IN THE SUPREME COURT OF VICTORIA **No 1341 of 2008**
COURT OF APPEAL

AT MELBOURNE

BETWEEN

RJE
Appellant

AND

SECRETARY TO THE DEPARTMENT OF JUSTICE
Respondent

AND

ATTORNEY-GENERAL OF VICTORIA and VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
Intervenors

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. The Charter is relevant to this appeal in two ways. It is relevant both to the interpretation of the *Serious Sex Offenders Monitoring Act 2005* (Vic) (**the Monitoring Act**), and to the duty of the County Court when it made the Extended Supervision Order (**ESO**) which is the subject of this appeal.

3. In summary, the Commission submits:

   (a) When making an ESO pursuant to s 11 of the Monitoring Act, a court is not a "public authority". It is not acting in an "administrative capacity", because the making of an ESO is an exercise of judicial power. The Court therefore is not subject to the duties imposed by s 38 of the Charter when making such an order.

   (b) The nature of an appeal in this Court under s 36 of the Monitoring Act does not allow the parties to adduce new evidence for the first time on appeal.

   (c) The Court is required by s 6(2)(b) of the Charter to exercise its functions in accordance with (relevantly) ss 26 and 27(2) of the Charter. However, an order under s 11(1) of the Monitoring Act could be made consistently with either or both of s 26 and 27(2) of the Charter.

   (d) Section 32 of the Charter operates on the interpretation of s 11 of the Monitoring Act so that the discretion to make an ESO cannot be lawfully exercised unless the Court has first considered whether the evidence adduced by the Secretary has demonstrably justified each limitation on human rights that would result from the exercise of that discretion. In order properly to consider that question, the Court would need to require the Adult Parole Board (**the Board**) to inform it of the directions or instructions that the Board proposed to give pursuant to s 16(2) and (3) of the Act if an ESO was made.

4. The respondent's approach to the operation of the Charter (as reflected in her written submissions) creates a substantial lacuna in the application of the Charter. That follows because the respondent contends:

   (a) no civil and political rights were engaged by the ESO made under the Monitoring Act;[1]

   (b) section 38 did not apply to the County Court;[2] and

   (c) section 32 (the interpretative obligation) had no application to this case.[3]

5. The Commission submits that many of the human rights set out in the Charter are required to be considered by a Court before it can lawfully make an ESO. For the reasons developed below, the effect of the interpretive obligation in s 32 is that courts, whenever they exercise any discretionary authority that is conferred by statute, are required to have regard to all of the human rights in Part 2. That obligation applies to all persons or bodies who exercise statutory powers, whether or not they are "public authorities" for the purposes of the Act. The interpretive

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1 Respondent's submissions at [43(a)].
2 Respondent's submissions at [50].
3 Respondent's submissions at [51].

obligation potentially affects the meaning of all legislation, and therefore the scope of all statutory powers, irrespective of whether the decision-maker is a public authority, and irrespective of whether the statutory function involves a human right of a kind in respect of which a Court has functions pursuant to s 6(2)(b) of the Charter.

6. The Secretary is, therefore, wrong to submit that "none of the human rights relied upon by the appellant under the *Charter* were engaged in the circumstances of this case".[4] It cannot be correct that orders which effectively result in preventive detention (deprivation of liberty and restrictions on freedom of movement), and in removal of rights to privacy, freedom of expression and freedom of association, can be made without regard for the fact that these human rights are now recognised by the law of Victoria. The contrary conclusion would be a surprising outcome for a human rights instrument.

II. THE COUNTY COURT WAS NOT ACTING AS A PUBLIC AUTHORITY IN MAKING AN ESO

7. Section 4(1)(b) of the Charter provides that a "public authority" includes "an entity established by a statutory provision that has functions of a public nature". That would appear to include the courts. However, s 4(1)(j) of Charter limits s 4(1)(b) by providing that courts and tribunals are not public authorities "except when … acting in an administrative capacity".

