

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL**

No. S APCI 0075 of 2010

BETWEEN

SUZANNE JILL WATERS

Applicant

and

THE DEPARTMENT OF HUMAN SERVICES

Respondent

and

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Intervener

and

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Intervener

**OUTLINE OF SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN
RIGHTS COMMISSION**

A. 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 for leave to Appeal by the Applicant against the orders of her Honour Judge Harbison, Vice President of the Victorian Civil and Administrative Tribunal (the **Tribunal**) dated 12 May 2010 (the **Orders**).
2. The application for leave to appeal involves questions concerning the proper application of the *Guardianship and Administration Act 1986* (Vic) (the **G&A Act**), as well as issues relating to the proper construction of that Act in light of s 32 of the Charter, and the actions of public authorities pursuant to s 38 of the Charter. The Commission intervenes only to address issues relating to the operation of the Charter.
3. The Charter is relevant to the fifth proposed ground of appeal, by which the following errors are alleged by the Applicant:

- (a) The Tribunal erred in finding that the right to family was not engaged.
 - (b) Failure to have regard to s 17(1) of the Charter.
 - (c) Failure to have regard to ss 10, 12 and 13 of the Charter.
 - (d) Failure to give proper consideration to s 17 of the Charter.
 - (e) Failure to interpret s 23 of the G&A Act pursuant to s 32 of the Charter.
4. The Commission submits that the consideration of relevant Charter rights should be informed by reference to the Convention on the Rights of Persons with Disabilities (CRPD)¹.
5. In summary, the Commission makes the following submissions in relation to each ground of appeal:

(a) **Proposed Ground of Appeal 5(a)**

The Commission submits that the right to family was engaged by the grant of the guardianship order. The right to family as protected by s 17 of the Charter was appropriately considered by the Tribunal.

The right to family as protected by s 17 of the Charter is broad, and not amenable to exhaustive definition. It is related to s 13(c) of the Charter and includes communication and contact between family members but does not encompass any element of control.

Different principles apply in considering the family relationships of an adult. The represented person, RB, must be recognised as an adult with a disability recognised in the CRPD, in particular at Article 3(d) which requires that States promote:

Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.

The family relationship, for the purposes of s 17 of the Charter, must be considered and characterised in light of these principles. Further, in determining the content of the right, primary consideration should be given to RB's right to family and the specific circumstances of the case.

(b) **Proposed Ground of Appeal 5(b)**

Discerning the proper construction of s 23 involves having regard to the relevant provisions of the G&A Act, the common law and the Charter (refer to

¹ The CRPD and the Optional Protocol entered into force on 3 May 2008 and as yet there have been no individual communications that have been decided.

section B, below). The rights which must be “broadly and beneficially” interpreted are *primarily* those of the proposed represented person (including his right to family).

For the reasons explained in **section C**, below, the Commission submits that the only “possible” interpretation of the relevant provisions in the circumstances is that which gives primacy to the best interests of RB. Permitting the rights of the Applicant to override to any extent the primacy of the concern for the best interests of RB involves an error of principle.

(c) **Proposed Ground of Appeal 5(c)**

The Tribunal fell into error by failing to identify with sufficient particularity the rights protected by ss 10, 12 and 13 of the Charter. These rights must all be considered by reference to the CRPD. For the reasons set out in paragraphs 47 – 51, below, the Court is invited to reconsider the approach taken in *Castles v Secretary to the Department of Justice*² (**Castles**).

As explained in paragraphs 55 – 56 below, failure to give “proper consideration” to the relevant rights renders the decision “unlawful” within the meaning of s 38(1).

(d) **Proposed Ground of Appeal 5(d)**

The Applicant suggests that insufficient consideration was given to s 17 of the Charter. The Tribunal considers the rights of the family³. Her Honour correctly notes that s 17(2) of the Charter has no application to an adult man⁴. The relevant finding is that:

...it is not my view that the section [17] commands the appointment of a member of the family as plenary guardian in order to protect his Charter rights.⁵

This is consistent with Article 3(a) of the CRPD which requires States to act with:

Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.

² [2010] VSC 310.
³ Reasons [452] – [454].
⁴ Reasons, paragraph 458.
⁵ Reasons at [459].

