16/07; [2007] VSC 65

SUPREME COURT OF VICTORIA

RICH v MAGISTRATES' COURT of VICTORIA & ANOR

Maxwell P

7, 9 March 2007

PRACTICE AND PROCEDURE – COMMITTAL PROCEEDINGS – ACCUSED CHARGED WITH MURDER AND ARMED ROBBERY – ACCUSED HELD IN CUSTODY – ARRANGEMENTS MADE IN PRISON AS TO AVAILABILITY OF VIDEOS AND RELEVANT DOCUMENTATION – ACCUSED UNREPRESENTED – CLAIM BY ACCUSED THAT PREPARATION OF CASE HAMPERED BY LACK OF ACCESS TO EVIDENTIARY MATERIAL – APPLICATION FOR ADJOURNMENT OF COMMITTAL PROCEEDINGS – NATURAL JUSTICE – CLAIM BY ACCUSED THAT HEARING WILL BE UNFAIR – APPLICATION FOR ADJOURNMENT REFUSED – WHETHER MAGISTRATE IN ERROR.

R. was charged with murder and armed robbery and was detained in custody. R. applied for Legal Aid which was refused. Whilst R. was detained in custody he was obstructed by Corrections Victoria in the form of limited access to materials and documentation or limited or no access to appropriate computer facilities. When the committal proceedings commenced, R. applied for an adjournment until the question of Legal Aid funding was resolved and to enable R. to prepare his case. The magistrate refused the application. Upon appeal—

HELD: Application for injunction refused.
1. In relation to the legal aid issue, the Court cannot review a decision by Victoria Legal Aid about the provision or otherwise of funding. The availability of legal aid is not unlimited. There must come a time when a person being funded out of the public purse has to accept that the representation might not in every respect be what he or she wants. Whilst it might be preferable for R. to be represented, there was no breach of natural justice in proceeding with R. unrepresented.

2. In relation to the issue of obstruction of preparation, there is no provision under Victorian law for a review on the merits of administrative decisions made by the Office of Corrections. Deliberate obstruction of a person in custody seeking to prepare to meet serious criminal charges is a serious abuse of power. Having a fair hearing means having a fair opportunity to present arguments and to have those arguments considered by a person who approaches them with an open mind. The minimum access that R. is entitled to involves having available at reasonable times the media necessary to listen to things like telephone intercepts and the record of interview. The magistrate has a duty to ensure that there is no obstruction of any kind. R. has received and will continue to receive a fair hearing before the magistrate. Accordingly, the application for an injunction is refused.

MAXWELL P:

1. On 8 March 2005, an armed robbery was committed at the North Blackburn shopping centre. During the robbery a security guard was murdered. On 16 June 2005 the applicant, Mr Rich, was charged with the armed robbery and the murder. On 1 March 2006, a committal date of 11 September 2006 was fixed. Following a series of court hearings, the date was changed to 11 October 2006. On that day the presiding magistrate ruled that the committal could not start. I will refer to the reasons for that decision shortly. At a further special mention on 23 October 2006, the magistrate directed that the committal be listed for hearing on 13 March 2007.

2. Last Friday, 2 March, Mr Rich applied to the magistrate to adjourn the committal proceeding which is due to start next Tuesday, 13 March. In a ruling delivered the same day, the magistrate dismissed the application for adjournment. In fact, as Mr Rich told the magistrate following the ruling, he had the previous day communicated with the Prothonotary of this Court by telephone, advising of his "urgent need to appear in the Practice Court before 13 March 2007". His letter dated 2 March to the Prothonotary stated in part as follows:

> "I am in peril and urgently require the supervision of a superior court managing these matters. ... Please find me a judge who would be willing to hear me on this matter without delay and well before 13 March next."

The letter was accompanied by the front page of an originating motion, a summons and a lengthy draft affidavit.