8. The meaning of the words "administrative capacity" are not clear.[5] In *Sabet v Medical Practitioners Board*,[6] the parties agreed that "acting in an administrative capacity" has the same meaning as "exercising administrative power". If that is correct, it is necessary to refer to complex constitutional law concerning Chapter III of the Commonwealth Constitution in order to determine whether courts and tribunals are bound by s 38 of the Charter when exercising particular functions.[7]

9. The fact that the Charter uses the phrase "acting in an administrative capacity" rather than "exercising administrative power" might indicate that a different construction is open. However, it is not necessary in this case to determine the meaning of the words "administrative capacity", because the power to make an ESO is properly characterised as judicial power, with the result that such an order clearly is not made in an "administrative capacity".

10. In *Fardon v Attorney-General (Qld)*, in the course of dismissing a challenge to the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), the Justices who expressed a view on the point indicated that the power to make preventive detention orders under that Act was judicial power.[8] The factors that supported that conclusion included: the fact that the legislation specified a clear standard that must be met before the order could be made; the discretion of the court as to whether to make an order; the burden of proof was on the State; the rules of evidence and

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4 Respondent's submissions at [43a]. Although this paragraph is qualified by the words "human rights relied on by the appellant" it must be recalled that the Secretary was the moving party in this application, is an officer of the State of Victoria and a public authority under the Charter, and was obliged to inform the Court if any civil and political rights were engaged by her application to it.

5 Evans and Evans, *Australian Bills of Rights* (2008) 1.65-1.67.

6 [2008] VSC 346, [122].

7 See, e.g., *Thomas v Mowbray* (2007) 237 ALR 194**;** *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1**;** *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350**.**

8 *Fardon* (2004) 223 CLR 575, 596 [34]. See also 592 [19] and 658 [229].

natural justice applied; reasons were required to be given; regular reviews of orders were required; and an appeal against the making of an order was available.

11. Those factors suggest that the power to make ESOs should be characterised as a conferral of judicial power.[9] It follows that the Country Court was not a "public authority" when making an ESO, and so was not subject to s 38 of the Charter.

III. THE NATURE OF THE APPEAL AND NEW EVIDENCE

12. In the County Court, neither of the parties raised the application and operation of the Charter. That failure does not resolve the questions whether the County Court was bound to interpret the Monitoring Act in accordance with s 32, to exercise its discretion in accordance with s 7(2) and to discharge its functions under s 11 of that Act consistently with ss 7(2), 26 and 27.

13. To the extent that any of the above questions are affected by s 7(2) of the Charter (a point examined below), the Secretary accepts that she bears the onus of establishing that the limitations on rights caused by the Monitoring Act are reasonable limits demonstrably justified in a free and democratic society.[10] She relies on evidence on appeal to discharge that onus,[11] although no submissions addressing the evidence of Dr Eccleston are made and Ms Penter's evidence is merely referred to in the submissions.

14. The nature and extent of evidence admissible to discharge the burden assumed is not something this Court need decide because no new evidence is admissible on this appeal. Having failed to lead evidence below to discharge the burden imposed by s 7(2) (if it applied and howsoever construed), it is not now possible for the Secretary to remedy that failure, nor for the appellant to contest the application of s 7(2) through evidence supportive of his contentions.

15. In *TSL v Secretary to the Department of Justice*, Callaway AP (for the Court) said of an appeal under s 36 of the Monitoring Act that "having regard to the terms of s 39 **and the lack of any power to receive further evidence**, it is probably an appeal in the strict sense".[12] The respondent accepts and relies upon this characterisation.[13] If this appeal is an appeal in the strict sense, it is not open to the Court to receive further evidence in the absence of a statutory power to do so, irrespective of the wishes of the parties.[14]

IV. THE LEGISLATIVE SCHEME

16. The purpose of the Monitoring Act is to "enhance the protection of the community" by requiring offenders who are "a serious danger to the community" to be subject to "ongoing supervision while in the community" (s 1). Contrary to the respondent's submissions,[15] rehabilitation of offenders is not expressed by s 1 to be a purpose of

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9 *Fardon* (2004) 223 CLR 575, 592 [19], 596-597 [34], 615 [93]-617 [99], 619 [109]-620 621 [117], 657-658 [225]-[232].

10 Respondent's submissions at [76]. This concession is supported by *R v Oakes* [1986] 1 SCR 103, [66]; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283.

