintiff: the outstanding amount of his fines and costs at the time of the hearing in February 2009 was $11,250.20 (First Affidavit of Sophie Claire Delaney, par 5), which was less than the value of 100 penalty units at the time: see s 147(2) of the Act. (For the financial year ending 30 June 2009, a penalty unit was equivalent to $113.42. The value of 100 penalty units was therefore $11,342.) He was therefore eligible for a community work permit unless the sheriff was not satisfied that he had the capacity to perform community work or was reasonably unlikely to breach the conditions of a community work permit: see s 147(3). There is no record of the sheriff giving any consideration to whether a community work permit should be issued to the plaintiff. He was arrested and bailed on the same day.

20 At page 32.

21 Victorian Parliament, *Hansard*, 16 November 2005, Assembly, at page 2189-2190 (Mr Hulls, (Attorney-General)).

the person has a mental or intellectual disability. If a person has exceptional circumstances, the court can place the person on community work. The term of imprisonment can also be reduced. The bill proposes that magistrates also be able to approve instalment payment plans and that where imprisonment would be 'excessive, disproportionate or unduly harsh' the magistrate can discharge the fine in all or part, or reduce the term of imprisonment by two thirds. These changes will ensure that imprisonment is, and will remain, a sanction of last resort for the most serious fine defaulters."

41. These extracts from the Second Reading Speech and the structure of the *Infringements Act* as a whole reveal two important purposes of the Act:

    (a) to afford improved protection for vulnerable persons inappropriately caught up in the infringements system, including by filtering them out of the system at various stages; and

    (b) that, where those filtering mechanisms have not succeeded or the fines have not otherwise been paid, the Court should have a range of options available to it and the imprisonment of an infringement offender for non-payment of an infringement penalty should be a measure of last resort.

42. An interpretation of s 160 which requires consideration of the availability and appropriateness of the alternatives to imprisonment for the full potential term in subss 160 (2) and (3) before making an imprisonment order under subs 160(1) gives effect to these purposes.

(c) Presumption against interference with rights

43. Statutory provisions are to be construed against the common law presumption that Parliament did not intend to abrogate or curtail fundamental rights unless it expresses its intention to do so clearly and unambiguously by express words or necessary implication.[22]

44. The power conferred by s 160(1) of the *Infringements Act* to imprison an infringement offender is plainly one that interferes with the liberty of the person, a freedom described by Gleeson CJ in *Al-Kateb v Godwin*[23] as "*the most basic*" of all the rights and freedoms protected by the common law. It follows that, as Maxwell P and Weinberg JA said in *RJE v Secretary to the Department of Justice*,[24] the Court

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22 There are many authorities to this effect. They include: *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 436-437; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Plaintiff S157 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]-[20] per Gleeson CJ, 643 [241] per Hayne J; *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [47] per French CJ.

23 (2004) 219 CLR 562 at [19]. See also at [150] where Kirby J referred to "*the common law presumption in favour of personal liberty*". See also *Antunovic v Dawson* [2010] VSC 377 at [6]-[9].

24 (2008) 21 VR 526.

"*should favour that interpretation which produces the least infringement of common law rights — in this case, the right to be at liberty*".[25]

(d) Effect of s 32 of the Charter

45. The application of s 32 of the Charter to the interpretation of s 160 of the *Infringements Act* depends first upon whether any Charter rights are engaged and limited by the section.[26] In determining this question, the rights potentially engaged should be construed in the broadest possible way.[27]

46. In the present case, the following Charter rights are engaged:

(a) the right to the equal protection of the law without discrimination in s 8(3);

(b) the right to liberty and security of the person in s 21;

(c) the right to a fair hearing in s 24.

47. It is preferable to look first at the right to liberty, as it is the right most clearly engaged by the potential exercise of the power of imprisonment under s 160.