3. On 5 March 2007, pursuant to rule 27.06 of the Supreme Court Rules, the Prothonotary referred those documents to me for my direction. I directed that the documents be accepted by the Prothonotary for filing, and that copies be served on the Director of Public Prosecutions, the Office of Corrections and Victoria Legal Aid, with a view to the matter being heard in the Practice Court on 7 March with all parties other than the magistrate being present. That is what occurred.

The nature of the application

4. In the summons, Mr Rich sought four orders, all in the nature of injunctions, in the following terms:

> "(1) A *quia timet* injunction restraining the [Magistrate] from beginning to hear the contested committal on or about 13 March 2007 and that the Order remain lawfully in place until such time the question of the Corrections Victoria and VLA funding is resolved by this Honourable Court or until such time the Court orders otherwise.
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> (2) An Order in the nature of an Interlocutory (interim) injunction restraining the [Magistrate] from beginning to hear the hearing of the contested committal on or about 13 March 2007 and that the Order remain lawfully in place until such time until the question of VLA funding is resolved in this Honourable Court or until such time the Court orders otherwise.
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> (3) An Order in the nature of an injunction compelling the [Magistrate] to ensure that the plaintiff will have enough time:
> (i) to prepare, file and serve upon Victoria Legal Aid and Corrections Victoria the prerequisite and necessary documentation to commence an action in this Honourable Court seeking to both review the efficacy of the associated administrative decisions made and affecting the interest of the plaintiff in those matters;
> (ii) to review the full content of the police exhibit computer upon the completion of the forensic examination currently undertaken by Corrections Victoria; and
> (iii) so as to ensure that the now confirmed missing court preparations may be reconstructed.
>
> (4) An Order in the nature of an injunction compelling the [Magistrate]:
> (i) to continue to hear and determine the matters associated with the conduct of the committal and in accordance with the mandated procedure prescribed by Schedule 5 PART 2 – MENTION HEARINGS and the powers under section 136 of the *Magistrates' Court Act* 1989 (Vic); and
> (ii) to set a new timetable for the contested committal proceeding."

5. At the commencement of the hearing on 7 March, I indicated to Mr Rich, and to counsel appearing respectively for the Director, Corrections and Victoria Legal Aid, that I would treat this as an urgent application for interlocutory injunctive relief to restrain the magistrate from commencing the committal, pending the hearing and determination of a foreshadowed application by Mr Rich under Order 56 of the Rules for judicial review of the magistrate's decision to refuse the adjournment. I said that, if I were minded to granted interim relief, I would do so on condition that Mr Rich file the necessary documentation – that is, an originating motion setting out the grounds – to institute such a proceeding. There was no objection from counsel to this course and I have proceeded on that basis.

6. The basis of Mr Rich's application for adjournment was, and the basis of his application for injunction in this Court is, that because of (a) the refusal of Victoria Legal Aid to fund his representation and (b) obstruction by the Office of Corrections of his preparation, he will be denied a fair hearing if the committal commences on 13 March. Mr Rich relies on that fundamental principle of natural justice known as the hearing rule, namely, that every person is entitled to a reasonable opportunity to know the case against him or her, to prepare to meet that case and to present argument and evidence in opposition to it. A refusal of adjournment can, of course, constitute a breach of natural justice.[1]

Jurisdiction to grant prohibition

7. In my opinion, this Court has jurisdiction to grant orders in the nature of prohibition to prevent a magistrate proceeding with a committal hearing in breach of the hearing rule. The existence of that jurisdiction is not inconsistent with the position clearly enunciated by the Court of Appeal in *Potter v Tural*[2], namely, that a magistrate's order committing for trial or refusing to commit is not amenable to *certiorari*.[3]

8. In *Potter*, it was accepted that an order in the nature of mandamus was an available remedy in connection with a committal, though such relief would only be granted where there had been an error which amounted to a refusal, whether actual or constructive, to exercise jurisdiction at all.[4] The converse must also be true. That is, if a magistrate purported to act outside jurisdiction, relief in the nature of prohibition must be available, subject always to discretionary considerations. For a decision-maker to proceed with a hearing in breach of natural justice would be to commit jurisdictional error, as the High Court has made clear repeatedly in recent years.[5] For the purposes of the argument before me, Ms Mortimer, on behalf of Corrections, conceded that this was so.