11 Affidavit of Elizabeth Penter sworn 31 October 2008; Affidavit of Dr Lynne Eccleston sworn 3 November 2008.

12 (2006) 14 VR 109, 118 [26] (emphasis added).

13 Respondent's submissions at [45].

14 See *Eastman v R* (2000) 203 CLR 1, 12-13 [17]-[18], 25-26 [75]-[76], 40-41 [130]-[133], 63 [190], 96-97 [290]; *Mickelberg v R* (1989) 167 CLR 259, 271, 297-299.

15 Respondent's submissions at [68], [86] and [87].

the scheme as a whole. Rather, it is expressed to be one of two purposes of the conditions power in s 15.[16] The Monitoring Act seeks to achieve its s.1 purpose by empowering the Court which sentenced an offender[17] to make ESOs in relation to "eligible offenders" (as defined in s 4), and by giving functions to the Secretary and the Board to give instructions concerning the operation of ESOs in specific cases.

17. The Court may only make an extended supervision order "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" (s 11(1)). The Secretary has the onus of proving the existence of that likelihood (s 11(2)). The Court must have regard to any assessment report, and may have regard to anything else that it considers appropriate (s 11(3)). Once the pre-condition of satisfaction in s 11(1) is met, the Court retains a residual discretion whether or not to make an order.[18]

18. An ESO "must have all the conditions set out in sub-section (3) attached to it" (s 15(1)). 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). The Board may give an offender who is subject to an ESO any instruction or direction that the Board considers necessary to achieve the purposes of the conditions of the order (s 16(2)). 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)). The Board may vary such instructions or directions at any time (s 16(4)).

19. In 2006, the Monitoring Act was amended to insert s 16(3A) and (3B).[19] The Sentencing Advisory Council has observed that these amendments, which authorised the Board to direct offenders to live on land within the perimeter of the Ararat Prison, "*had the effect of making meaningless the distinction between 'supervision in the community' and 'detention'*".[20]

20. Under s 69(2) of the *Corrections Act 1986* (Vic), the Board is expressly exempted from any obligation to comply with the rules of procedural fairness. Accordingly, it is not required to hear from the offender before making directions under s 16(2). Further, at present, by force of regulations made under s 4(1)(k) of the Charter, the Board is **not** a "public authority" for the purposes of the Charter[21], although it obviously would otherwise fall within the definition in s 4(1)(b) of the Charter. Accordingly, it is not a contravention of s 38 of the Charter for the Board to give

16 And therefore, to control the kind of conditions which can be imposed by the Secretary or the Board.

17 Or the County Court if the sentencing Court was the Magistrates' Court: see s 5(2).

18 *TSL v Secretary to the Department of Justice* (2006) 14 VR 109.

19 By the *Serious Sex Offenders Monitoring (Amendment) Act 2006* (Vic), which commenced on 11 October 2006. This amendment was a response to the decision of Gillard J in *Fletcher v Secretary to Department of Justice* (2006) 165 A Crim R 569 and what his Honour found about the proper construction of the word "reside" in s 16(2).

20 Sentencing Advisory Council, *High Risk Offenders – Post Sentence Supervision and Detention* (May 2007) ix.

21 See *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007* (Vic), which expire on 31 December 2008.

directions that are incompatible with an offender's human rights, or for the Board to fail to give proper consideration to an offender's human rights in making directions.

V. HOW WAS THE CHARTER TO BE APPLIED BY THE COUNTY COURT?

The Charter applied in the County Court

21. Section 32 of the Charter did not commence until 1 January **2008** (see s 2(2)). The same is true of s 6(2)(b) and s 7 of the Charter. However, s 49(1) of the Charter provides that the Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after commencement. Section 32 therefore applied to the interpretation of the Monitoring Act as at 23 April 2008, when the County Court made the ESO.

In performing any functions under Part 2: s 6(2)(b)

22. Section 6(2)(b) of the Charter provides that the Charter applies to "courts and Tribunals, to the extent they have functions under Part 2 and Division 3 of Part 3". Section 3(2)(a) defines a "function" as including powers, authorities and duties. Part 2 sets out all the human rights that are protected by the Charter, and also contains the reasonable limits qualification in s 7(2), while Division 3 of Part 3 relates to the interpretation of laws (s 32) and the making of declarations of inconsistent interpretation (s 36).

