IN THE SUPREME COURT OF VICTORIA **No 549 of 2009**
COURT OF APPEAL

AT MELBOURNE

BETWEEN

BMV
Appellant
AND

SECRETARY TO THE DEPARTMENT OF JUSTICE
Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Intervener

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
Intervener

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION (INTERVENING)

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I. INTRODUCTION AND SUMMARY

1. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervenes as of right under s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**).

2. This is an appeal from the Extended Supervision Order (**ESO**) made by the County Court (Judge Sexton) on 30 September 2008 pursuant to s 11(1) of the *Serious Sex Offenders Monitoring Act 2005* (Vic) (**the Monitoring Act**). That section provides:

> A court may only make an extended supervision order in respect of an offender if it is satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if released in the community ... and not made subject to an extended supervision order.

3. The Secretary has the onus of proving that the offender is likely to commit a relevant offence if released in the community (s 11(2)). Once that pre-condition is satisfied, the court has a discretion whether or not to make an ESO.[1]

4. In summary, the Commission submits:

   (a) Having regard to the terms of s 52 of the *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) (**the Amending Act**), it is no longer possible to interpret the word "likely" in s 11(1) of the Monitoring Act as meaning "more likely than not".[2]

   (b) Contrary to the assumption made by the Appellant (and apparently accepted by the Respondent), that conclusion does not exhaust the relevant operation of s 32 of the Charter.

   (c) Section 32 requires the discretions conferred by s 11(1), 16(1) and 16(2) of the Monitoring Act to be read as not authorising any order, condition or direction that is not a reasonable limit that is demonstrably justifiable in a free and democratic society having regard to the considerations identified in s 7(2) of the Charter and the specific circumstances of the relevant offender.

   (d) If the Monitoring Act is interpreted in that way, it is not necessary for this Court to assess whether the regime created by the Monitoring Act is demonstrably justifiable pursuant to s 7(2) of the Charter, or to admit or consider evidence directed to that question. The justification analysis is undertaken at the level of specific orders or directions made in light of the circumstances pertaining to a specific individual.

   (e) The fact that the Adult Parole Board (**the Board**) is not a "public authority" for the purposes of the Charter does not mean that the Board is "exempt" from the operation of the Charter. Section 32 of the Charter requires all statutory provisions – whether or not they confer powers on a public authority – to be interpreted compatibly with human rights if that is possible consistently with their purpose. The fact that, by reason of regulations made under s 46(2)(b) of the Charter, the Board is not a "public authority" is of no relevance to the interpretation of legislation that confers powers on the Board, because there is no power by regulation to limit the operation of s 32.

   (f) If the Monitoring Act is interpreted in the manner identified above, there is no occasion for the making of a declaration of inconsistent interpretation pursuant to s 36 of the Charter in relation to that Act.

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1 *TSL v Secretary to the Department of Justice* (2006) 14 VR 109,112 [7].

2 Cf *RJE v Secretary, Department of Justice* [2008] VSCA 265.

II. SECTION 32 OF THE CHARTER

5. 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".

6. This Court is presently reserved in *Momcilovic v The Queen*, in which the methodology that should be adopted when interpreting legislation in accordance with s 32 was fully argued. In that case, both the Commission and the Attorney-General submitted that the four steps identified by Bell J in *Kracke v Mental Health Review Board*[3] (***Kracke***) will often be of assistance in approaching the task required under s 32 of the Charter. Those steps are:

   (a) **Engagement:** Interpret the statutory provision in question according to ordinary principles of interpretation;[4] interpret the right in issue as broadly as possible so as to identify its scope; and then compare the two. If the ordinary interpretation does not limit the right in issue, adopt that interpretation. [5]

   (b) **Justification:** If the statutory provision does limit human rights, ask whether that limitation is reasonably justifiable having regard to section 7(2) of the Charter.

   (c) **Reinterpretation:** If the limitation is not justifiable in accordance with s 7(2) of the Charter, reinterpret the statutory provision in a manner that is compatible with human rights, provided that it is possible to do so consistently with the purpose of the provision.

   (d) **Declaration of inconsistent interpretation:** If it is not possible to reinterpret the provision in a rights-compatible manner, consider whether the Court should make a declaration of inconsistent interpretation (Supreme Court only).

7. The above steps reflect the approach that has most often been adopted when applying s 32 of the Charter.[6] That approach is followed below, although as will be seen in a case of this kind the second and third steps overlap.