As explained in paragraph 51, below, the Tribunal gave sufficient consideration to the right protected by s 17 of the Charter.

(e) **Proposed Ground of Appeal 5(e)**

The Commission submits it was incumbent upon the Tribunal to explore all possible interpretations of s 23(4) of the G&A Act and to adopt that interpretation which least infringes Charter rights.

An analysis of the statutory framework of the common law, G&A Act, the Charter, and relevant international instruments⁶ including the CRPD is undertaken in **section C**, below. This approach gives primary consideration to the best interests of RB in circumstances where he is unable to express his own preferences⁷. No other interpretation is relevantly “possible”.

B. THE OPERATION OF S 32 OF THE CHARTER

6. 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.

7. The Tribunal characterised the approach to s 32 of the Charter in the following terms:

[455] In considering the application of the Charter, this Tribunal is required to follow the process of interpretation set out in *R v Momcilov[i]c* (2010) VSCA 50. The OPA submission set out the three step process required as a result of the analysis in that case, and all parties accepted that this approach is correct.

[456] The first step is to ascertain the meaning of the sections of the *Guardianship and Administration Act* sought to be applied. That meaning must be ascertained by applying the common law principles of statutory construction and the *Interpretation of Legislation Act* 1984 (Vic).

[457] Once the true meaning of the section under consideration is ascertained, I must consider whether, so interpreted, the section breaches a human right protected by the Charter.

⁶ Requiring consideration of relevant international conventions: s 32(2).
⁷ Reasons at [347].

8. In so characterising and applying s 32 of the Charter, the Tribunal fell into error. The correct interpretive exercise required by s 32 is that set out in *R v Momcilovic*.⁸ The Commission submits that the following principles may be drawn from *Momcilovic*:⁹
- (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.”
 - (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) Where one “possible” statutory interpretation is more compliant with the protection and promotion of Charter rights, then that interpretation ought to be preferred.
 - (f) Justification under s 7(2) of the Charter becomes relevant only if the provision, so interpreted, breaches a right protected by the Charter. In the circumstances of this case, the Commission contends that a Charter-compliant interpretation was available, such that no s 7(2) analysis was required.
9. The Tribunal erred in two ways:
- (a) **First:** by ascertaining the meaning of the relevant provision without reference to the Charter *before* considering whether the provision so construed breached any Charter right. The Tribunal misdirected itself by failing to consider at the outset the meaning of the statutory provision by reference to *all* tools of statutory

⁸ [2010] VSCA 50.

⁹ [2010] VSCA 50 at [35], [103]-[110].

interpretation, *including* the Charter.

- (b) **Second:** by engaging in a s 7(2) proportionality analysis in circumstances where a Charter-compliant interpretation of the relevant provisions of the G&A Act was available.

10. In this sense, there was a relevant error of law.

C. THE PROPER CONSTRUCTION OF THE G&A ACT

11. The proper construction of the G&A Act involves consideration of the words of the G&A Act, the Charter, and the common law.

The G&A Act

12. The G&A Act is to be interpreted in accordance with its objects, set out in s 4(2) as follows:

- (2) jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that-
- a. the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
 - b. the best interests of a person with a disability are promoted; and
 - c. the wishes of a person with a disability are wherever possible given effect to.

13. In the circumstances of the present case, it was accepted by the parties and the Tribunal that:

- (a) a Guardianship Order was necessary and appropriate in the circumstances, and there was no less restrictive means of safeguarding the welfare of RB¹⁰; and
- (b) it was not possible to ascertain the wishes of RB with respect to his preferred choice of guardian¹¹.

14. In the circumstances of this case, the relevant object of the G&A Act to which the Tribunal was required to have regard, was to ensure that "*the best interests of a person with a disability are promoted.*"¹² The Commission submits that this concept of "best interests" must be understood by reference to the CRPD and in particular,

¹⁰ Reasons at [317] and [476].

¹¹ Reasons at [346].

¹² The G&A Act, s 4(2)(b).

the guiding principles in Article 3, which provides:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.¹³

15. Within this general framework, the effect of s 22(2) of the G&A Act requires that the Tribunal take into account a range of factors, including:

- (a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action; and
- (ab) the wishes of the proposed represented person, so far as they can be ascertained; and
- (b) the wishes of any nearest relatives or other family members of the proposed represented person; and
- (c) the desirability of preserving existing family relationships.