23. The respondent proposes three possible approaches to the construction of s 6(2)(b), each with different outcomes on the scope of the application of the Part 2 of the Charter to courts and tribunals.[22] She further submits that comparative human rights jurisprudence is of no assistance on this issue.[23] The respondent's submissions put this issue at a level of generality which invites the Court on this appeal to decide on a construction of s 6(2)(b) of the Charter which could extend well beyond the circumstances of the Monitoring Act and the order under appeal.

24. The Commission submits that if the Court is persuaded that ss 26 and 27(2) involve functions performed by the County Court (i.e. for the purposes of s 6(2)(b)) but that an exercise of power under s 11(1) of the Monitoring Act to make an ESO does not involve a failure to adhere to the prohibitions in ss 26 and 27(2), then it need only make these findings for the resolution of this appeal. Wider questions about the construction of s 6(2)(b) in other circumstances, or for the purpose of different Charter rights, should be left for decision as and when those matters arise.[24]

Functions under sections 26 and 27(2)

25. If a Court in making an ESO under s 11(1) fails to adhere to those parts of Part 2 which confer functions on it, then it has erred in the performance of its functions, and that error can be remedied on appeal.[25] The error might be, for example, a misunderstanding of, or failure to discharge, its task (eg s 24(1), the duty to give a fair hearing) or it might be a considerations errors (eg s 27(2) in fixing a penalty, failing to take into account whether the penalty would contravene s 27(2)).

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22 Respondent's submissions at [53] ff.

23 Respondent's submissions at [57].

24 For example, the respondent at [58] of her submission identifies s 21(5)(c) but not 21(5)(b) where there would appear to be a solid argument that s 25(5)(b) "relates" to court proceedings. These issues should be determined in an appeal in which they truly arise.

25 See Evans and Evans, *Australian Bills of Rights* (2008) 1.42, 1.44.

26. In this case, the Appellant has relied on ss 26 and 27 of the Charter.[26] For that reason, the Court must consider the relevance of s 6(2)(b) to the lawfulness of the County Court's action in making the ESO.[27]

27. The Commission submits it is unlikely that the making of an order under s 11(1) involves a contravention of either of the prohibitions in s 26 and s 27(2). On this question, it agrees with the submissions made by the respondent concerning *Fardon*.[28]

28. Further, it is well accepted that in some cases imprisonment occurs for protective purposes without impermissibly violating rights. In Australia, it has long been accepted that sentences may be imposed in part for the purpose of protecting the community.[29] The same is true in other jurisdictions. The House of Lords,[30] the Supreme Court of Canada, [31] and European Court of Human Rights[32] have all accepted that preventive detention is permissible at least where the preventive component of the sentence is imposed at the same time as the punitive component. The same distinction underlies the decisions of the Supreme Court of the United States that have held that regimes designed to protect the public from "predatory acts of sexual violence" do not violate the United States' constitutional protections against double jeopardy or ex post facto law-making.[33]

29. There are some countervailing considerations. This Court has recognised that the practical effect of orders under the Monitoring Act is that a person is "imprisoned in all but name".[34] The High Court has acknowledged that there are real conceptual difficulties with any attempt to draw a clear distinction between protective and punitive measures.[35] The High Court has also observed that:

    (a) "[p]unishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines … constitute punishment"[36]; and

    (b) "[t]he involuntary detention of a citizen in custody by the State is penal or punitive in character and … exists only as an incident of the exclusive judicial function of adjudging and punishing criminal guilt."[37]

30. Further, in *Belcher v Chief Executive of the Department of Corrections*,[38] the New Zealand Court of Appeal held that legislation that is very similar to the Monitoring Act[39] "amounts to punishment" for the purposes of the New Zealand Bill of Rights