8. The Respondent has submitted that this Court should not even "embark on the inquiry into the consistency of s 11(1) with human rights, which, in the circumstances of this case, would be futile."[7] The submission appears to be that, even if s 11 of the Monitoring Act is inconsistent with the Charter, no declaration of inconsistent interpretation should be made because of the pending commencement of the *Serious Sex Offenders (Detention and Supervision) Bill 2009* (Vic), and that in those circumstances there is no need to consider whether s 11(1) is compatible with human rights. That submission must be rejected. The Court cannot avoid an inquiry into whether s 11(1) is compatible with human rights, because that inquiry is a necessary step in the process of interpretation mandated by s 32 of the Charter.

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3 [2009] VCAT 646, [65]. See also *RJE v Secretary, Department of Justice* [2008] VSCA 265, [106], [115]; *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, [84] (Mason NPJ); *Hansen v The Queen* [2007] 3 NZLR 1, 37 [93] and 27 [59].

4 Including the presumption that the legislature did not intend to infringe civil right unless it does so expressly or by necessary intendment (e.g. *Coco v The Queen* (1993) 179 CLR 427, 437-438) and that statutes should be interpreted and applied, so far as their language allows, in a manner which is consistent with international law (e.g. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [97]).

5 *R v Johnstone* [2003] 3 All ER 884, [54]; *R v Oakes* [1986] 1 SCR 103, 114; *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, [29]; *Hansen v The Queen* [2007] 3 NZLR 1.

6 *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [50]-[53] (Warren CJ); *RJE v Secretary, Department of Justice* [2008] VSCA 265, [115] (Nettle JA); *Kracke* [2009] VCAT 646, [65]. See also *R v Fearnside* (2009) 165 ACTR 22, 43 [98].

7 Respondent's submissions, paragraph 37.

(I). ENGAGEMENT

9. The Monitoring Act engages numerous rights in the Charter, as it authorises ESOs to be made that have a severe impact on, at least, freedom of movement (s 12), privacy (s 13) and liberty (s 21).[8] That follows because:

   (a) Once an ESO is made, that ESO must have all the conditions set out in s 15(3) attached to it. Those mandatory conditions include that the offender must obey all lawful instructions and directions of the Board given under s 16(2), and of the Secretary under s 16(1).

   (b) The Board may give an offender any instruction or direction that the Board considers necessary to achieve the purposes of the conditions of the order set out in s 15(2) of the Monitoring Act (s 16(2)). The Board may vary such instructions or directions at any time (s 16(4)). Without limiting that power, the directions given by the Board may include instructions or directions as to: "where the offender may reside" (s 16(3)(a)); "times at which the offender must be at home" (s 16(3)(b)); places or areas that the offender must not visit; persons an offender may not associate with; employment or community activities in which the person must not engage; and forms of monitoring (including electronic monitoring) to which the offender must submit (s 16(3)(c)-(i)). Further, pursuant to s 16(3A) and (3B), the Board may direct offenders to live on land within the perimeter of the Ararat Prison.

10. In light of the above, this Court has accepted that an ESO can result in a person becoming "a prisoner in all but name".[9] On the facts of this case, that is what occurred when the interim ESO was made in relation to the Appellant, because he was directed to reside within the ESOTAC facility within the walls of Ararat Prison, and to be escorted whenever he left that facility.[10] It seems that similar conditions are imposed on the vast majority of ESOs.[11]

The threshold for the operation of s 11

11. The parties have focused their submissions on the threshold risk that must be proved before an ESO may be made. That focus reflects the focus of the two leading decisions of this Court in relation to the operation of s 11 of the Monitoring Act, being *TSL v Secretary to the Department of Justice*[12] (***TSL***) and *RJE v Secretary, Department of Justice*[13] (***RJE***).

12. In *TSL*,[14] this Court held that the word "likely" in s 11 meant "to a high degree of probability", but did not mean "more likely than not". *TSL* was followed by Judge Sexton in making the ESO in this case.

13. On 18 December 2008, after the ESO that is presently under appeal had been made, this Court handed down judgment in *RJE*.[15] The Court held that *TSL* should not be followed,[16] and that "likely" in s 11 meant "more likely than not".[17] Maxwell P and Weinberg JA reached that conclusion by applying ordinary common law rules of interpretation. Nettle JA reached the same result by relying on s 32.[18]

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8 See *Secretary to the Department of Justice v AB* [2009] VCC 1132, [245]; *RJE* [2008] VSCA 265, [106]; *Fletcher v Secretary to the Department of Justice* (2006) 165 A Crim R 569, [24], [79]; *Justice Legislation Amendment Bill 2008, Statement of Compatibility*, 17 April 2008, p 1431.

9 *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, 113 [10].

