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

Presentment Number: C0806379

BETWEEN:

THE QUEEN

v

KABALAN MOKBEL

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 as of right under s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) to make submissions in relation to the application of the Charter to criminal proceedings in the context of an application for the ordering of a separate trial from another accused.

2. The Charter is relevant to the application in a variety of ways, two of which are:

   (a) s 6(2)(b) of the Charter is relevant to the obligations of the Court if the right to be tried without undue delay is engaged in this matter, and

   (b) s 32 of the Charter is relevant to the interpretation of s 193 of the *Criminal Procedure Act 2009* (**the Act**) (and of any other Victorian legislation to be interpreted) whilst the Court makes any decision to

      (i) list the various charges against Antonios Mokbel (**Antonios**) in a manner that causes significant delays in the trials of his co-accused, or

(ii) sever the trials of Antonios Mokbel and Kabalan Mokobel (**Kabalan**).

3. In summary, the Commission submits that:

(a) by reason of s 6(2)(b) of the Charter, the Court must exercise the discretion in s 193(3) of the Act in a manner that is "compatible" with the Charter rights engaged by its decision, taking into account the considerations articulated in s 7(2) of the Charter;

(b) s 193 of the Act should be interpreted using s 32 of the Charter so that the concept of "appropriateness" in s 193(3)(c) involves a consideration of whether any Charter rights of the accused have been, or are at risk of being, limited.

II. THE RIGHTS ENGAGED: UNREASONABLE DELAY

4. For present purposes, the relevant human rights are found within sections 24 and 25 of the Charter. They read as follows:

> 24 Fair hearing
>
> (1) 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.
>
> 25 Rights in criminal proceedings
>
> (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –
>
> (c) to be tried without unreasonable delay;

5. In *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* Pound and Evans note that the right to a hearing without undue

delay is an implied aspect of the right to a fair hearing[1] and discuss the relationship between ss 24 and 25:

> In respect of criminal proceedings, s 24 is closely related to a number of other rights in the Charter, especially the various rights in criminal proceedings in s 25, and also to ss 26 and 27. However it does not necessarily follow that the fulfillment of the minimum guarantees in s 25 will be sufficient to ensure the fairness of a hearing under s 24: see General Comment 13 (para 5). Conversely, the fact that one of the components of the right to a fair hearing, such as the minimum guarantees in s 25(2), has not been observed does not automatically lead to the conclusion that the accused has not had, or will not receive, a fair trial.[2]

6. Pound and Evans also discuss the relationship between s 25 and more general provisions:

> Section 25(2)(c) over laps with the right to be brought to trial without "unreasonable delay" in s 21(5)(b). However section 25(2)(c) applies to the time taken at all stages in the proceedings (including sentencing and any appeal or retrial), rather than merely the length of time before a trial commences.[3]

7. For the purposes of this severance application, no material distinction exists between the more general rights set out in s 24 of the Charter, and the more specific right set out in s 25(2)(c). For that reason, the Commission has confined its submissions to the latter right to be tried without unreasonable delay.

8. In both Canada and New Zealand the courts have approached the question of the point at which delay becomes "unreasonable" on a case by case basis considering the following factors:[4]

   (a) the total length of the delay between charging and final trial,

   (b) any waiver of time periods by any party (such as bypassing committal),

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[1] At p 165
[2] At p 166
[3] Pound & Evans p 183
[4] New Zealand has accepted the Canadian decision of *R v Morin* (1992) 1 S.C.R. 771 as the leading authority. See pp.21 – 39 of the version of *Morin* copied in the Crown authorities folder for the Court's methodology and elucidation of principles. See *Martin v Tauranga District Court* [1995] 2 NZLR 419 at 422 for that Court's acknowledgement of the guidance offered by *Morin*.

(c) reasons for the components of the delay, including the:

(i) inherent time requirements of the case,
(ii) actions of the accused,
(iii) actions of the Crown,
(iv) limits on institutional resources, and
(v) other reasons for delay; and

(d) any prejudice to the accused.

9. Although the cases cannot be analysed with mathematical precision, an overview of relevant international jurisprudence is informative. Bear in mind that if the trials are listed in the order currently proposed, Kabalan will have to wait approximately three to three and a half years between being charged and receiving an opportunity to clear his name at trial. This period of time is in excess of what the majority of the authorities would permit.