26 See, e.g., the submissions under Ground 2(c).
27 *R v Williams* (2007) 16 VR 168, [54], where King J left open the possibility that s 6(2)(b) may operate in this way. See also *Gray v DPP* [2008] VSC 4, [12].
28 Respondent's submissions at [61]-[66].
29 See *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473.
30 See *R (Giles) v Parole Board* [2004] 1 AC 1, 30 [40]-[41], 34 [51].
31 *R v Lyon* [1987] 2 SCR 309, where the Supreme Court of Canada upheld the validity of Pt XXI of Canadian Criminal Code, which authorised preventive detention imposed at the time of sentencing.
32 *Weeks v United Kingdom* (1987) 10 EHRR 293, 310 [46]; *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666, 694 [76]; *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, 460 [47] – 461 [48]; *Iribarne Perez v France* (1995) 22 EHRR 153, 173-174 [30];
33 See, e.g., *Kansas v Crane* (2002) 534 US 407; *Kansas v Hendricks* (1997) 521 US 346, 361-362.
34 *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, [10], [20].
35 *Rich v ASIC* (2004) 220 CLR 129, [32]; *Al-Kateb v Godwin* (2004) 219 CLR 562, [137]-[139].
36 *Witham v Holloway* (1995) 183 CLR 525, 534.
37 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27; *Fardon* (2004) 223 CLR 575, [80]; cf *Al Kateb v Godwin* (2004) 219 CLR 562, [258].
38 [2006] NZCA 262, [47]-[49].
39 Part 1A of the *Parole Act 2002* (NZ).

provisions concerning retroactive penalties and double jeopardy. In order for this Court to adopt the approach in *Belcher*, however, it would be necessary for it to distinguish *Fardon*.[40]

In interpreting the Monitoring Act: s 32

31. The respondent submits s 32 "has no application" to this case.[41] That is incorrect. Section 32 imposes a mandatory obligation on (amongst others) courts, to interpret all provisions in Victorian legislation in a certain way. For that reason, it applied to the task performed by the County Court in considering whether to make an order under s 11(1).

32. There is a question whether s 32 requires legislation to be interpreted in a way which is compatible with civil and political rights in their **primary form** if such an interpretation is tenable consistently with the purpose of the legislation, or whether it requires legislation to be interpreted in a way which is compatible with civil and political rights **as reasonably limited** after the application of s 7(2). There remain a variety of approaches in other jurisdictions to their respective Bill of Rights interpretation provisions. None of those comparative provisions are identical to s 32: there are some common features and some unique ones.

33. In the UK, a majority of the House of Lords held that s 3(1) of the *Human Rights Act* was a prime remedial measure, with the incompatibility declaration a "measure of last resort" (*Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [46]), requiring a court[42] to concentrate on the substance of a provision (*Ghaidan* at [123]), to imply words into a provision if need be (*Ghaidan* at [122]-[123]) but as not extending to "judicial vandalism" where an express power conferred by the Parliament was negatived (*Ghaidan* at [111]). Having said that the mischief to be remedied by the *Human Rights Act* was that the ECHR rights could not be vindicated in domestic courts, Lord Steyn said that the interpretative provision in s 3(1) was a principal remedy for that mischief and at [41] that "Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved."

34. In Canada, a majority of the Supreme Court[43] decided that the interpretative exercise (whether a statutory provision was consistent or inconsistent with a human right – in that case, a reverse onus provision and the presumption of innocence) must be kept "analytically distinct" from the reasonable limits justification under s 1 of the Canadian Charter.[44] Therefore, the majority first decided whether the provision imposing the reverse onus violated the right to be presumed innocent in s 11(d) of the Canadian *Charter of Rights and Freedoms* and, finding that it did, then went on to consider whether that provision was a reasonable limit demonstrably justified in a free and democratic society.

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40 Mr Fardon has lodged a complaint with the Human Rights Committee under the Optional Protocol to the *International Covenant on Civil and Political Rights*. When that complaint is determined, it will provide guidance as to the manner in which preventive detention schemes should be assessed against rights such as those set out in s 26 and 27(2) of the Charter.

41 Respondent's submissions at [51].

42 But not only a Court, the obligation extends to public authorities who must interpret the powers they are to exercise: *Ghaidan* at [106]

43 *R v Oakes* [1986] 1 SCR 103 per Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ.

44 *R v Oakes* [1986] 1 SCR 103, [60].