10 Affidavit of Jennifer Ann Hosking sworn 26 September 2008, paragraph 3.

11 *Secretary to the Department of Justice v AB* [2009] VCC 1132, [127]-[131].

12 (2006) 14 VR 109.

13 [2008] VSCA 265.

14 (2006) 14 VR 109, 112-114 [8]-[12].

15 [2008] VSCA 265.

16 [2008] VSCA 265, [48].

17 [2008] VSCA 265, [21], [36]-[37], [53].

18 [2008] VSCA 265, [117].

14. Parliament responded to *RJE* by enacting the Amending Act, which commenced on 11 February 2009. The Amending Act inserted new subsections 11(2A) and (2B) into the Monitoring Act. Those subsections were not, however, given retrospective operation, with the result that the meaning of those subsections is not at issue in this appeal.[19] However, the Amending Act also contained s 52(1), which provided:

> For the avoidance of doubt, sections 11 and 23 as in force before the commencement day[20] are taken always to have permitted a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not.

15. The parties apparently agree that s 52 restores the test previously established by *TSL*,[21] and that the ESO made by Judge Sexton therefore cannot be attacked merely because her Honour adopted the test from *TSL*.

16. The Commission accepts that, having regard to the terms of s 52 of the Amending Act, it is no longer possible to interpret the word "likely" in s 11 as meaning "more likely than not".[22] However, contrary to the submissions of the parties, that conclusion does not exhaust the operation of 32 of the Charter.

Discretion

17. The opening words of s 11(1) of the Monitoring Act make it clear that, once the threshold condition for the making of an ESO is satisfied, the Court has a discretion whether or not to make an ESO.[23]

18. Section 11 does not identify the matters that are relevant to the exercise of that discretion. Accordingly, on ordinary principles of interpretation, those matters are to be identified having regard to the subject matter, scope and purpose of the Act.[24] As Deane J pointed out in *Sean Investments Pty Ltd v MacKellar*: [25]

> where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards.

19. On ordinary principles of interpretation, a Court making an ESO (or the Board in imposing conditions or making directions pursuant to s 16(2) of the Monitoring Act) would not be required to consider whether the effect of making an order would be to derogate from the rights of an offender in a way that is not demonstrably justifiable in a free and democratic society. Instead, each exercise of the power conferred by s 11 or s 16(2) would be confined primarily by reference to the objects of the Monitoring Act (and, in the case of the Board, by reference to the matters specified in s 15(2)). Provided those matters were considered, an order or direction might be lawful (and thus not liable to be set aside on judicial review) even if it involved an interference with human rights that was not a reasonable limit that was demonstrably justifiable in a free and democratic society.

20. Accordingly, on its ordinary interpretation, the Monitoring Act purports to authorise limitations on human rights that are protected by Part 2 of the Charter.

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19 Those subsections were analysed in *Secretary to the Department of Justice v AB* [2009] VCC 1132.

20 Section 52(3) provides that the commencement day means the commencement of the Amending Act.

21 Appellant's outline, paragraphs 30-31, 53; Respondent's outline, paragraph 8.

22 See *Secretary to the Department of Justice v AB* [2009] VCC 1132, [284].

23 *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, 112 [7], 118 [26]; *Secretary to the Department of Justice v AB* [2009] VCC 1132, [276]-[278]. The Respondent accepts that such a discretion exists: Respondent's outline, paragraph 32.

24 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24, 39-40; *Minister for Immigration, Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505, 523 [72].

25 (1981) 38 ALR 363, 378.

(II). JUSTIFICATION

21. The next step in the analysis is to consider whether the potential interference with human rights identified above is demonstrably justifiable having regard to the terms of s 7(2) of the Charter.

22. The Respondent bears the onus of establishing that any limitations on rights are consistent with s 7(2) of the Charter.[26] That onus should ordinarily be discharged by reference to evidence.[27] Cogent evidence is required, because the words "demonstrably justified" impose a "stringent standard of justification".[28]

23. When the Court is confronted with a legislative regime that involves a range of possible interferences with rights, some of which may be justifiable and some of which may not be, it will often not be possible to approach the analysis required by s 7(2) by focusing on the legislative regime.[29] Instead, it may be necessary to focus upon whether the operation of that regime in a particular case complies with s 7(2).[30] That approach ensures that, in the context of a particular set of facts, no order can lawfully be made that would result in an interference with rights that is not demonstrably justifiable.

24. The point is well illustrated by the Monitoring Act, because under that Act:

    (a) the potential impact on rights is highly variable, ranging from minimal impact to complete deprivation of liberty and privacy (depending on the terms of the conditions and directions imposed on the ESO); and

    (b) the justifiability of any impact on rights will also vary, depending on the degree of risk of a person reoffending, and upon the likely harm caused by the reoffending if it occurs.