(i) Section 21: the right to liberty

48. Section 21 of the Charter is concerned with the physical liberty of the person.[28] It provides, so far as is relevant:[29]

> *(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.*

49. Section 21(1) expresses the general right of individual liberty and may be regarded as the statutory equivalent of the common law "*right to be at liberty*" referred to in *RJE v Secretary to the Department of Justice*.[30] It is engaged in any case in which a person is at risk of imprisonment.[31]

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25 (2008) 21 VR 526 at [37] per Maxwell P and Weinberg JA, citing *Balog and Stait v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635–6 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

26 *Castles v Secretary to the Department of Justice* [2010] VSC 310 at [45].

27 *DPP v Ali (No 2)* [2010] VSC 503 at [29]; *Castles v Secretary to the Department of Justice* [2010] VSC 310 at [55]-[56]; *Re an Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at [80]; *Director of Housing v Sudi* [2010] VCAT 328 at [32]-[34]; *Kracke v Mental Health Review Board* [2009] VCAT 646 at [75]-[91].

28 Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill, page 16.

29 The remaining subsections of s 21 are not relevant to these proceedings.

30 (2008) 21 VR 526 at [37] per Maxwell P and Weinberg JA.

31 See, eg, *R v Malmo-Levine* [2003] 3 SCR 571 at [84] ("*the availability of imprisonment for the*

50. The making of an imprisonment order under s 160(1) of the *Infringements Act w*ould clearly interfere with the right to liberty in s 21(1) of the Charter. Although the right to liberty in s 21(1) is expressed in unqualified terms, it may be limited in accordance with the test set out in s 7(2) of the Charter. However, following the approach suggested in *Momcilovic*, the question of whether a limitation on a right may be justified under s 7(2) is considered only after the meaning of the provision in question has been established.[32] Accordingly, it is sufficient to attract the operation of s 32 of the Charter to recognise that the exercise of the power of imprisonment conferred by s 160(1) of the *Infringements Act* would interfere with the right to liberty in s 21(1) of the Charter. In those circumstances, s 32 requires that, of the "possible" alternative interpretations of s 160, that which least interferes with the right to liberty should be adopted.[33]

Reasonable limitations on the right to liberty

51. Further, the circumstances in which the right to liberty may lawfully be limited provide further assistance in the interpretation of s 160.

52. Section 21(2) and (3) provide protection against arbitrary or unlawful interferences with individual liberty. These are separate requirements: an otherwise lawful deprivation of liberty may nevertheless be arbitrary.

53. The New Zealand Court of Appeal has said, in relation to s 22 of the *New Zealand Bill of Rights Act* 1990 (the **NZ BORA**), which is equivalent to s 21(2) of the Charter, that a deprivation of liberty may be arbitrary where it exhibits "*elements of inappropriateness, injustice, or lack of predictability or proportionality*".[34] In *DPP v Ali (No 2)*,[35] Hargrave J noted a difference of opinion in recent Victorian authorities as to whether the word "*arbitrary*" in s 13(a) of the Charter means "*unreasonable*" or "*disproportionate*"[36] or "*capricious and not based on any identifiable criterion or criteria*",[37] but did not need to resolve it. Similarly, if the same conflict arises in relation to s 21(2), it is not necessary to resolve it here. That is because s 160 itself supplies the content of the concept of "arbitrariness" for the purposes of that section, for the following reasons.

54. There may be no dispute as to the lawfulness criterion in this case. The grounds on which the power under s 160(1) of the *Infringements Act* may be exercised are apparent from ss 158 and 160(1) itself: the person must be an "*infringement offender*" (that is, a person arrested under an infringement warrant) and be a person

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offence … is sufficient to trigger s 7 scrutiny", section 7 being the equivalent in the *Canadian Charter of Rights and Freedoms* to s 21 of the Charter).

32 *Momcilovic*, at [105]-[110].

33 *Momcilovic*, at [103].

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35 [2010] VSC 503 at [37]-[38].

36 See *Kracke v Mental Health Review Board* [2009] VCAT 646 at [165]; and *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 at [169].