16. It has been recognised that “Just as each person is unique so is each proceeding under the *Guardianship and Administration Act 1986* unique.¹⁴” This flexibility of approach is consistent with the recognition of the infinite variety of circumstance within which a Guardianship Order may be made.

Section 32 of the Charter

17. Section 32(2) of the Charter provides that:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

18. The CRPD informs the nature and scope of each relevant right in circumstances where the rights of persons with disabilities is in issue. The CRPD is relevant to the operation of each of ss 32 and s 38.

19. In this regard, insofar as the approach of the *Supreme Court in WBM v Chief*

¹³ CRPD, Article 3.

¹⁴ *XYZ (Guardianship)* [2007] VCAT 1196 per Billings, DP at [47].

*Commissioner of Police*¹⁵ encouraged limited recourse to international jurisprudence, it should not be followed.

20. A proper construction of the relevant provisions involves the conclusion that:
- (a) The Act already contains the recognition that OPA is guardian of last resort¹⁶;
 - (b) No additional presumption as to the identity of the guardian is warranted or “possible” applying ordinary rules of statutory interpretation, including the Charter;
 - (c) In the circumstances of this case, the guiding principle must be the best interests of the represented person.

D. THE OPERATION OF S 38 OF THE CHARTER

21. Section 38(1) of the Charter provides:

Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

22. The subsection plainly has, and was intended to have,¹⁷ two limbs. It makes it unlawful:
- (a) to act (defined in s 3 to include a failure to act) in a way that is “incompatible” with human rights (the **First Limb**); and
 - (b) in making a decision, to fail to give “proper consideration” to relevant human rights (the **Second Limb**).

23. The Tribunal accepted that it was a public authority for the purposes of the application before it¹⁸. The Commission does not submit that the Tribunal has breached the First Limb.

24. The Commission submits that the Tribunal has failed to give proper consideration to relevant human rights as required by the Second Limb. In this regard, the Commission invites the Court to reconsider the approach taken in *Castles*.

¹⁵ [2010] VSC 219, in particular at [48] - [57].

¹⁶ G&A Act, s 23(4).

¹⁷ *Charter of Human Rights and Responsibilities Bill 2006*, Explanatory Memorandum, p 27.

¹⁸ Reasons at [445].

25. This requires consideration of which rights are engaged, and the content of each of those rights. The Commission submits that in making a Guardianship Order under s 23 of the G&A Act, the following rights were relevant to that exercise of the Tribunal's power.

The rights engaged

26. The rights engaged in the present application were those protected by ss 10, 12 and 13 and 17 of the Charter. In order to discharge its obligations under s 38(1) to give proper consideration to the relevant rights, the Tribunal must identify the nature and scope of the relevant rights. The Tribunal acknowledged¹⁹ that it had received submissions on the Charter, and it is noted that those submissions included some detailed consideration of the content of the rights protected by ss 10, 12, 13 and 17 of the Charter.²⁰
27. The Commission makes the following submissions concerning the content of each relevant right. In accordance with the general approach to rights protected by the Charter, each right should be interpreted broadly²¹.

Engagement of section 10(c) of the Charter

28. The Charter provides that a person must not be subjected to medical treatment without full, free and informed consent. New Zealand²² and the Australian Capital Territory²³ also protect this right in their human rights legislation. In New Zealand the right has been interpreted so as to only apply to those who are "competent" to refuse treatment.²⁴
29. The Australian common law generally places a high value on the freedom of individuals to decide what medical treatment they undertake.
30. The High Court in *Rogers v Whitaker* (1992) 175 CLR 479 quoted with approval 'the paramount consideration that a person is entitled to make his own decisions about his life'.²⁵ In particular, non-consensual medical treatment has been considered a trespass on the person: *Department of Health and Community Services v JWB and SMA ("Marion's Case")* (1992) 175 CLR 218.²⁶

¹⁹ Reasons at [450].

²⁰ Submissions of the Applicant dated 26 February 2010, AB Vol 3, p43, especially AB pp 54 – 61.