    The variability both of the impact on rights, and of the justification for that impact, makes it impossible to reach a meaningful conclusion about whether the Monitoring Act as a whole is consistent with s 7(2) of the Charter. The reality is that some orders under that Act may be justifiable, and others may not be.

25. If the Court focuses its analysis under s 7(2) on the particular case in question, rather than the regime as a whole, it would not be necessary for the Court to receive evidence directed to the "scope and complexity of the social problem of serious sex offenders" or the "role of ESOs in the management and treatment of high risk offenders", because that evidence would relate to a question that the Court does not need to decide.[31]

26. Of course, it may be possible to test the regime created by Monitoring Act against s 7(2) of the Charter to the extent that the Monitoring Act will have a consistent effect on human rights in every case. As Nettle JA pointed out in *RJE*, whenever an ESO is made s 12(2) and s 15(3) require the imposition of some mandatory conditions, and Nettle JA considered that the interference with rights that arose

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26 *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [147]; *Kracke* [2009] VCAT 646 at [108]; *R v Oakes* [1986] 1 SCR 103, 136-137.

27 *R v Oakes* [1986] 1 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]; *Kracke* [2009] VCAT 646, [148].

28 *R v Oakes* [1986] 1 SCR 103, [65]; Evans and Evans, *Australian Bills of Rights* (2008) 5.51-5.52.

29 There may, however, be some rare situations in which the court is entitled to say that the legislation itself strikes a fair balance between the rights of the individual and the interests of the community, so that there is no room for the court to strike the balance in the individual case: see *Doherty v Birmingham City Council* [2008] 3 WLR 636; [2008] UKHL 57.

30 *Slaight Communication Inc v Davidson* [1989] 1 SCR 1038, 1080-1081; *In Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, [56]-[57], [62].

31 The Respondent seeks to lead such evidence for the first time in this Court as "legislative fact" evidence, notwithstanding her failure to raise the Charter when the matter was in the County Court: see Respondent's outline, paragraphs 49-50.

from those conditions alone was "not capable of demonstrable justification in the relevant sense unless the risk of the offender committing a relevant offence is at least more likely than not". [32] Judge Ross expressed the same view in *Secretary to the Department of Justice v AB*,[33] in the course of finding that s 11 of the Monitoring Act, as amended by the Amending Act, did not impose limitations on human rights that were reasonably or demonstrably justified in a free and democratic society.

27. However, even in the context of the mandatory conditions, the justifiability of those conditions will vary with the characteristics of the offender and the risk of re-offending. Accordingly, while the Commission adopts the reasoning of Nettle JA and Ross J to the effect that it is very difficult to see how it would be possible to justify the making of an ESO (and thus the imposition of the mandatory conditions) in circumstances where the risk of re-offending is less than "more likely than not", that possibility cannot be entirely excluded.

28. If it is possible to interpret the Monitoring Act so that:

    (a) the Court must decline to exercise its discretion under s 11(1) to make an ESO unless it is satisfied that the mandatory conditions that will be imposed pursuant to s 12(2) and 15(3) are reasonable limits that are demonstrably justifiable in a free and democratic society in the circumstances of a particular offender; and

    (b) if the Court has made an ESO, the Secretary and the Board must decline to exercise their discretionary powers to impose any conditions or directions pursuant to s 16 of the Monitoring Act unless those conditions or directions are reasonable limits that are demonstrably justifiable in a free and democratic society in the circumstances of a particular offender;

    then it would follow that the Monitoring Act would not authorise any interference with rights that would be inconsistent with s 7(2) of the Charter.

29. That would be the position irrespective of the threshold risk fixed by s 11(1) of the Monitoring Act. However, the level of risk of re-offending would remain important, because in cases where the risk of re-offending was low, the Secretary may be unable to satisfy the Court that the mandatory conditions are justified, and it would also be impossible to establish that onerous conditions or directions under s 16 were justified.

30. On the approach advanced above, the "justification" step of the analysis required by s 32 of the Charter would be undertaken on a case by case basis. It therefore need not be undertaken by this Court as part of this appeal.

31. However, the above approach will be open only if it is possible, consistently with the purpose of the Monitoring Act, to interpret that Act in the manner identified in paragraph 28 above.

(III). RE-INTERPRETATION

32. Section 32 of the Charter creates an interpretive obligation that is "very strong and far reaching".[34] It was enacted with full knowledge of, and with an apparent intention to replicate, the approach taken by the House of Lords in *Ghaidan*,[35] where a majority of the House of Lords held that s 3(1) of the *Human Rights Act*

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32 [2008] VSCA 265, [113].