9. Thus understood, the substantive application which Mr Rich makes in this Court – or will make if and when an originating motion in proper form is filed – is an application for relief in the nature of prohibition to prevent the magistrate from commencing the committal proceeding in breach of the principles of natural justice. It follows that, on this application for interlocutory relief pending the hearing and determination of that judicial review proceeding, the test to be applied is the conventional test applicable to interlocutory injunctions, namely, whether there is a serious question to be tried and where the balance of convenience lies. More particularly, Mr Rich needs to satisfy me that there is a serious question to be tried as to whether the hearing which the magistrate proposes to begin on 13 March will be a hearing that fails to comply with the requirements of natural justice, in the sense that it denies him the opportunity to have a fair hearing.

10. For reasons which follow, I am not persuaded that there is any serious question to be tried. Accordingly, the application for interlocutory injunctions will be refused.

The legal aid issue

11. In his affidavit in support of the application, Mr Rich describes as the primary issue for consideration his need to have the committal hearing deferred "until the question of funding and representation is resolved in this matter". That was also the first ground of the application before the magistrate. His Honour's ruling on that point was in these terms:

> "The first question to be considered is: does the refusal of Legal Aid to grant assistance to Mr Rich mean that he, Mr Rich, will not be afforded the opportunity of a fair hearing at the proceeding? Legal Aid has not been available since about October of last year. This matter was adjourned from October of last year, approximately, until 13 March this year to afford time to Mr Rich to prepare personally, as opposed to instruct counsel. It was adjourned for a substantial period of time so as to allow Mr Rich that opportunity. The short answer to the question, 'Does the refusal of Legal Aid mean that a fair hearing cannot be afforded to Mr Rich?', is 'No'. Even though, in my view, it would be appropriate, as I have said, for Mr Rich to be represented, it might be of value to the court for Mr Rich to be represented. It might be a preference of the court for Mr Rich to be represented. They are not matters proper for an exercise of discretion in relation to an adjournment, in any event. The question is whether or not the refusal creates an unfairness in relation to the matter and on that point, as I have already indicated, I say 'No'."

12. Before me, Mr Rich has renewed his complaint about the refusal of Victoria Legal Aid to fund his defence at the committal. His complaint is, in substance and in terms, a complaint about the decision-making by Victoria Legal Aid in respect of the termination of his grant of aid. I made clear from the outset of the hearing on Wednesday, and I wish to make unambiguously clear in these reasons, that this is not – and could not be – a proceeding for review of Victoria Legal Aid's decisions; nor, for that matter, is it a proceeding for review of decisions by Corrections.

13. As already noted, Mr Rich said in his letter to the Prothonotary that he urgently required the supervision of a superior court "managing these matters". That is, with respect, a misconception of what this Court can do. Supervision is available in the form of the supervisory judicial review jurisdiction, but it is no function of this Court to "manage" committal hearings, or relationships between a prisoner and the Office of Corrections or between an applicant for legal aid and Victoria Legal Aid.

14. In his affidavit, Mr Rich says:

> "98. The plaintiff respectfully asserts that he requires the immediate supervision and protection from this Honourable Court restraining the [Magistrate] in the manner described and for those requested orders to remain in force until such time in which both the VLA funding and/or the

> Corrections questions have been resolved one way or another or otherwise by direction and order of this Honourable Court.
>
> 99. The plaintiff further undertakes to continue with his preparations so that both VLA and Corrections may appear in this Honourable Court as a defendant or defendants in consequence of responding to the matters that require adjudication in this case and abide by any order or directions the Court may impose.
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> The issues as detailed in this affidavit pertain to an urgent review of the decision by VLA to terminate the former funding package, and further matters against Corrections Victoria whose conduct, *inter alia*, brought about a loss of the former funding package because of their long term protracted obstructionistic attitude, as outlined in this affidavit.
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> 100. It is respectfully submitted that Corrections Victoria need to be restrained (so that) I may have the full opportunity to prepare for the committal proceedings without the unnecessary imposition of constant impediments and being repeatedly confronted with the loss of my previous court preparations.
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> 101. It is also respectfully submitted that Corrections Victoria need to be restrained to ensure that I have reasonable time and also adequate facilities to continue with my committal preparations. The facilities are available, but Corrections will not permit my having access to them."

