

BETWEEN:

VERA MOMCILOVIC

Applicant

and

THE QUEEN

Respondent

**HUMAN RIGHTS LAW RESOURCE CENTRE'S
OUTLINE OF SUBMISSIONS**

1. The Human Rights Law Resource Centre (the **Centre**) seeks leave to appear as *amicus curiae* to make brief oral submissions.¹ The grounds and submissions in support of the application are set out in the affidavit of Philip Alan Lynch sworn 7 May 2009.
2. Set out below is an outline of the Centre's proposed submissions if granted leave.

Introduction

3. The Centre's submissions are directed to addressing the proper approach to the interpretative task that a court is required to perform under s 32 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the **Charter**) when construing a statutory provision compatibly with human rights² and particularly address these two questions:
 - (1) is the obligation imposed by s 32 of the Charter enlivened only after the court has first given the provision its "ordinary" meaning and determined that meaning does not impose reasonable limitations on human rights?
 - (2) does s 32 only operate after the provision has been measured against s 7?

¹ The application is made by summons dated 12 May 2009.

² In the present case, the Court's task is to construe s 5 of the *Drugs, Poisons and Controlled Substances Act 1981*, so far as it is possible to do so, in a way that is compatible with the applicant's right to be presumed innocent until proved guilty according to law, protected by s 25(1) of the Charter. Even though the applicant was charged with the offences on 15 January 2006, the presentment was filed and the judicial proceeding commenced in the County Court on 14 February 2008.

4. The Centre submits that the answers to these questions (which are inter-related) are:
- (1) No. The proper approach to statutory construction under the Charter is to start with s 32, that is, to see s 32 as a cardinal principle of statutory construction, rather than seeing s 32 as an “extraordinary” or “special” provision which only operates in the event that a statutory provision is incompatible with human rights as a matter of “ordinary” construction.
 - (2) No. Where a provision is said to limit a human right, it is wrong to consider, first, whether such limits can be justified under s 7(2), before considering whether it is possible to reinterpret the provision compatibly with human rights under s 32. Rather, where it is alleged that a statutory provision limits human rights, it is necessary to consider whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with s 32 of the Charter; consideration of s 7 only arises in the event that it is not possible to interpret the provision compatibly with human rights under s 32.

Authority

5. There is no binding and authoritative judicial decision on the proper approach to the issues relating to s 32 of the Charter identified above.³

Section 32 applies in the first instance

6. Section 32 is central to the Charter’s purpose of protecting and promoting human rights. It speaks to all involved in the task of statutory construction and obliges them to interpret all statutory provisions in a way that is compatible with human rights.
7. Applying s 32 in the first instance (rather than at a later stage) best gives effect to the purposes of the Charter in general and s 32 in particular. The Charter seeks to “establish a framework for the protection and promotion of human rights in

³ In *RJE v Secretary, Department of Justice* [2008] VSCA 265, Maxwell P and Weinberg JA did not need to consider the issues referred to above (at [55]). Although Nettle JA expressed a preference for the “Poplar/HKSAR approach” this was qualified by the words “as presently advised” (at [115]) and it does not appear that submissions as set out in this Outline were advanced by any party or intervener. For the reasons given in this Outline, the Court should not follow the approach adopted by Bell J, sitting as President of the Victorian Civil and Administrative Tribunal in *Kracke v Mental Health Review Board* [2009] VCAT 646 at [37]-[66], [80] in relation to the issues identified in paragraph 3 of this Outline.

Victoria”.⁴ The purpose of s 32 is to establish a requirement that statutory provisions be interpreted in a way that is compatible with human rights.⁵ To give effect to this purpose, statutory provisions should be interpreted (so far as possible and consistently with their purpose) in a way that is compatible with human rights in the first instance and not at a later stage. If the contrary view were correct, there would be many cases where s 32 would never be reached, thus frustrating its statutory purpose.