37 See *WBM v Chief Commissioner of Police* [2010] VSC 219 at [51]-[57].

to whom Pt 12 Div 2 applies.[38]

55. However, even if these preconditions are satisfied, there is clearly a risk that an imprisonment order made under s 160(1) in a particular case may nevertheless be arbitrary, and therefore contrary to s 21(2) (and s 21(1)) of the Charter, if its exercise is not preceded by a consideration of whether imprisonment is appropriate and proportionate in all the circumstances. See, for example, the following statement of principle by two leading commentators on the equivalent provision of the NZ BORA:[39]

> *"A detention or arrest can be … arbitrary where, even though the prerequisites to the exercise of the power are satisfied, the arresting officer has failed to consider whether or not it is appropriate in all the circumstances to have resort to the exercise of the power."*

56. This is not a case of a statutory provision conferring an open-ended discretionary power, where the question would arise whether the discretion could only lawfully be exercised in a manner which imposes only reasonable or proportionate limitations on the right to liberty.[40] Rather, the discretion in s 160(1) must be read together with s 160(2) and (3). Section 160(3), in particular, uses the language of proportionality. It empowers the Court to make any of a range of orders falling short of imprisonment (or at least, short of imprisonment for the full potential term) if it is "*satisfied that, having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh*". That, of course, requires consideration of the individual circumstances of the case: of the offender's "situation" and the effect that an order for imprisonment would have on him or her. That may lead, in turn, to discovery of information relevant to the potential application of s 160(2). It is submitted that that exercise should be conducted, in every case, before any exercise of the power to make an imprisonment order under s 160(1), in order to ensure that that power is not exercised arbitrarily.[41]

57. It follows, in the Commission's submission, that the interpretation of s 160 of the *Infringements Act* that least interferes with the right to liberty in s 21 of the Charter and must therefore be adopted is one which requires the Court to consider whether the circumstances enlivening the available alternatives to imprisonment in subss 160(2) and (3) are present before exercising the power of imprisonment in subs 160(1).

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38 In Mr Taha's case, Pt 12 Div 2 may have applied to him for no other reason than that he was "not issued with a community work permit within 24 hours after being arrested": s 158(c).

39 Butler and Butler, *The New Zealand Bill of Rights Act: a commentary* (2005, LexisNexis), [19.8.23], referring to *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC); and *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA).

40 See, eg, *Kracke v Mental Health Review Board* [2009] VCAT 646, [208]-[210], referring to *Slaight Communication Inc v Davidson* [1989] 1 SCR 1038, 1048, 1058; *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [77]-[78], [85], [90]-[91]; and *R v Lord Saville ex parte A* [1999] 4 All ER 860 at 872 [37].

41 Section 160 may be contrasted, in this respect, with s 38 of the *Confiscation Act 1997* in issue in *DPP v Ali (No 2)* [2010] VSC 503, esp at [42]-[45].

(ii) Section 24: the right to a fair hearing

58. Section 24(1) of the Charter provides:

> *A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.*

59. The right to a fair hearing in s 24(1) of the Charter reflects a fundamental principle of the common law,[42] one that is "deeply ingrained in the law" and "inherent in the rule of law" itself.[43] While the right to a fair hearing is itself absolute, what fairness requires in a particular case will vary with the circumstances.[44] The fundamental principle to be applied is whether the proceedings as a whole are fair.

60. It is submitted that, for the following reasons, the right to a fair hearing in s 24 of the Charter may in certain cases oblige a Court exercising the powers conferred by s 160 of the *Infringements Act* to inquire into the availability and appropriateness of the alternatives to imprisonment in s 160(2) and (3).

61. First, the procedure adopted in every case must fairly reflect the nature of the interests at stake.[45] Here, as discussed above, the liberty of the individual, one of the most basic rights protected by the law, is at stake.

62. Secondly, there are a number of authorities regarding the existence and nature of a duty to inquire in the administrative law context. The plaintiff has addressed those authorities in his submissions. The Commission supports those submissions. The only further submission that the Commission seeks to make in relation to those authorities is that the right to a fair hearing in s 24 of the Charter is informed by common law principles of natural justice or procedural fairness and that the content of the right in any particular case should be construed at least as broadly as the content of the requirements of procedural fairness.