35. In New Zealand, the Supreme Court has divided on the correct approach to its interpretative provision. In *Hansen v R*,[45] a majority decided, albeit with substantial qualifications,[46] that the reasonableness of any limits on rights should be evaluated **before** the court considers whether a provision can be interpreted consistently or compatibly with relevant civil and political rights. Elias CJ delivered a strong dissent, noting at [21] that the approach she preferred had also been adopted in South Africa.

36. *Hansen*, like *Oakes* in Canada, was a case involving the imposition by statute of a reverse onus in a drug prosecution. Both clearly involved a construction issue first and foremost. New Zealand and Canada have thus taken different approaches. Similarly, *Ghaidan* also involved a clear construction issue on the terms of the statute itself. The approach in *Ghaidan* is different again, and perhaps closer to the familiar principles set out by the High Court from time to time; namely that rights, freedoms and immunities appropriately recognised as fundamental will not be taken to be abolished, suspended or adversely affected in the absence of "a clear expression of an unmistakable and unambiguous intention";[47] that identification of what rights and interests are fundamental in the relevant sense should proceed from the Constitution, the common law and the exposition of principle contained in human rights treaties and Conventions to which Australia is a party;[48] and that statutes are to be interpreted and applied, as far as their language permits, so as to be in conformity and not in conflict with established rules of international law.[49]

37. The phrase "in a way which is compatible" in s 32 does not necessarily mean "identical with" the rights identified in Part 2 in their pure or unlimited form. The Macquarie Dictionary defines the noun "compatible" as meaning "capable of orderly, efficient integration with other elements in a system". The integration of rights into a statutory scheme may take account of limitations on those rights, and the purpose of those limitations.

Statutory discretions that may affect rights

38. An ESO is the product of an exercise of discretion, upon a condition precedent being met (satisfaction to a high degree of probability about risk). In deciding to make an order under s 11(1) of the Monitoring Act, and in deciding what conditions to attach to such an order, the County Court exercised a statutory discretion (s 11(1)) and a statutory power (s 15, read with s 12(2(e)) which limited several of RJE's civil and political rights under Part 2 of the Charter.

39. Unless and until the discretion conferred by s 11 is exercised in a particular way, no right is affected by that section. Nevertheless, s 11(1) plainly authorises the making of orders that may impact upon people's rights to freedom of movement (s 12), privacy (s 13), freedom of expression and association (ss 15(2), 16(2)) and liberty (ss 21, 22). Noting the level (and length) of interference with the rights referred to, if s 11 is to be interpreted (so far as is possible consistently with its purpose) in a way that is compatible with human rights, it must be read as empowering the

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45 *Hansen v The Queen* [2007] 3 NZLR 1, [57]-[60], [92], [191]. See also *Brooker v Police* [2007] 3 NZLR 91. See also Evans and Evans, *Australian Bills of Rights* (2008) 3.40 - 3.43.

46 *Hansen v The Queen* [2007] 3 NZLR 1, [94].

47 *Coco v R* (1994) 179 CLR 427, 438.

48 *Swaffield v R* (1997) 192 CLR 159, 213 per Kirby J.

49 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 per Mason CJ and Deane J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, at [97] per Gummow and Hayne JJ. See also *Al Kateb v Godwin* (2004) 219 CLR 562, [19]-[20] per Gleeson CJ.

making of a discretionary decision to interfere with the above rights only in extraordinary circumstances, where it is demonstrably necessary.

40. In *Slaight Communication Inc v Davidson*, the Supreme Court of Canada said:[50]

> 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.

41. The same idea was well put by the United Kingdom Immigration Appeal Tribunal ("IAT"), in the course of explaining the impact of the *Human Rights Act 1998* (UK) on the scope of discretions, as follows: [51]

> 'Discretion' … is a word that can easily be misunderstood. In performing the act of balancing or of judgement to which we refer, the decision maker is not, or is not only, informing himself about which decision he should make from an allowable range of decisions. He is, for the purposes of the Human Rights Act, informing himself about which decisions would be prohibited as disproportionate. He is, in this particular exercise, laying out the boundaries within which his decision-making discretion can lawfully be exercised. This is the allowable (that is to say, lawful) area of his discretion.
>
> By prohibiting certain acts and decisions that would otherwise be lawful, the Human Rights Act may conceivably invalidate some non-discretionary decisions and will certainly narrow the boundaries within which some discretions might be exercised. It can do no more. It does not itself confer any discretions on decision-makers. Where a decision-maker exercises a discretion, the Act may operate to restrict the range of permissible responses to the facts. Certain exercises of the discretion which might have been lawful but for the Act are now prohibited.