15. In his submissions to the magistrate on the adjournment application, Mr Rich made reference to the need to "challenge in another place" the conduct of Corrections which he said had caused the loss to him of $112,000 of legal aid funding:

> "The central thrust of my application, with respect, Your Honour, has always been that I've not had sufficient time to prepare, in relation to the obstructionistic conduct of Corrections. It's Corrections' conduct that's caused the set of circumstances that come to the fore whereby I lost a significant benefit of $112,000 grant from the public purse. That benefit needs to be now challenged in another place in order to find and to make them responsible for that, for that loss, or, for an example, parts of that loss. So it's either $112,000 or $24,000 they need to potentially recompense me on so I can get back to square one. They are responsible, I am not responsible, and sufficient materials to do what I need to do.
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> Six times now Corrections, as a group, as an entity, have destroyed my preparations by the inadvertence, inadvertent claim loss, and it can't stay like that anymore, Your Honour, it can't stay like that anymore, and the reality of it is, that unless I get some support from a higher authority, because Your Honour is shackled as the court has indicated, you have only got implied jurisdiction, not inherent jurisdiction, in order to make some significant changes in these matters, I am sorry, sir, I have got to go across the road. That's what it is, and I again renew my application for an adjournment so those matters can take place."

16. The magistrate said this in the ruling of 2 March, in relation to proceedings elsewhere:

> "It is said by Mr Rich that he may now need to make application in another place in relation to this proceeding. That opportunity has been available to Mr Rich from the time of this matter being adjourned in approximately October until 13 March upon the basis that Mr Rich has always argued that it is the obstruction caused by Corrections. I understand that it is inconvenient and difficult for a person in custody to take such a proceeding in the appropriate place, but that has been indicated as an intention of Mr Rich throughout these applications for adjournments."

17. Following that ruling, Mr Rich made statements to the magistrate about his endeavours to ascertain the reasons for Victoria Legal Aid's decision to terminate aid. It should be noted that the magistrate had, on 21 September last year, required the attendance of an officer of VLA to explain the position. That is only one of a number of instances of the magistrate intervening actively and vigorously to protect what he perceived to be Mr Rich's interests. Following that attendance, senior counsel appeared on behalf of Mr Rich on 22 September. Victoria Legal Aid funding had been increased to cover senior counsel's fees. Subsequently, on 4 October 2006, when the committal was listed to commence, senior counsel appeared and informed the court that his instructions and those of his instructing solicitor had been withdrawn.