63. Thirdly, the nature of the proceedings should be taken into account. The plaintiff came before the Court as an "infringement offender", despite there having been no hearing of the matter of the infringement offences themselves, in which matters potentially relevant to the exercise of the Court's powers under s 160(2) or (3) may have been exposed. The administrative and "highly automated"[46] nature of the process leading up to that point emphasises the need for proper procedures to be

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42 *Re an Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at [38]-[39], citing *Dietrich v The Queen* (1992) 177 CLR 292. See also *R v Thomas* (2006) 14 VR 475, 510; *R v McFarlane; ex parte O'Flanagan* (1923) 32 CLR 518, 541-542.

43 *Tomasevic v Travaglini* (2007) 17 VR 100 at [68]; *R v McFarlane; ex parte O'Flanagan* (1923) 32 CLR 518, 541-542.

44 *Tomasevic v Travaglini* (2007) 17 VR 100 at [88]; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300 at [65]; *Brown v Stott* [2003] 1 AC 681 at 693 per Lord Bingham; *R v A (No 2)* [2002] 1 AC 45 at [38] per Lord Steyn; *R v Hansen* [2007] 3 NZLR 1 at [65]-[66] per Blanchard J.

45 *R v Parole Board; ex parte West* [2005] UKHL 1, [2005] 1 WLR 350 at [30] per Lord Bingham.

46 Victorian Parliament, *Hansard*, 16 November 2005, Assembly, at page 2187-2188 (Mr Hulls (Attorney-General).

observed at the s 160 hearing. Further, the hearing itself is not an adversarial proceeding in the true sense, as it appears that the practice is for the Court's infringements registrar to appear before the Magistrate to provide him or her with certain relevant information.[47]

64. Fourthly, the infringement warrant issued in respect of the plaintiff concerned a large number of infringement offences over a relatively lengthy period of time and which amounted in total to a very large fine. That in itself ought to have triggered an inquiry from the Court as to how that situation came to be, whether any of the filtering mechanisms in the Act had been considered or tried and whether any of the tools available to the Court should be utilised. For example, given the practical constraints of the duty lawyer system, the Court always has power to adjourn the hearing to allow for further investigation into the offender's circumstances to be carried out.

65. Fifthly, it is recognised both at common law[48] and in international human rights jurisprudence[49] that one aspect of the right to a fair trial in the ordinary setting of an adversarial criminal trial is the prosecution's duty to disclose material in its possession or available to it against the accused and which may assist the accused. In a case under s 160 of the *Infringements Act*, where, as noted above, the proceedings are not adversarial in the true sense, it is arguable that the right to a fair trial requires the Court itself, through the infringements registrar or the Magistrate hearing the case, to disclose to the infringements offender information in its possession.[50]

66. For these reasons, an interpretation of s 160 of the *Infringements Act* which did not require consideration of an infringement offender's individual circumstances and of whether any of the sentencing options in s 160(2) and (3) are available and appropriate before the power of imprisonment in s 160(1) is exercised would limit or interfere with the offender's right to a fair hearing.

67. For the reasons given at pars 32 - 44 above, an interpretation of s 160 which conditions the exercise of the Court's power of imprisonment in s 160(1) upon prior consideration of an infringement offender's individual circumstances and of whether any of the sentencing options in s 160(2) and (3) are available and appropriate is an interpretation that is open on ordinary principles of statutory construction. Accordingly, following the approach adopted in *Momcilovic*, s 32 of the Charter requires that that interpretation be adopted.

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47 Affidavit of Sophie Claire Delaney sworn 28 January 2011 (**Second Delaney Affidavit**), pars 5-6.

48 See, eg, *Cannon v Tahche* (2002) 5 VR 317 at 339-340 [56]; and the authorities discussed by Kirby J in *Mallard v The Queen* (2005) 224 CLR 125 at 150-156 [64]-[84].

49 See the authorities discussed by Bell J in *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300 at [45]-[65], which suggest that the duty is an aspect of the principle of "equality of arms" and of the express guarantee that a person charged with a criminal offence must have adequate time and facilities to prepare his or her defence: see s 25(2)(b) of the Charter.

50 In the present case, it appears that the Court had in its possession the information that the plaintiff had previously been put on a sentencing plan only available to persons certified by the Secretary to the Department of Human Services as suffering from an intellectual disability: see Plaintiff's Outline of Submissions, par 7; Second Delaney Affidavit, par 9 and exh SD 2.