33 [2009] VCC 1132, [267]-[269].

34 *Kracke* [2009] VCAT 646, [202], [218]-[219]. See also *R v Lambert* [2002] 2 AC 545, [79]-[81]; *Sheldrake v DPP* [2005] AC 264, 303-304.

35 See Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 82-83, endorsing the approach in *Ghaidan*.

1998 was the "prime remedial measure",[36] and the declaration of incompatibility a "measure of last resort".

33. The extent to which an ESO will limit human rights depends upon three different statutory discretions: [37]

    (a) first, the Court, if satisfied to the requisite standard that it is likely that a person will reoffend if released into the community, may make the ESO pursuant to s 11(1), in which case certain mandatory conditions must be attached to the ESO (s 12(2)(e) and s 15(3));

    (b) second, once an ESO has been made, the Secretary may give instructions or directions to the person pursuant to s 16(1);

    (c) third, once an ESO has been made, the Board may give instructions or directions to the person pursuant to s 16(2), including any of the instructions or directions identified in s 16(3) or (3A).

34. Section 32(1) of the Charter contains a statutory command. "It is not an optional canon of construction."[38] 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.

35. It will normally be "possible" to interpret a statutory discretion so that it does not authorise action that would involve a limitation on the rights protected in Part 2 of the Charter unless that limitation is a reasonable limit that is demonstrably justifiable on the facts of the particular case. That follows because it is a routine part of statutory interpretation to confine discretionary powers by reference to matters not identified in the text. For example:

    (a) the matters that a decision maker is required to take into account, or to exclude from consideration, in exercising a particular power will often be identified having regard to the subject matter and purpose of an Act as a whole, even though in its terms a particular power appears to be unfettered;[39]

    (b) statutory provisions that confer apparently unfettered discretions may be read down so that the power cannot be exercised in circumstances that would exceed the constitutional reach of the relevant Parliament.[40]

36. The process of interpretation that is required to identify limitations of the above kinds is not relevantly distinguishable from the process of interpretation under s 32 of the Charter that would prevent a general statutory power from being read as authorising an interference with human rights of a kind that is not demonstrably justifiable.

37. It is only if it would not be "consistent with the purpose" of a statutory provision to read it down in the above fashion that s 32 of the Charter will not require a general discretion to be limited in the manner just described. In the context of the Monitoring Act, however, Parliament was informed in the Statement of Compatibility that extended the Act to authorise interim orders to be made that the Act was compatible with human rights.[41] In those circumstances, it is difficult to see

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36 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [46].

37 *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, 112 [7], citing *R v Moffatt* [1998] 2 VR 229, 234 (Winneke P) and 246-247 (Hayne JA). See also *Interpretation of Legislation Act 1984* (Vic) s 45.

38 *In Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, [37].

39 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24, 39-40.

40 See, e.g., *Acts Interpretation Act 1901* (Cth) s 15A; *Pidoto v Victoria* (1943) 68 CLR 87, 109.

41 *Justice Legislation Amendment Bill 2008, Statement of Compatibility*, 17 April 2008, p 1431.

how it can be said that Parliament's purpose in enacting the Monitoring Act was to authorise interference with rights of a kind that is not demonstrably justifiable.[42]

38. The above approach to the interpretation of discretionary powers is adopted in both the United Kingdom and Canada. Thus, in a leading work on the *Human Rights Act 1998* (UK), it was observed that:[43]

> It has rightly been said that as a matter of "constitutional logic" s 3 leads to Convention rights being read into enabling statutory provisions as implied limitations. In this way both s.3 [the equivalent to s 32] and s.6 [the equivalent to s 38] apply the Convention directly to the decisions of public officials made under statutory authority. Decisions that are incompatible with Convention rights will (subject to s 6(2)) be unlawful and ultra vires … It follows that where a decision of a public official is taken under statutory powers it may not be necessary to rely on s 6.

39. In the same vein, in *Slaight Communication Inc v Davidson*, the Supreme Court of Canada examined the relationship between the Canadian Charter and administrative law. Lamer J, who dissented as to the result, but whose analysis on this point was accepted by the other members of the Court,[44] said:[45]

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. **Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed**. (emphasis added)

40. The Canadian Charter does not contain an express equivalent to s 32 of the Charter, because legislation that unjustifiably infringes the rights protected by the Canadian Charter is invalid. For that reason, the interpretive principle that was applied in *Slaight* was the principle that legislation should if possible be interpreted so as not to render it invalid. However, that interpretive principle is not relevantly distinguishable from that created by s 32 of the Charter. Both require legislation to be read, if possible, so that it does not interfere with rights if that interference is not demonstrably justifiable. Indeed, if there is a distinction between the two interpretive rules, it seems that s 32 of the Charter provides the stronger rule.[46] Accordingly, *Slaight* is directly on point as to the approach that should be taken to a discretionary power that, in its terms, would authorise an interference with rights of a kind that is not demonstrably justifiable. Further, the concept of justifiable limitations is closely analogous, given that s 7(2) of the Charter is modelled in part on the limitation provision in s 1 of the Canadian Charter).