10. In Canada, a delay of 24 months between arrest and commencement of trial has been held to be unreasonable,[5] whilst in *Morin* a delay of 14 months was held to be reasonable in the context of an overburdened court system and an accused who was not on bail.[6] In *Morin*, the Court was of the opinion that a delay of between 8 - 10 months to accommodate institutional and or resourcing issues between committal and trial would generally be an acceptable delay in a Provincial (i.e. State) Court, but that the period could be altered by a few months either way according to the presence or absence of prejudice to the accused.[7]

11. Since *Morin*, *R v Gauvin* (2009) NBPC 29 at [32] held that a 12 month delay attributable to the prosecution altering the charges upon which it wished to proceed three times was unacceptable. In *R v Maillet,* 1997 CanLII 9555 (NB C.A.) a delay of 20 months attributable to administrative errors by the Court and the prosecutor was unacceptable.

12. In the UK, two and a half years was held to be too long for prisoners, who were in

[5] *R v Askov* [1990] 2 S.C.R. 1199
[6] *R v Morin* (1992) 1 S.C.R. 771 at p.45
[7] At p.44.

custody anyway, to wait for trial in relation to a notorious uprising.[8] In *Dyer v Watson* [2004] 1 AC 379, a three and a half year delay between charge and trial in relation to a young teenage offender was not acceptable, whilst a 20 month delay in relation to serving police officers was acceptable.

13. In New Zealand, a total delay of two and a half years was held to be undue delay, decisively because 17 months of the delay was made up of unjustified delays by the prosecution.[9]

14. Undue delay has also been considered under the Australian Capital Territory's *Human Rights Act* in *R v Upton*.[10] In that case, Mr Upton had been charged in December 2002 with common assault and damaging a motor vehicle, and entered a plea of not guilty. The matter went to a hearing in the Supreme Court in October 2003, but the jury was dismissed on the second day after allegations that another person had attempted to influence a witness. The matter was not listed again for hearing until June 2005, by which time more than 2 ½ years had elapsed since he was charged. Shortly before the hearing date, the prosecution sought to vacate his hearing date, as a key witness was not available. The realistic next trial date would mean that three years would elapse between charge and trial. The defence opposed this application, relying on the right to be tried without delay in s 22(2)(c) of the Human Rights Act. Connolly J ordered that the proceedings against Mr Upton be stayed.[11]

15. In the civil jurisdiction, the European Court of Human Rights in Strasbourg held that three and a half years was unreasonable in an administrative appeal case at a single jurisdictional level. The sole cause of delays has been the manner in which the court carried out its task and the court's excessive workload.[12]

16. The United Nations Human Rights Committee has held that delays of 16 months between charge and trial, and a further 20 months until completion of the appeal

[8] *AG's Reference (No 2, 2001)* [2004] 2 AC 72 (HL) at [29] per Lord Binham of Cornhill for the majority.
[9] *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) at p.426
[10] [2005] ACTSC 52
[11] at [27].
[12] *Zimmerman v Switzerland* [1983] 6 EHRR 17 at [32].

is unreasonable, rejecting arguments that the matter was particularly complex.[13]

17. In *Gray v Director of Public Prosecutions* Justice Bongiorno discussed ss 21(5)(b) and 25(2)(c) in the context of a bail application in a matter that would not get to trial until well after any likely conviction would have been served. Bongiorno J concluded that bail was the only remedy available to the court short of a permanent stay.[14] In the present matter, severance of the co-accused's trials would seem to remove the prejudice of delay without requiring any stay of proceedings.

III. SECTION 6(2)(B) OF THE CHARTER: OBLIGATIONS OF THE COURT

18. Section 6(2)(b) applies the Charter to courts and tribunals to the extent that they have functions under Part 2 and Division 3 of Part 3. Section 3(2)(a) of the Charter defines a 'function' as including powers, authorities and duties. Part 2 of the Charter sets out all the human rights that are protected by the Charter and Division 3 of Part 3 relates to the interpretation of laws (s 32) and the making of declarations of inconsistent interpretation (s 36).