(iii) Section 8(3): the right to equality

68. Section 8(3) of the Charter provides:

> "*Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.*"

69. *Re Lifestyle Communities Ltd (No 3)*,[51] Bell J said that s 8(3), like Art 26 of the ICCPR, on which it is modelled, is an "*autonomous human right*", in the sense that it "*creates that right substantively and independently, not in terms which are purely protective of the other rights in the Charter.*"

70. *"Discrimination*" is defined in s 3 of the Charter to mean "*discrimination (within the meaning of the Equal Opportunity Act 1995) on the basis of an attribute set out in section 6 of that Act"*. The list of attributes in s 6 of the *Equal Opportunity Act* includes "*impairment*" which is defined in s 4 to include "*a mental or psychological disease or disorder*".

71. An interpretation of s 160 of the *Infringements Act* which relied upon infringement offenders to raise circumstances calling up the Court's powers under s 160(2) or (3) before the Court is required to consider the applicability of those powers has the potential to discriminate indirectly against offenders suffering from mental impairment, in the sense that it would impose a practice that:

(a) someone with an attribute does not or cannot comply with; and

(b) a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and

(c) is not reasonable.[52]

72. That is because it is self-evident that their impairment may itself render them less capable than persons without such an impairment (and in some cases *in*capable) of informing the Court of circumstances which may enliven the Court's powers to make orders other than imprisonment. The right of infringement offenders with an intellectual impairment to the equal protection of the law may thereby be adversely affected. Accordingly, for the reasons given above in relation to the rights to liberty and a fair hearing, s 32 of the Charter favours the interpretation of s 160 of the *Infringements Act* in a manner which requires the Court to inquire into the applicability of s 160(2) and (3) before making an imprisonment order under s 160(1).

IV. CHARTER OBLIGATIONS OF THE COURT

73. In addition to the interpretation of legislation, the Charter may be directly relevant to the exercise by a court or tribunal of its powers where:

(a) the court or tribunal is acting in an administrative capacity and is therefore a

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51 [2009] VCAT 1869 at [126]. See also his Honour's examination of the jurisprudence in relation to the international equivalents to s 8(3) of the Charter at [134]-[161].

52 See definition of indirect discrimination in s 8 of the *Equal Opportunity Act 2010*.

public authority under s 4(1)(j) of the Charter, it will be bound by s 38 of the Charter to act compatibly with, and give proper consideration to, relevant human rights; or

(b) the court or tribunal is applying or enforcing those human rights in Part 2 of the Charter that relate to court and tribunal proceedings. In such a case, those particular rights will apply directly to the court or tribunal by force of s 6(2)(b) of the Charter.

The obligations of public authorities: ss 4(1)(j) and 38

74. Section 38(1) of the Charter imposes human rights compliance obligations on public authorities. It provides:

> "*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.*"

75. The term "*public authority*" is defined in s 4 of the Charter. The fact that the First Defendant is a "court" does not preclude it from being a public authority for the purposes of the Charter.[53] Section 4(1)(j) excepts courts and tribunals from the definition except when they are "*acting in an administrative capacity*". Thus, where a court or tribunal is acting in an administrative capacity, it will be a public authority and will be bound by s 38 of the Charter.

76. The plaintiff submits that the Magistrate was acting in an administrative capacity and was therefore a public authority for the purposes of the Charter[54] and that the Court acted incompatibly with the human rights set out in ss 8, 21 and 24 of the Charter and therefore breached its obligations under s 38.

77. The Commission submits that, in determining whether a Magistrate is "*acting in an administrative capacity*" for the purposes of s 4(1)(j) of the Charter when exercising the powers conferred under s 160 of the *Infringements Act*, the following matters should be taken into account:

(a) The reference to "*acting in an administrative capacity*" in s 4(1)(j) is to be understood as a reference to a court or tribunal exercising administrative power, as distinct from judicial or legislative power, as understood at common law.[55]

(b) Principles and authorities relating to the distinction between judicial and administrative power in the federal constitutional context may be applied to determine whether a court or tribunal is acting in an administrative capacity in

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53 Cf par 22(d)(i) of the Second, Third and Fourth Defendants' Submissions.