18. Mr Rich gave the following version of these matters in his affidavit, which he summarised before me.

> "48. The [Magistrate] was advised that instructions had been 'withdrawn' from both Senior Counsel and those instructing him in consequence of my former solicitor consciously (despite receiving instructions to the contrary) ignoring previous instructions in relation to the principle trunk of a defence issue. Moreover, up to this point in time, I had not had the benefit or any opportunity to confer with Counsel (or indeed any counsel) about matters of importance, nor provide instructions affecting the proper and effective presentation of the committal proceedings.
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> In addition to that circumstance, the new solicitor advised that she 'had no knowledge of the competing issues in my matters' and in consequence could not assist Counsel in any way to illuminate those matters in the short term.
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> The solicitor confirmed to me that she had not reviewed any of the previous formal written instructions, nor had they been delivered to Senior Counsel.
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> 49. Confronted with that admission and the stark reality that my instructing solicitors had no intention to 'instruct' Senior Counsel on these issues, and in the context that Counsel had previously advised the court namely, that '... he *was not in a position to adequately represent me as things stood at that time...*', I was forced to reluctantly withdraw instructions by reason of the fact I was going to be embarrassed and that my interests were not going to be protected.
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> 50. Both the instructing solicitor and Counsel refused to accept my instructions, *inter alia*, to formally apply for an adjournment so that the Supreme Court may urgently hear and determine the protracted 'Correctional Issue'.
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> 51. It was also made quite plain to me that unless I accepted Counsel's judgment, that being he was not now going to confer with me in relation to my former written instructions, or the issues relating the police exhibit computer, and if I continued to press the point, both the instructing solicitor and Counsel would no longer be able to act for me in the committal proceedings.
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> The instructing solicitor and Counsel then 'withdrew' from proceedings in consequence of my withdrawing instructions for [these] matters."

19. In substance, his counsel would not comply with his instructions, *inter alia*, to formally apply for an adjournment so that this Court might "urgently hear and determine the protracted 'Correctional Issue'." This was the second falling-out between Mr Rich and a set of lawyers. The first was in November 2005, when he was dissatisfied with the performance of the firm of lawyers originally retained, and they felt compelled to withdraw.

20. Ms Ellyard, who appeared for Victoria Legal Aid, informed me that Mr Rich was notified on 30 November 2006 that the grant of assistance had been terminated. His decision to withdraw instructions was adjudged to have been made without reasonable cause. By letter dated 1 December 2006, Mr Rich set out in detail why that withdrawal was not unreasonable. He sought reconsideration of the decision. He sent a further detailed letter to Victoria Legal Aid setting out all the matters he wished to have taken into account in that reconsideration. By letter dated 15 February 2007, Victoria Legal Aid advised that there had been a review of the termination decision by an independent reviewer and the decision confirmed.

21. Mr Rich makes complaints about the process, including a complaint about a lack of independence of the Director of Legal Aid in being involved in that decision-making. None of those matters is before me and I make no ruling about them. It is plain enough that there has been both a primary decision and an independent review process, the latter activated by Mr Rich and involving a consideration of his detailed written submissions. It is no function of this Court to express any view about the correctness of the decision arrived at. This is not a merits review tribunal in relation to legal aid.

22. Ms Ellyard also pointed out that the High Court's decision in *Dietrich*[6] – a matter in which Mr Rich was the appellant under his former name – was concerned only with legal aid for trials and then only where a defendant "through no fault on his or her part" is unable to obtain legal representation. It is asserted by Legal Aid, and disputed by Mr Rich, that it is his fault that he no longer has legal representation. It is neither possible nor appropriate for me to investigate that matter. Suffice it to say that the availability of legal aid is not unlimited. There must come a time when a person being funded out of the public purse has to accept that the representation might not in every respect be what he or she wants. (I note further that s360A of the *Crimes Act* 1958 (Vic) is also concerned with legal aid only in connection with a trial.)

23. At all events, I see no reason to form any different view from the magistrate on this issue. In the circumstances of the case (including Mr Rich's own competence, as discussed below), there is no breach of natural justice in proceeding with the committal with Mr Rich unrepresented. The magistrate has expressed his own view strongly that it would be preferable for Mr Rich to be represented. There are good reasons why that would be in the Court's interests as well as Mr Rich's, but that is a matter for the funding authority.

Obstruction of preparation

24. In his affidavit in support of this application, Mr Rich said:

> "The secondary issue in the case touches upon my ability to have adequate time and facilities to prepare my defence and obtain equitable access to the court in that regard. These too are issues that require a judicial intervention in this case. Corrections Victoria will not permit me to both have access and retain resources and documentation in the form of the brief of evidence to prepare my defence so that counsel may ultimately be properly instructed. Without a proper resolution to these issues, it will not be possible for me to obtain a fair and impartial hearing for both the committal proceedings and potentially for my criminal trial."