42. On that approach, in determining the boundaries of its discretion under s 11 of the Monitoring Act, it would be necessary for the Court to recognise the likelihood that an ESO would infringe, to vary degrees, the civil and political rights referred to in paragraph 39 above and therefore to exercise its residual discretion under s 11(1) with the utmost caution, only on being satisfied there is no alternative way to deal with the risk it has found to exist, and being conscious that the particular terms of an ESO should be crafted so as to result only in demonstrably justified interference with those rights. That requires the discretion to be exercised only after the County Court has considered the factors identified in s 7(2) of the Charter in the context of the specific offender.

43. However, the scheme of the Monitoring Act is such that the County Court cannot itself shape the ESO so as to ensure that it does not unreasonably infringe rights, because the real power to determine the content of an ESO resides with the Board

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50 [1989] 1 SCR 1038, 1078. See also *Michaud v. Quebec (Attorney General)* [1996] 3 SCR 3*; New Brunswick (Minister of Health and Social Services v G(J)* [1999] 3 SCR 46; *Quebec (C.D.P.D.J.) v Montreal (City)* [2000] 1 SCR 665.

51 *Noruwa v Secretary of State for the Home Department* [2001] UKIAT 00016, [45]-[46]. This decision of the Tribunal was described as a "starred" decision of the Tribunal, and was referred to with approval by the High Court in *Ala v Secretary of State for the Home Department* [2003] EWHC 521 (Admin), [47] per Moses J. That judgment, in turn, was approved by the Court of Appeal in *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716, [16]-[20], although that judgment acknowledges that some of the reasoning in *Noruwa* (not the quoted passage) is "somewhat difficult": at [17].

through the ‘lawful instructions’ given to an offender. The Court will be unable to determine how a particular ESO will in fact affect the civil and political rights of an offender unless it is informed by the Board of the directions that the Board intends to give under s 16(2) if an ESO is made.[52]

44. For that reason, s 32 of the Charter requires s 11 to be interpreted as involving a second precondition to the discretion in s 11 being available: namely, that the Court has notice of the directions that the Board intends to give under s 16 of the Monitoring Act. If the Board does not voluntarily inform the Court of its intended directions, then s 32 requires a construction of s 11 which makes the discretion unavailable to be positively exercised until that information is provided, meaning the Secretary’s application would have to be refused.[53]

45. The above interpretation is “possible” consistently with the purpose of that Act, because it permits ESOs to be made under the Monitoring Act, notwithstanding the resulting infringements of rights, so long as in every case the limitations on rights that result from such an order are demonstrably justified. It is not only possible, but straightforward, to interpret the Monitoring Act on the basis that Parliament would not have intended that Act to authorise unjustified limitations on human rights. What might be a justifiable limit on the human rights of one offender may not be so on the human right of another offender, and what human rights may be justifiably limited will also vary according to individual circumstances.

VI. CONCLUSION

46. Through no fault of its own, the Court in this case failed to consider the factors identified in s 7(2) of the Charter, which s 32 of the Charter made mandatory relevant considerations in the exercise of the discretionary power conferred on the Court by s 11 of the Monitoring Act. It also failed to require the Board to inform it of the directions or instructions that it proposed to give or make.

47. The above errors have the consequence that the appeal should be allowed.

48. In the event that the Court of Appeal considers it might be helpful to understand in more detail how the task under s 7(2) of the Charter might or should be approached by the County Court in considering whether to make a particular ESO, the Commission will have available at the hearing of the appeal a short document (of 4 pages) which it will be able to hand up containing its submissions on that issue.

Dated: 7 November 2008

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[52] Compare *Department of Justice v Fletcher (No 3)* [2008] VSC 217, [15]-[18] (Harper J).

[53] Such a regime would have parallels with that which operates expressly in relation to supervised treatment orders under the *Disability Act 2006* (Vic) ss183-201.