19. Courts and tribunals may be given functions (that is – powers, authority or duties) under various sections in Part 2 and Division 3 of Part 3 in various circumstances. It is not possible or desirable to predetermine the circumstances in which courts and tribunals will have powers, authority or duties under the relevant parts and divisions of the Charter – each situation must be examined on its facts. However some sections clearly give functions to courts and tribunals. These sections are:[15]

- s 21(5)(c): rights when arrested and detained on a criminal charge;
- s 21(6)-(8): rights when awaiting trial;
- s 23(2)-(3): rights of children in the criminal process;
- s 24: right to a fair hearing;

[13] *Hill and Hill v Spain* (Communication No 526/1993) at [12.4]
[14] [2008] VSC 4 at [10]-[12].
[15] *Kracke v Mental Health Review Board [*2009] VCAT 646 at [254]

- s 25: rights in criminal proceedings;
- s 26: right not to be tried or punished more than once;
- s 27: prohibition on retrospective criminal laws;
- s 32: interpretation;
- s 33: referral to Supreme Court;
- s 36: declaration of inconsistent interpretation by Supreme Court.

20. This means that when these rights are raised, the Court is not simply deciding between the adversarial positions of the parties. Instead, the Court has a positive duty to enquire into the protection of those rights, including by giving directions for the preparation of evidence on Charter issues if it would be assisted by same, and then to make such orders as are justified in the circumstances.

21. Section 6(2)(b) was considered in *R v Williams* (2007) 16 VR 168. Although Justice King held that the Charter did not apply to the case before her, she commented that:

> When a court is determining what would constitute a fair hearing in respect of a criminal trial it would be difficult to imagine that the rights referred to as minimum guarantees in criminal proceedings, would not form, in addition to any common law and other statutory requirements, the basis of what constitutes a fair hearing.[16]

22. This is the approach that has been taken in the Australian Capital Territory, where courts are similarly not public authorities (except when exercising their administrative functions). Although there is no specific application provision akin to s. 6 in the ACT, ACT courts have proceeded on the basis that they are required to apply and respect the right to a fair hearing. For example in *Commonwealth of Australia v Davis Samuel Pty Ltd (no 3)* [2008] ACTSC 76 (unreported) Justice Refushage considered whether the right to a fair trial contained in the Human Rights Act 2004 (ACT) required him to vacate a trial date as requested by the Applicants. His Honour noted that in deciding the application he 'must have regard to the paramount duty to see that the Applicants are not

[16] *R v Williams* (2007) 16 VR 168 at [54]

denied a fair trial nor access to the court as protected by the *Human Rights Act 2004* (ACT)'.[17] In *R v Griffin* [2007] ACTCA 6 (unreported) the Court of Appeal stated that:

> It should be noted that s 21 Human Rights Act 2004 (ACT) (HR Act) now is the source, under Territory law, of the right to a fair trial. The difference may be one of emphasis rather than of substance. It does, however, mean that there is now a positive right to a fair trial rather than the right not to be tried unfairly as the common law provides. It may be that would make a difference in some cases, though in this case it seems to us to lead to the same result.
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> There is a duty cast on the trial judge to relieve the unfairness referred to by Wilson J (supra).
>
> That duty is reinforced by the provisions of the HR Act (for example, s 21).[18]

23. By reason of s 6(2)(b) of the Charter, the Court must exercise the discretion in s 193(3) of the Act in a manner that is "compatible" with the Charter rights engaged by its decision, taking into account the considerations set out by s 7(2) of the Charter.

IV. SECTION 32 OF THE CHARTER: INTERPRETING THE CRIMINAL PROCEDURE ACT

24. 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.

25. That interpretive exercise must now be approached in the manner set out in *R v Momcilovic*,[19] where the Court of Appeal set out several principles concerning the proper approach to the interpretation of a statutory provision when it is contended that the provision infringes a Charter right.

26. The Commission submits that the following principles may be drawn from

[17] *Commonwealth of Australia v Davis Samuel Pty Ltd (no 3)* [2008] ACTSC 76 at [51]
[18] *R v Griffin* [2007] ACTCA 6 at [4] – [6]
[19] [2010] VSCA 50.

Momcilovic:[20]

(a) The meaning of the statutory provision in question must be ascertained by applying s 32 of the Charter at the outset of the interpretive exercise, in conjunction with other relevant principles of statutory interpretation.

(b) "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. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights."[21]

(c) The presumption against interference with fundamental rights must now be understood to extend to the protection and promotion of the human rights set out in the Charter.

(d) Whether it is "possible" to give a statutory provision a meaning compatible with human rights does not depend on the presence of ambiguity in the language of the provision being interpreted.