41. It must be acknowledged that in *Secretary to the Department of Justice v AB*,[47] Ross J rejected an argument that the discretion to make an ESO is limited by s 7(2) of the Charter. With respect, however, his Honour's reasons for rejecting that argument are not sustainable. His Honour said that the argument should be rejected because: [48]

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42 Beatson, Grosz, Hickman and Singh, *Human Rights: Judicial Protection in the United Kingdom* (2008) 5-28.

43 Beatson, Grosz, Hickman and Singh, *Human Rights: Judicial Protection in the United Kingdom* (2008) 6-05 to 6.06. See also *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, [8], [11], [17]-[18]; *R (Gillian) v Commissioner of Police for the Metropolis* [2006] 2 AC 307, [22], [25], [29], [35].

44 [1989] 1 SCR 1038, 1048, 1058.

45 [1989] 1 SCR 1038, 1078. See also *Michaud v. Quebec (Attorney General)* [1996] 3 SCR 3*; Quebec (C.D.P.D.J.) v Montreal (City)* [2000] 1 SCR 665.

46 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, [64]-[65] (Mason NPJ).

47 [2009] VCC 1132, [277]-[281].

48 [2009] VCC 1132, [280].

A consequence of the Respondent's construction of the discretion in s 11(1) would deprive the court of the power to make an ESO if such an order was "incompatible with a human right". Such a consequence is inconsistent with the intent of s 32(3) of the Charter.

42. Section 32(3) of the Charter provides that s 32 does not affect the validity of an Act or subordinate instrument that is incompatible with human rights. The argument that s 32 confines the scope of a statutory discretion does not impugn the validity of any Act or subordinate instrument. It merely confines the scope of a valid statutory power. Section 32(3) of the Charter is therefore irrelevant to the argument outlined above.

43. The interpretive approach identified above has different implications for the different persons or bodies that exercise powers under the Monitoring Act.

The Court

44. The Court can not lawfully exercise its discretion under s 11(1) of the Monitoring Act to make an ESO unless the Secretary demonstrates both:

    (a) that it is "likely" that a person will re-offend if the person is released into the community and not made subject to an ESO; and

    (b) that the restrictions on rights that will result from the mandatory conditions required by ss 12(2)(e) and 15 of the Monitoring Act are reasonable limits that are demonstrably justifiable having regard to the criteria in s 7(2) of the Charter and the circumstances of the particular offender.

The Secretary

45. If an ESO has been made, the Secretary cannot lawfully give an instruction or direction under s 16(1) of the Monitoring Act unless, in relation to each instruction or direction:

    (a) the Secretary considers the instruction or direction necessary to ensure the effective and efficient implementation and administration of the conditions of the order (that requirement emerging from s 16(1) itself); and

    (b) the instruction or direction is a reasonable limit that is demonstrably justifiable having regard to the circumstances of the particular offender in the context of the considerations identified in s 7(2) of the Charter.

46. There is therefore considerable overlap between the above requirements and those that would arise pursuant to s 38 of the Charter by reason of the fact that the Secretary is a "public authority".[49]

The Board

47. At present, as a consequence of regulations made pursuant to s 46(2)(b) of the Charter,[50] the Board is not a "public authority" as defined in s 4 of the Charter (by reason of the exclusion in s 4(1)(k)).

48. That does not mean that the Board is "currently exempt from the Charter".[51] It means only that the Board is exempt from the obligations imposed by s 38 of the Charter.

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49 The Respondent accepts that the Secretary is a public authority: see Respondent's submissions, paragraph 62.

50 *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2008* (Vic), which expire on 29 December 2008. As at the date of these submissions, draft regulations propose extending the exemption in relation to the Board for a further period of 4 years.