²¹ *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (**DAS**).

²² Section 11 of the *New Zealand Bill of Rights Act 1990* provides that 'everyone has the right to refuse to undergo any medical treatment'.

²³ Section 10 of the *Human Rights Act 2004* (ACT) provides that 'no-one may be subjected to medical or scientific experimentation or treatment without his or her free consent'.

²⁴ *Re S* [1992] 1 NZLR 363; *Re M* [1992] 1 NZLR 29; *Re K* [2003] NZFLR 318

²⁵ *Rogers v Whitaker* (1992) 175 CLR 479 at 487

²⁶ *Department of Health and Community Services v JWB and SMA ("Marion's Case")* (1992) 175 CLR 218

Engagement of section 12 of the Charter

31. Section 12 of the Charter protects the right of each person in Victoria to move freely and to choose where they live.
32. It is clear from cases such as *Raimondo v Italy*²⁷ that impediments on a person's movements, including refusing to allow a person to leave their home will constitute an interference with the freedom of movement. To the extent that a 'condition' imposed by an Guardianship order could specify a particular residence, then the right protected by s 12 is likely to be engaged.
33. In the case of a person with a disability, it is appropriate to read the right consistent with the provisions of the CRPD. In particular, Article 18 relevantly provides:

States Parties shall recognize the rights of persons with disabilities to liberty of movement, the freedom to choose their residence and to a nationality, on an equal basis with others...

Engagement of section 13 of the Charter

34. The Charter provides that a person has the right not to have his or her privacy unlawfully or arbitrarily interfered with. Article 8 of the *European Charter of Human Rights* ("ECHR") (the right to respect for private and family life, home and correspondence) has been interpreted to include bodily privacy.²⁸
35. The privacy right in the Charter is internally limited – it is bounded by the concepts of unlawfulness and arbitrariness. An interference with privacy will be lawful if the interference is authorised by law.
36. The concept of privacy in the context of a person with a disability must be considered in light of the CRPD, which relevantly provides:

No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others²⁹.

²⁷ (1994) 18 EHRR 237.

²⁸ *Pretty v The United Kingdom* (2002) 35 EHRR 1 at [61]

²⁹ Article 22.

37. Interpreting that right broadly and purposively in the manner identified above, it is apparent that:³⁰

The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.

The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.

38. In a similar vein, in *R (Razgar) v Secretary of State for the Home Department*, Lord Bingham stated³¹

Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person. Professor Feldman, writing in 1997 before the most recent decisions, helpfully observed ("The Developing Scope of article 8 of the European Convention on Human Rights" [1997] EHRLR 265, 270). "Moral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the State and society in ways which respect people's moral worth by taking account of their need for security.

Engagement of section 17

39. Section 17³² of the Charter provides:

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

40. The right protected by s 17 will not be engaged in all cases involving Guardianship Orders.

41. The obligation to protect the family set out in s 17 of the Charter is a positive one.

³⁰ *Kracke v Mental Health Review Board* [2009] VCAT 646, [619]-[620].

³¹ [2004] 2 AC 368, [9]. See also *Pretty v United Kingdom* (2002) 35 EHRR 1, [61].

³² This right is based on Article 32(2) of the ICCPR, and finds an analogue in article 3.1 of the *Convention on the Rights of the Child*.

42. The right to family as protected by s 17 of the Charter is broad, and not amenable to exhaustive definition. This is recognised by General Comment 16 in the following terms:

Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.

43. It is a positive obligation on the State to protect the family unit, however so described. The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.³³

44. It is related to s 13(c) and includes communication and contact between family members but does not encompass any element of control.

45. Different principles apply in considering the family relationships of an adult. RB must be recognised as an adult with a disability rather than merely equated with a child by reason of his disability. This is consistent with the relevant provisions of the CRPD which provides:

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests³⁴.

46. In the event, it is clear that each of these rights are engaged by the appointment of a guardian. The Commission considers that the identity of the proposed guardian is not determinative of whether these rights are engaged. However, in circumstances where a family member is the proposed guardian, the Tribunal's consideration of s 17 of the Charter will necessarily differ.