(e) If the provision, so interpreted, breaches a right protected by the Charter, then one considers whether the breach is justified under s 7(2) of the Charter.

27. Section 193 of the Act should be interpreted using s 32 of the Charter so that the concept of "appropriateness" in s 193(3)(c) involves a consideration of whether any Charter rights of the accused have been, or are at risk of being, limited.[22]

28. The concept of "appropriateness" is sufficiently broad in its natural meaning that it does not restrict the Court from including the consideration of human rights as a component of the exercise of its discretion. Nor does the context of the provision within the Act narrow the scope of the term for the purposes of this

[20] [2010] VSCA 50 at [35], [103]-[110].
[21] At [103]
[22] *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 281 per Warren CJ at [52], relying on *Sorby* (1983) 152 CLR 281, 289 (Gibbs CJ).

application.[23]

29. It is conceded by all parties that Kabalan's trial has been delayed by the prior listing of the trials chronologically later offences of Antonios, so the rights in question have clearly been engaged. The question of whether the delay is "unreasonable" and whether severance is "appropriate" requires consideration of the question under s 7(2) of the Charter, [24] which is also sometimes referred to as the "proportionality" clause.

30. This section of the submissions addresses the issues raised by the proportionality question as follows:

(a) the burden and standard of proof;

(b) the content of the proportionality analysis;

(c) the application of the proportionality analysis to this case.

Burden and standard of proof

31. It is for the Crown to show that any limitation on the Plaintiff's rights is reasonable and "demonstrably justified" in a free and democratic society, having regard to the specific matters identified in s 7(2) of the Charter. That was accepted by Warren CJ in *DAS*, who said, in comments approved by the Court of Appeal in *Momcilovic*,[25] that the onus of establishing that a limitation on a human right is justified is on the party seeking to uphold the limitation.[26]

32. In *Momcilovic*,[27] the Court of Appeal accepted that in many cases evidence would be required to discharge that burden.[28] Such evidence must be "cogent and persuasive and make clear to the Court the consequences of imposing or

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[23] Emerton J reached a similar conclusion in relation to a provision dealing with the reasonableness of medical treatment for prisoners in *Castles v Secretary to the Department of Justice* [2010] VSC 310 at [127].

[24] *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 281 at [80], referred to with approval by Emerton J in *Castles v Secretary to the Department of Justice* [2010] VSC 310 at [55].

[25] *R v Momcilovic* [2010] VSCA 50, [144].

[26] [2009] VSC 381 at [147], citing *Kracke v Mental Health Review Board [*2009] VCAT 646, [108].

[27] *R v Momcilovic* [2010] VSCA 50, [144], citing *DAS* at [147].

[28] *R v Momcilovic* [2010] VSCA 50, [143]-[146].

not imposing the limit".[29] The nature and extent of the infringement of rights that it is sought to justify will determine how much evidence needs to be led, and of what kind.[30]

33. Not only is the burden of proof on the Crown, but the "standard of proof is high".[31] It requires "a degree of probability which is commensurate with the occasion".[32]

34. Some Charter rights contain internal limitations. In this case, s 25(2)(c) contains the term "unreasonable", which implies a balancing process in the mind of the tribunal. Within the framework of the Charter, the concept of reasonableness (or unreasonableness) should be understood taking into account the Charter as a whole, including the proportionality analysis in s 7(2) and what are reasonable limitations. There is an overlap in the operation of those internal limits and s 7(2) when considering whether any delay under s 25(2)(c) is unreasonable. This is an area where the decision to blend two different styles of rights drafting (one in which rights have no internal limits, but can be limited "reasonably", and one where rights have predetermined reasonable limits) creates confusion. The Commission submits that this confusion is to be resolved by interpreting "unreasonable" in relation to any delay as requiring a s 7(2) assessment of the reasons for the delay. It is submitted that to do so brings the obvious advantage of employing a consistent methodology to Charter jurisprudence.

35. The same can be said of the concept of "appropriateness" in s 193(3)(c) of the Act.

The content of the proportionality analysis

36. Section 7(2) of the Charter expressly identifies the matters that must be considered as part of the proportionality analysis. It says:

> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human

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29 *R v Oakes* [1986] 1 SCR 103, 138 (Dickson CJ).

30 *R v Momcilovic* [2010] VSCA 50 at [146]; *Director of Housing v Sudi* [2010] VCAT 328, [123].

31 *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381, [147].