8. To approach s 32 on the basis that it is extraordinary or special and that it operates only when the “ordinary” construction is found not to be demonstrably justified is really to treat it as a “reinterpretation” provision.⁶ That contradicts the section’s heading and the reference in its text to “interpretation”. It is also contrary to the extrinsic materials which refer to “the traditional role for the courts in interpreting legislation”⁷ and state that the object of s 32 “is to ensure that courts and tribunals *interpret* legislation to give effect to human rights.”⁸
9. To invoke s 32 in the first instance is supported by the same reasoning as underpins the contextual approach to statutory construction.⁹ That approach requires regard to be had to context in the first instance, rather than at some later stage of the analysis. One of the reasons for this approach is that, viewed in context, a statutory provision may appear in a different (and more appropriate) light. In the same way, viewed through the lens of s 32 of the Charter, a statutory provision may appear in a different (and more appropriate) light. Indeed, human rights are now part of the context of every statutory provision in Victoria.¹⁰
10. Conceptually and structurally, s 32 should be approached in much the same way as s 35 of the *Interpretation of Legislation Act* 1984. Section 35, which provides (among other things) that a construction that would promote the purpose or object underlying an Act is to be preferred, is applied in the first instance and not at a later stage, after a common law construction has been found. As Dawson J observed in *Mills v Meeking*, “the approach required by s 35 ... allows a court to consider the purposes of the Act *in determining whether there is more than one possible*

⁴ Explanatory Memorandum for the Charter of Human Rights and Responsibilities Bill 2006 at 1; Charter, preamble.

⁵ Charter, s 1(2)(b).

⁶ See *Kracke v Mental Health Review Board* [2009] VCAT 646 at [198].

⁷ Second Reading Speech on the Charter of Human Rights and Responsibilities Bill, Victoria, Legislative Assembly, *Parliamentary Debates*, 4 May 2006 at 1293 (Mr Hulls, Attorney-General).

⁸ Explanatory Memorandum at 23 (emphasis added).

⁹ *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ).

¹⁰ Charter, ss 1(2)(b), 32, 49(1).

construction".¹¹ That is precisely because s 35 is applied in the first instance. Just as s 35 may be used by a court to determine whether a provision has more than one possible construction by reference to a provision's purpose, so too should s 32 be used by a court to determine whether a provision has more than one possible construction by reference to relevant human rights.

11. Further, it is now established that common law principles of interpretation permit regard to be had to international instruments to which Australia is a party, at least in certain circumstances.¹² It seems circuitous to have regard to international instruments via the common law principles in circumstances where Parliament has expressly provided for regard to be had to these materials (and more) in s 32(2).

Section 32 requires provisions to be construed compatibly with "human rights", not "human rights subject to reasonable limitations"

12. The issue of the relationship between an interpretative obligation and a reasonable limitations provision was the subject of a powerful judgment by Elias CJ in *R v Hansen*, a New Zealand case that is also relevant for its analysis of reverse-onus provisions.¹³
13. In her judgment, the Chief Justice expressed the view that the reasonable limitations provision should not be considered before engaging in the process of interpretation required by the interpretative obligation. On the other hand, three members of the New Zealand court considered that the reasonable limitations provision had to be considered before considering the interpretative obligation and that it was only if the construction could not be demonstrably justified under the reasonable limitations provision that one went on to consider whether the provision could be reinterpreted.
14. The view of Elias CJ is to be preferred. Where it is alleged that a statutory provision limits human rights, it is not appropriate to consider, first, whether such limits can be justified under s 7, before considering whether it is possible to reinterpret the provision compatibly with human rights under s 32. That is because s 7 is not in its terms a rule of statutory construction, but is addressed to those responsible for enacting or prescribing limitations on rights. That is not to say that rights are absolute; some of the rights are internally qualified and they must, in any event, be read together.

¹¹ *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J) (emphasis added).

¹² *Royal Women's Hospital v Medical Practitioners Board* (2006) 15 VR 22 at [75].

¹³ [2007] 3 NZLR 1.