54 Plaintiff's Outline of Submissions, par 41(h)(i); Amended Originating Motion dated 18 April 2011, ground 5. This issue is not addressed in the Second, Third and Fourth Defendants' Submissions.

55 *Sabet v Medical Practitioner's Board of Victoria* (2008) 2 VR 414 at [119]-[127]; *Kracke v Mental Health Review Board* [2009] VCAT 646 at [270]; and *Re Lifestyle Communities (No 3)* [2009] VCAT 1869 at [39].

a particular case, as those cases reflect the well-established common law distinction between judicial and administrative power.[56]

(c) Although it has been said that the "*adjudgment and punishment of criminal guilt*" under law is a function which is "*essentially and exclusively judicial in character*",[57] the functions of a Magistrate under s 160 of the *Infringements Act* are somewhat different from the characteristic functions of a court conducting an ordinary criminal trial:

(i) First, the Magistrate is not determining guilt. The person's guilt in relation to the infringement offence is established by the administrative process of the infringements registrar making an enforcement order. The person therefore comes before the Magistrate under s 160 as an "infringement offender".

(ii) Second, the function being exercised by the Magistrate is not simply or wholly one of sentencing. The powers conferred on the Magistrate include the power to discharge some or all of the outstanding fines on the grounds specified in s 160(2) and (3), which is a power more characteristic of the exercise of the prerogative of mercy than the determination of the appropriate punishment for criminal guilt.

Direct application to courts and tribunals: s 6(2)(b)

78. Alternatively, the right to a fair hearing in s 24 of the Charter may have been directly applicable to the exercise of the Court's powers under s 160 of the *Infringements Act* by operation of s 6(2)(b) of the Charter.

79. Section 6 is a pivotal provision of the Charter. It defines who has the human rights set out in Pt 2 of the Charter and the entities to whom the Charter is to apply and how it is to apply to them. Section 6(2) provides:

"*This Charter applies to –*

(a) the Parliament, to the extent that the Parliament has functions under Divisions 1 and 2 of Part 3; and

(b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and

(c) public authorities, to the extent that they have functions under Division 4 of Part 3."[58]

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56 *Sabet v Medical Practitioner's Board of Victoria* (2008) 2 VR 414 at [125]; *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 319.

57 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

58 Section 3(2) provides that "*a reference to a function includes a reference to a power, authority and duty*" and that, where the function is a duty, it includes "*a reference to the performance of the duty*".

80. There is an apparent tension between s 4(1)(j), which provides that courts and tribunals are public authorities for the purposes of the Charter only when acting in an administrative capacity, and s 6(2)(b) which contemplates that courts and tribunals have functions under Part 2 of the Charter and that the Charter applies to them "*to the extent that*" they have those functions. Bell J reconciled that tension in *Kracke v Mental Health Review Board*.[59] Accepting the submission of the Attorney-General, who intervened in the case, his Honour held that the correct interpretation of s 6(2)(b) was that:[60]

> "*The functions under Part 2 referred to in s 6(2)(b) are the functions of applying or enforcing those human rights that relate to court and tribunal proceedings. I think that is the correct interpretation because it respects the structure of the Charter, is most consistent with its purposes in the context of that structure and gives the opening words of s 6(2), and the words 'functions under Part 2' in s 6(2)(b), an appropriately general meaning.*"

81. His Honour held that the "*human rights that relate to court and tribunal proceedings*" included the fair hearing rights in ss 24 and 25 of the Charter and that courts and tribunals were therefore bound by reason of s 6(2)(b) to act compatibly with those rights, even if they are not "*acting in an administrative capacity*".[61]

82. Whether the Court acted compatibly with s 24 of the Charter when exercising its powers under s 160 of the *Infringements Act* in this case is to be determined by examining whether its conduct of the hearing limited or interfered with the right in a manner that was not demonstrably justifiable having regard to s 7(2) of the Charter.

