

**IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
(CRIMINAL DIVISION)**

Presentment Number: C0806379

**BETWEEN:**

**THE QUEEN**

v

**KABALAN MOKBEL**

**SUPPLEMENTARY WRITTEN SUBMISSIONS OF THE VICTORIAN  
EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION**

**I. INTERNAL QUALIFIERS AND THE S 7(2) LIMITATIONS CLAUSE**

1. Having had the benefit of reading the Attorney General's Outline, and pending the outcome of the High Court appeal in *Momcilovic*, the Commission agrees with the Attorney's submission 6.1 that compliance with the internal qualifiers of a right can be assessed without reference to the general limitation provision in s7(2). However, if the application of a provision, so assessed, breaches a right protected by the Charter, then one must consider whether the breach is justified under s 7(2) of the Charter.

**II. CONSTRUE RIGHTS BROADLY**

2. Section 25(2)(c) contains the right to be tried without "unreasonable" delay. Notwithstanding that the right is internally confined by notions of reasonableness, when considering the scope of the right, it should be construed broadly and generously. This approach to construing Charter rights was laid down by Chief Justice Warren in *DAS v VEOHRC*:

The Charter supports the approach that rights should be construed in the broadest possible way before consideration is given to whether they should be limited...<sup>1</sup>

### III EVIDENTIAL BURDEN TO SHOW INTERNAL QUALIFIER IS PRESENT

3. As a minimum, the Defendant need only bring the length of the delay to the Court's attention. In this matter, the delay is apparent from the state of the record and from the DPP's listing estimate at paragraph 26 of his Outline, such that this part of the Court's 6(2)(b) duty is conceptually straight forward. If, without further explanation by the party seeking to limit the right, the extent of the delay appears to the Court to be unreasonable, then the right has been breached.
4. Where there has been no conduct of the accused which has contributed to the delay, much of the information necessary to conclusively determine the "unreasonableness" of any delay will be in the hands of the DPP. If s 25(2)(c) right has been limited by a delay which is unreasonable on its face, further information will need to be provided by the DPP to discharge the burden imposed by s 7(2) of justifying the limit as "reasonable".
5. This is the approach taken in the New Zealand cases referred to by the Attorney General in his Outline at paragraph 18. *R v Jefferies* contains the following discussion of onus:<sup>2</sup>

Non-compliance with the Bill of Rights must be put in issue. Where not otherwise apparent from the material already before the Court the complainant must lay an evidential foundation for the claim. The onus then rests on the Crown to establish any facts on which it seeks to rely to support a conclusion as to the reasonableness of the search or seizure. That final question involves a judicial determination not susceptible to questions of onus of proof.

6. *R v Goodwin* explicitly takes the approach proposed by the Commission:<sup>3</sup>

At criminal trial, if a Bill of Rights Act-based objection to evidence is taken for the appellant, an evidential foundation is needed to raise the issue... we reaffirm that an evidential foundation must exist. Of course it must be a real foundation, in that from the prosecution evidence and any cross-

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<sup>1</sup> [2009] VSC 381 at [80]. See also *Kracke v Mental Health Review Board* [2009] VCAT 646 at [97]

<sup>2</sup> [1994] 1 NZLR 290, at 306

<sup>3</sup> [1993] 2 NZLR 390, at 392

examination thereon, or from any evidence called for the defence, there must appear substantial reason for exploring the Bill of Rights point. Once that stage is reached, the onus falls on the Crown to prove that there was no relevant breach of the Bill of Rights Act.

7. Imposing anything greater than an evidential burden on the Defence to raise the potential breach of the right in s 25(2)(c) would make the right illusory, as most defendants will not have sufficient information about any justification for the delay.

#### **IV. PROSECUTORIAL DISCRETION**

8. In response to paragraph 21 of the Attorney General's Submissions, the Commission notes that whilst the Court of Appeal of Ontario in *R v Cornacchia*<sup>4</sup> confirms that the exercise of the Crown's discretion to join offenders in a trial is not reviewable, this did not prevent the Court itself considering the reasonableness of the delay in question and whether the trials ought to be severed. In this case the Commission has not asked the Court to review the decision of the DPP to proceed against Kabalan jointly with Antonios, but rather to consider the Court's own discretion and its obligations under s 6(2)(b) of the Charter, in the timetabling of proceedings.

**Dated:** 18 October 2010

**SIMON MCGREGOR**

*Counsel for the Intervener*

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<sup>4</sup> 1994 Canlii 439