15. Furthermore, the language of s 32 quite plainly refers to “human rights” and not “human rights as reasonably limited by s 7(2)”. It is only if a provision is construed by reference to the *rights* (and not to any asserted limitations) that the interpreter fulfils Parliament’s direction to protect and promote human rights as fundamental and essential values.¹⁴ On the contrary, to consider *limitations* in the first instance fails to respect and promote the human rights recognised by Parliament and elevates the importance of limitations over rights and is thus likely to erode rights.¹⁵
16. There is also the difficulty that an assessment of the wider social ends required by s 7(2) would require the calling of evidence about those matters in all cases in which s 32 is invoked. It is well established that it is for the government party to satisfy the court with evidence that a purported limitation is “demonstrably justifiable”¹⁶ and that if it fails to discharge that burden then there is no basis upon which the court can be satisfied that a limitation is reasonable. A declaration of inconsistent interpretation may follow. What this reveals is that to require an assessment of reasonable limitations before allowing s 32 to operate would be to require courts and tribunals at all levels to receive evidence about reasonable limitations on every occasion on which s 32 is invoked. It is difficult to reconcile that approach with the view that the court’s role under s 32 is its traditional one of interpreting legislation.
17. The Centre submits that where it is alleged that a statutory provision limits human rights, it is necessary to consider whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with s 32 of the Charter; consideration of s 7 only arises in the event that it is not possible to interpret the provision compatibly with human rights under s 32.
18. This interpretation is supported by the provenance and conceptual purpose of s 7. Section 7 is based on s 5 of the *New Zealand Bill of Rights Act* and s 36 of the *Constitution of the Republic of South Africa*. Those provisions were in turn based on s 1 of the *Canadian Charter of Rights and Freedoms* (forming part of the Constitution Act 1982), which provides: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” That provision allowed limited derogation from human rights in the context of a supreme law allowing for judicial review of legislation. Thus

¹⁴ Charter, preamble.

¹⁵ *R v Hansen* [2007] 3 NZLR 1 at [17] (Elias CJ).

¹⁶ See, eg, *R v Oakes* [1986] 1 SCR 103 at 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260 at 283; *Moise v Transitional Land Council of Greater Germiston*, 2001 (4) SA 491 (CC) at [19].

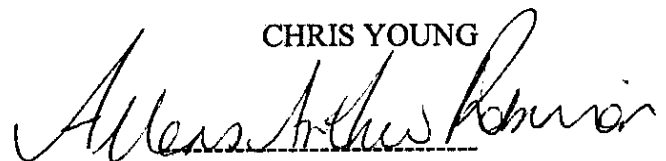
legislation which was “demonstrably justified in a free and democratic society” would survive challenge, with the onus lying on the State to make out the justification.¹⁷

19. The alternative argument – that s 7(2) is to be applied before the interpretative obligation can operate to reinterpret a provision – is said to be supported by decisions from the United Kingdom¹⁸ and Hong Kong.¹⁹ But it is difficult to see how decisions of the United Kingdom courts (a jurisdiction in which there is no equivalent to s 7(2)) and Hong Kong (a jurisdiction in which there is no equivalent to s 32 and no equivalent of s 7(2)) can be at all persuasive in answering the question about the relationship of those two provisions under the Charter.
20. It may be suggested that the concept of compatibility with human rights in s 32 of the Charter means compatibility with human rights as subject to reasonable limits under s 7(2).²⁰ However this conflates the concept of determining whether a law is consistent or congruent with human rights with determining whether a law imposes a reasonable limitation on human rights. Properly construed, the Charter envisages three possible relationships between a human right and a law:
- (1) the law is *compatible* with human rights;
 - (2) the law is *incompatible* with human rights, but the incompatibility is a *reasonable limit* on the right;
 - (3) the law is *incompatible* with human rights and the incompatibility is *not a reasonable limit* on the right.
21. That understanding of the relationship between compatibility and reasonable limits properly respects and accounts for the text and structure of the Charter and gives primacy to the Charter’s purpose of protecting and promoting human rights.

Dated: 3 June 2009

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¹⁷ See, eg, *R v Oakes* [1986] 1 SCR 103.

¹⁸ *Poplar Housing and Regeneration Community Assn v Donoghue* [2002] QB 48.

¹⁹ *HKSAR v Wai and Man* [2006] HKCFA 84.

²⁰ Cf *Kracke v Mental Health Review Board* [2009] VCAT 646 at [55].