83. Where a right has been limited, it is not sufficient to say that "there is no evidence suggesting that the First Defendant did not take into account all those rights to which the Plaintiff refers that were relevantly drawn to the First Defendant's attention by Plaintiff's counsel".[62] As Warren CJ said in *Re Application under the Major Crime (Investigative Powers) Act 2004*, the rights set out in Part 2 of the Charter are "*guaranteed unless the party invoking s 7(2) can bring him or herself within the exception criteria which justify the rights being limited*".[63] The State bears the onus of establishing that any limitations on rights are consistent with s 7(2) of the Charter.[64] That onus should ordinarily be discharged by reference to evidence.[65] As Warren CJ explained:[66]

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59 [2009] VCAT 646.

60 [2009] VCAT 646 at [250].

61 [2009] VCAT 646 at [251]. His Honour also considered, again accepting the Attorney-General's submission, that other provisions of Part 2 potentially capable of applying to courts and tribunals by reason of s 6(2)(b) included ss 21(5)(c), 21(6), 21(7), 21(8), 23(2), 23(3), 26 and 27. See also See also *Smeaton v Victorian WorkCover Authority* [2009] VCAT 1195 at [4], where Bell J reiterated his conclusion in relation to s 24.

62 Second, Third and Fourth Defendants' Submissions, par 22(d)(iv).

63 *Re an Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [115].

64 *Re an Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [147]; *Kracke* [2009] VCAT 646 at [108]; *R v Oakes* [1986] 1 SCR 103, 136-137.

65 *Momcilovic* (2010) 25 VR 436 at [146]; *Kracke* [2009] VCAT 646, [148]; *R v Oakes* [1986] 1

> "*[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. It follows that the 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.*
>
> *The party seeking to justify the limitation must satisfy each of the factors in paragraphs (a)-(e), which broadly correspond to the proportionality test identified in Oakes. The notion of proportionality is a key principle embraced by the Charter and reflects the human rights jurisprudence of most comparable jurisdictions.*"

84. In the present case, if the right to a fair hearing is interpreted, as the Commission submits it should be, so as to require a court or tribunal to make positive inquiries into relevant material in its possession, the apparent failure of the Court in this proceeding to consider the availability and appropriateness of the alternatives to imprisonment in s 160(2) and (3) prior to making the imprisonment order under s 160(1) would constitute a *prima facie* limit on or interference with the right to a fair hearing. No justification has yet been offered for that interference. In the absence of any purported justification for that failure and, if necessary, of evidence to support it, the Court should be found to have acted incompatibly with the right to a fair hearing in s 24 of the Charter.

V. JURISDICTIONAL ERROR

85. If the proper interpretation of s 160 of the *Infringements Act* is that for which the Commission contends, the Magistrates' Court in this case has misconstrued the statute and misconceived the nature of the function that it was required to perform. It would follow that it has committed an error going to its jurisdiction.[67]

86. In addition, where a public authority fails to act compatibly with a human right, it will have acted unlawfully: s 38 of the Charter. The same description should apply to a failure by a court or tribunal to act compatibly with a human right which applies to it by virtue of s 6(2)(b) of the Act. In either case, the failure by a court or tribunal to act compatibly with a relevant and applicable human right, and in particular a failure to comply with the right to a fair trial, should be understood as unlawful and as an error of jurisdiction.[68]

SCR 103, 138; *Hansen v The Queen* [2007] 3 NZLR 1, [9], [50], [132]-[133], [229]-[232]; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 61 [30].

66 *Re an Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at [147]-[148]. See also *R v Oakes* [1986] 1 SCR 103, [65]; Evans and Evans, *Australian Bills of Rights* (2008) 5.51-5.52.

67 See *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 573-574 [71]-[72].

68 In the United Kingdom, breach by a public authority of the obligation to act compatibly with human rights has been treated as entitling the victim of the breach to remedies in the nature of the prerogative writs: see Evans and Evans, *Australian Bills of Rights* (2008), 130-132 [4.43]-[4.46].

Dated: 27 June 2010

A.D. POUND

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Sarala Fitzgerald
Solicitor for the Victorian Equal Opportunity and Human Rights Commission