51 Cf Respondent's submissions, paragraph 62; *RJE* [2008] VSCA 265, [56(c)].

49. The operation of the Charter is not confined to "public authorities". Instead, as s 6 makes clear, the Charter also applies to Parliament, and to courts and tribunals to the extent that they have functions under, relevantly, Division 3 of Part 3 (which includes s 32). The fact that courts and tribunals must interpret all Victorian laws consistently with s 32 of the Charter means that the Charter may have a profound affect on persons and bodies who are not public authorities. Indeed, it is principally by that mechanism that the Charter may have a "horizontal effect" on relationships between private citizens.[52]

50. It is neither possible nor permissible to read regulations that relate to the definition of "public authority" as limiting the operation of s 32 of the Charter. Section 32 does not use the term "public authority", so the scope of that term is irrelevant to the operation of that section. It is s 31 of the Charter (override declarations), not ss 4(1)(k) and 46(2)(b), that provides the mechanism by which Parliament may exclude the operation of s 32. That mechanism not having been used in relation to the Monitoring Act, that Act must be interpreted consistently with s 32 of the Charter.

51. Accordingly, s 32 of the Charter applies to the interpretation of s 16(2) of the Monitoring Act in the same way that it applies to the other provisions in the Monitoring Act. The result is that the Board cannot lawfully give any instruction or direction under s 16(2) unless that instruction or direction involves a reasonable limit that is demonstrably justifiable in a free an democratic society having regard to each of the matters identified in s 7(2) of the Charter.

52. That submission does not defeat the purpose of ss 4(1)(k) and 46(2)(b) of the Charter, because regulations made under s 46(2)(b) will operate in accordance with their terms to exempt the Board from the operation of s 38 of the Charter. For that reason, the Board remains free from any requirement to comply with the Charter in the discharge of its non-statutory functions.

53. The Commission advanced a similar argument to that advanced above in *RJE*. Maxwell P and Weinberg JA expressly left that point open.[53] Importantly, however, during argument in *RJE* the Attorney-General conceded that s 32 of the Charter operates on wide discretionary powers in the manner outlined above. As Nettle JA recorded in his judgment:[54]

> Counsel for the respondent and counsel for the Attorney submitted that, although it is open to the Secretary or Parole Board to impose onerous restrictions on an offender under ss 15 and 16, when it comes to the interpretation of s 11 the court should presume that the Secretary and Parole Board **will act lawfully**, **and so in accordance with the Charter**; and, therefore, that such orders and directions as the Secretary or Parole Board might give **would never go further in restricting the rights of an offender than would be demonstrably justifiable according to the criteria delineated in s 7 of the Charter**. (emphasis added)

54. The emphasised words in the above passage acknowledge that there is a nexus between the Board acting lawfully, and the Board acting in accordance with the Charter. Given that the Board is not bound by s 38 of the Charter, that nexus exists only because s 32 of the Charter requires the powers conferred by s 16 of the Monitoring Act to be read so as not to authorise the Board to restrict rights in a way that is not demonstrably justifiable according to the criteria delineated in s 7 of the Charter.

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52 See Beatson, Grosz, Hickman and Singh, *Human Rights: Judicial Protection in the United Kingdom* (2008) 4-181 to 4-183, 5-08 to 5-10; Evans and Evans, *Australian Bills of Rights* (2008) 3.64-3.65; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [106].

53 *RJE* [2008] VSCA 265, [56(c)].

54 *RJE* [2008] VSCA 265, [108].

55. It is true that in *RJE* Nettle JA doubted whether the reasoning in *Slaight* could apply to s 11:[55]

> if only because the Parole Board is for the time being exempted by regulations from compliance with the Charter. Presumably, the exemption was given just so the Parole Board could act lawfully in ways that are not demonstrably justified in a free and democratic society having regard to the criteria delineated in s 7 of the Charter.

56. As a matter of principle, however, whatever the policy intention behind the regulations made under s 46(2)(b) of the Charter, the argument that is advanced above must be correct unless:

    (a) s 32 of the Charter does not apply to s 16(2) of the Monitoring Act; or

    (b) consistently with the purpose of the Monitoring Act, it is not "possible" to interpret s 16(2) as being limited by s 7(2) of the Charter.

57. The first possibility must be rejected, because s 32 expressly applies to the interpretation of all "statutory provisions" (as defined in s 3 of the Charter). As a matter of construction of the Charter, the operation of s 32 is not subject to regulations made pursuant to s 46(2)(b) of the Charter.

58. In relation to the second possibility, if attention is focused solely on the Monitoring Act, it is plainly "possible" to interpret the power conferred by s 16(2) as not authorising the imposition of conditions that have not been demonstrably justified in accordance with the criteria in s 7(2) of the Charter. The argument that such an interpretation is not "possible" appears to depend upon the proposition that a regulation made under the Charter can render impossible an interpretation of the Monitoring Act that would otherwise have been open. There is no principle of statutory interpretation that would allow a regulation made under one Act to have such an effect on the interpretation of a different Act.