32 *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381, [147], citing *Bater v Bater* [1950] 2 All ER 458, 459 per Lord Denning.

> dignity, equality and freedom, and taking into account all relevant factors including—
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> (a) the nature of the right; and
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> (b) the importance of the purpose of the limitation; and
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> (c) the nature and extent of the limitation; and
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> (d) the relationship between the limitation and its purpose; and
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> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

37. The precise wording of s 7(2) differs from the limitation provisions in other comparable jurisdictions (except South Africa). However, in *DAS*, Warren CJ accepted that the analysis required by s 7(2) reflects the proportionality jurisprudence of comparable jurisdictions. In particular, her Honour approved the decision of the Canadian Supreme Court in *R v Oakes*.[33] Speaking of s 7(2) of the Charter, Warren CJ said:[34]

> 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. *Oakes* appears to be an authoritative precedent in the field. In that case, it was said:
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> > There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance" (citation omitted).

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33 [1986] 1 SCR 103, 139 (Dickson CJ).

34 *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381, [148].

38. That passage from *Oakes* was approved by the Court of Appeal in *Momcilovic*,[35] and has also proved influential in both New Zealand[36] and South Africa.[37]

39. The leading case in the United Kingdom concerning proportionality or justification is *R (Daly) v Secretary of State for the Home Department*,[38] where Lord Steyn said:[39]

> The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

40. Further, in *Huang v Secretary of State for the Home Department*,[40] the House of Lords, having quoted from *de Freitas,* said:

> This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is (p 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77 …

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35 *R v Momcilovic* [2010] VSCA 50, [147].

36 *R v Hansen* (2007) 3 NZLR 1, [23], [42], [64], [103], [120], [185], [203]; *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283-284.

37 *S v Manamela* (2000) 3 SA 1; 5 BCLR 491, [32].

38 [2001] 2 AC 532.

39 [2001] 2 AC 532, [27].

40 [2007] 2 AC 167, [19].

41. The endorsement of *Oakes* in the United Kingdom means that the United Kingdom approach to proportionality is not relevantly distinguishable from that required by s 7(2) of the Charter. There is therefore no difficulty translating the analysis in the United Kingdom cases concerning proportionality to the analysis required by s 7(2) of the Charter.

Application of the proportionality analysis

42. Whilst the Commission recognises it has not been a party to the entire proceeding, nor had the opportunity to peruse the hand up brief or past transcript, we are not aware of any evidence tending to show that it was necessary to list all the related trials before a single judge. Nor are we aware of any evidence tending to show that it was necessary to list the trials of the more recent offences first and the earlier offences later. The cumulative effect of both these decisions on Kabalan needs to be considered.

43. The Crown's reply to the severance application does not go as far as to submit that no other order of listing the trials is possible.[41] Nor does it submit that the conduct of Kabalan's trial is of itself sufficiently complex to require additional time.

44. Against this background :

    (a) There will be a delay of between three to three and a half years between Kabalan being charged and receiving an opportunity to clear his name at trial;

    (b) Kabalan is on bail and having to report every week.

45. It is well settled law that long delay triggers a ". . . virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time." [42]

46. In *DAS*, Warren CJ pointed out that "It is clear the 'more severe the deleterious effects of a measure, the more important the objective must be if the measure is

[41] At [28] - [30]
[42] *R v Askov* [1990] 2 S.C.R. 1199 per Cory J at p. 37 and Chief Justice Lamer at p. 56.

to be reasonable and demonstrably justified in a free and democratic society'."[43]

47. If Kabalan's trial was severed from Antonios, the prejudice of delay would be removed unless there was some evidence that any common witnesses could not be accommodated in the timetabling of the separate trials.

48. In this case, the Crown has not demonstrated and the Court could not be satisfied that the delay of Kabalan's trial was not "unreasonable", and therefore in breach of s 25(2)(c). In particular, there is no evidence that less restrictive means reasonably available to the Court and the Crown could not achieve the purpose that the foreshadowed limitation on the Kabalan's rights sought to achieve.

IV. CONCLUSION

49. The Court must consider the Charter in deciding whether Kabalan has not been, or will not be, tried without unreasonable delay, and in exercising its discretion to manage the timetabling of the trials, particularly with reference to the decision on severance.

Dated: 11 October 2010

SIMON MCGREGOR

Counsel for the Intervener.

[43] *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381 at [150].