Proper Consideration

47. Consideration of the Second Limb of s 38(1) relevantly requires consideration of whether:

(a) the public authority has given proper consideration to the relevant rights;

³³ UN HRC, General Comment 19, Thirty-fifth session, 1990, Art 2.

³⁴ CRPD, Article 12(4).

(b) if so, is the decision one that limits the rights in a justifiable manner having regard to s 7(2) of the Charter.

48. It is not in dispute that the Tribunal referred to the rights protected by ss 10(c), 12 and 13 of the Charter ([449] – [451]) in a superficial way, while s 17 of the Charter received greater analysis ([452] – [461]). The relevant dispute surrounds the degree of specificity required of a Public Authority in identifying the content of each Charter right for the purposes of their obligation to give “proper consideration” to relevant rights.

49. In *Castles* Emerton J suggested that the proper consideration requirement could be satisfied as follows:

While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person’s human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.³⁵

50. With respect, the Commission submits consideration required by s 38(1) is broader than contemplated in *Castles* because:

(a) Section 38(1) imposes a requirement to give “proper” consideration to human rights; a requirement that operates to subject decisions by public authorities to a stricter standard of review than would be required in the course of judicial review proceedings; and

(b) As a matter of logic it is necessary to identify the *content* of a right with some precision before it can be meaningfully applied.

51. The Commission therefore submits that it was necessary for the Tribunal to identify the essential characteristics of each relevant right in order that they may receive the “proper” consideration required by s 38. It was not sufficient merely to name each right.

52. As a result, the Commission contends that the Tribunal failed to comply with the requirements of s 38(1) in respect of ss 10(c), 12 and 13 insofar as the Tribunal did not give “proper consideration” to those relevant rights. The Commission contends that the Tribunal’s consideration of the right protected by s 17 was adequate for the purposes of s 38 of the Charter.

³⁵ *Castles* at [186].

The standard of review required by proportionality analysis – section 7(2)

53. The enactment of s 38(1) of the Charter has introduced a new standard of review into the law of Victoria in relation to the legality of the conduct and decisions of public authorities.
54. That follows because, Parliament having enacted s 38(1) of the Charter in terms that are relevantly identical to s 6(1) of the *Human Rights Act (UK) (1998) (HRA)*, it should be taken to have intended s 38(1) to operate in the same way as s 6(1) of the HRA. That is particularly true given that the Explanatory Memorandum for the Charter states (p 27) that s 38(1) “is modelled on section 6 of the United Kingdom *Human Rights Act 1998* and is intended to ensure that public authorities make decisions and act compatibly with human rights”.
55. The standard of review required by proportionality analysis under s 6 of the HRA was explained by Lord Steyn in *Daly*, in an opinion that the House of Lords has described as “justly-celebrated and much-quoted”.³⁶ Lord Steyn said:³⁷
- Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality ... But the intensity of review is somewhat greater under the proportionality approach ... I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517554 is not necessarily appropriate to the protection of human rights ... [T]he intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
56. The Commission submits that there may be some cases in which a range of possible decisions will interfere with rights in a way that would be demonstrably justifiable

³⁶ *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 184 [13].

³⁷ [2001] 2 AC 532, [28] (emphasis added).

having regard to s 7(2) of the Charter. In the present case:

- (a) The Tribunal considered that the Applicant had a number of attributes relevant to her ability to act positively as RB's guardian;³⁸ and
- (b) OPA is a public authority within the meaning of the Charter, and so is required to act compatibly with Charter rights, consistent with s 38 of the Charter.

57. The present case is one where there were a range of possible decisions open to the Tribunal. In order to be lawful, it will be necessary for the Tribunal to have "properly considered" the rights involved in the available options as part of the decision-making process. As a matter of principle this must be required, even if the decision that was made involved a justifiable interference with rights, because if rights *had* been properly considered a different decision might have been made.

58. As a result, the Tribunal fell into error in respect of its application of s 38 of the Charter.

F CONCLUSION

59. The Commission submits that the Tribunal fell into error in its approach to both s 32 and s 38 of the *Charter*. The Commission makes no submission as to the appropriate orders for the disposition of this application.

Elizabeth A Bennett
Joan Rosanove Chambers
14 September 2010

³⁸ Refer to paragraph 53 of the Applicant's submissions.