59. In this case, the Respondent apparently accepts that the directions and instructions given by the Board are limited by the Charter, because the Respondent's submissions in paragraphs 62.1 to 62.4 are directed to establishing that directions of the Board do not contravene Charter rights. However, as this proceeding is not an application for judicial review of the Board's decision to give particular instructions or directions, it is not appropriate to address the question whether the particular instructions or directions given in this case are within power.

60. The point of present importance is that, once it is understood that instructions or directions given by the Board will exceed the power conferred by s 16(2) of the Monitoring Act if they are not demonstrably justified pursuant to s 7(2) of the Charter, that will change the nature of the arguments that are available in judicial review proceedings against the Board by making it possible to ensure that those conditions or instructions do not infringe the Charter.[56]

Conclusion as to re-interpretation

61. The Monitoring Act is not incompatible with the Charter, notwithstanding the fact that the risk of re-offending that must exist before the discretion to make an ESO under s 11 is engaged is lower than "more likely than not". The level of risk that must exist is not determinative of the question of compatibility, because even when the threshold level of risk specified in s 11(1) is exceeded, with the result that the power to make an ESO is engaged, it is possible to interpret the Monitoring Act so that:

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55 *RJE* [2008] VSCA 265, [111]. See also [113], where the possible applicability of *Slaight* is left open.

56 Proceedings of that kind are possible under Order 56: see *Kotzmann v Adult Parole Board of Victoria* (2008) 221 FLR 134; [2008] VSC 356, [54]-[56] (Judd J); *Department of Justice v Fletcher (No 3)* [2008] VSC 217, [15]-[18] (Harper J); *Fletcher v Secretary to the Department of Justice* (2006) 165 A Crim R 569, [24], [79].

(a) the Court cannot lawfully make an ESO unless the Secretary has demonstrated that all the mandatory conditions that must be imposed on that order are reasonable limits that are demonstrably justifiable in a free and democratic society; and

(b) if the ESO is made, no further instructions or directions can be given or made by the Secretary or the Board unless those instructions or directions are likewise reasonable limits that are demonstrably justifiable in a free and democratic society.

(IV). DECLARATION OF INCONSISTENT INTERPRETATION

62. If the discretions conferred by ss 11 and 16 of the Monitoring Act are interpreted in the manner identified above, there is no occasion for the making of a declaration of inconsistent interpretation pursuant to s 36 of the Charter, because the Monitoring Act does not authorise any interference with rights that is not demonstrably justifiable in accordance with the criteria specified in s 7(2) of the Charter.

63. For that reason, it is unnecessary to address the Respondent's submission[57] that a declaration of inconsistent interpretation should not be made because by the time this appeal is heard the Monitoring Act will likely have been repealed by the *Serious Sex Offenders (Detention and Supervision) Bill 2009* (Vic), with the result that it would be futile for the Court to engage in the formal dialogue with Parliament contemplated by s 36 of the Charter.[58]

64. For the same reason, it is likewise unnecessary to address the Respondent's submissions[59] that new evidence may be led in relation to whether a declaration of inconsistent interpretation should be made, despite the fact that in an appeal under s 36 of the Monitoring Act new evidence would ordinarily not be admissible.[60]

III. CONCLUSION

65. Once it is recognised that each of the discretions conferred by s 11(1), 16(1) and 16(2) of the Monitoring Act can be lawfully exercised only in circumstances where any interference with rights involves a reasonable limit that is demonstrably justifiable having regard to s 7(2) of the Charter, it follows that the Monitoring Act is not incompatible with the Charter, notwithstanding the fact that an ESO may be made even if it is not more likely than not that a person will reoffend.

66. The Charter not having been raised in the Court below, through no fault of its own the Court failed to consider whether the mandatory conditions required to be imposed on an ESO by s 12(2) and 15(3) of the Monitoring Act were demonstrably justifiable in a free and democratic society having regard to the factors identified in s 7(2) of the Charter. For that reason, the Court made an error of law, and the appeal should be allowed.

Dated: 10 December 2009

STEPHEN DONAGHUE

Douglas Menzies Chambers

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57 Respondent's outline, paragraphs 38-41, relying on *R v Manawatu* (2006) CRNZ 833.

58 Respondent's submissions, paragraph 38-39. In relation to this argument, see *Bellinger v Bellinger* [2003] UKHL 21, [55], [79] (where a declaration was made even though a government Bill to remove the incompatibility was before Parliament); *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, [52] (where it was said that there was "no point" making a declaration where the relevant legislation had been repealed).

59 Respondent's outline, paragraphs 51-53.

60 See *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, 118 [26].