25. The Magistrate dealt with that issue in his ruling in the following terms:

> "The next matter that is raised is whether, in fact, there has been an obstruction or obstructions effected by Corrections such as to interfere with Mr Rich's preparation of this proceeding, and I have said on a number of times that *it is my view that there have been obstructions*. Obstructions have been in the form of limited access to materials, limited or no access to appropriate computer facilities, no access to materials that have already been prepared by Mr Rich because they are limited by the computer access, limited or no access to some documentation which has either been given to Mr Rich in the course of the proceeding or has otherwise been through the court or otherwise been delivered to Mr Rich. *I have got no doubt, as I have said, that there have been obstructions*.
>
> The next issue, though, is whether those obstructions have created the circumstance *such that Mr Rich is unable to have a fair hearing in this proceeding, because that is the determinative point*.
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> As I have said before and I repeat, because it becomes a stronger and more identifiable position, I have been impressed substantially with the capacity of Mr Rich to address the issues in relation to the matters that have been raised during the course of long argument and discussion in relation to the matters that are raised in the summonses to witness. In relation to each and every one of those matters, and as I say there have been a substantial number, Mr Rich has been able to identify the issues that have been raised, identify the areas within the materials that are relevant to the issues that have been raised, argue eloquently the matters of fact and of law, and has demonstrated a substantial, if not impressive, understanding of the materials that constitute the materials that will be relied upon by the prosecution.
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> I have got no doubt that if this proceeding commences on 13 March that there may be times where allowances need to be made for Mr Rich to ensure that he has a complete understanding of the particular evidence that is being given or particular issues that are being raised. Such allowances can be made in the context and in the course of a committal proceeding.
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> I see no impediment to this committal proceeding commencing on 13 March, having regard to the matters that I have earlier referred to. In my view, though at least unfortunate, as I have already said, *perhaps deliberate obstruction by the Office of Corrections*, notwithstanding that, in my view does not cause an impediment to a fair hearing in relation to Mr Rich." (emphasis added)

26. It is of the first importance to note that on 11 October 2006 the same magistrate adjourned the start of the committal indefinitely on precisely this ground. In his ruling of 11 October 2006, the Magistrate said:

> "I have made my view known strongly that the prison authorities should provide Mr Rich with proper access to computer facilities so that he can prepare his case. I am not satisfied that what is being suggested as provision of material is sufficient. I cannot understand why Mr Rich is not given his personal computer, which apparently exists, or is not allowed to have provided to him a personal computer facility that allows him to access his hard drive. ...
>
> I have to take into account that in probability Mr Rich has contributed to his lack of consideration of substantial materials that have been either delivered to him or attempted to be delivered to him, and I have got no doubt that part of Mr Rich's application is to effectively attempt to stop this proceeding

> whilst he, in colloquial terms, gets his way, but I have to balance that against a prisoner's right of opportunity to reasonably prepare his case. In my view, as I have said already, Mr Rich hasn't had that opportunity, though that has been contributed to by his own actions.
>
> I do not propose to start this committal until Mr Rich is given what I consider to be reasonable access to the materials, including the capacity to examine the materials, prepare his committal, with the use of appropriate computer facilities, with access to his hard drives in such a way as he can reasonably prepare, and so this committal will not start until such access is provided."

27. It could not be clearer, in my view, that the learned magistrate was then, and is now, fully aware of the requirements of procedural fairness, of the need to ensure that Mr Rich has a fair hearing at his committal. More than that, the ruling of last October shows unambiguously that the learned magistrate was quite prepared to intervene – no doubt at great inconvenience to all of those who were ready to proceed last September and October – and postpone the committal where he was not satisfied that Mr Rich would have a fair hearing. He adjourned the committal for what ended up being a period of five months – a very lengthy adjournment indeed. I do not overlook the sustained submission made by Mr Rich that the time elapsed is really no guide because, he says, the obstruction has continued and he has still not been given access, or sufficient access, to critical materials.

28. As I said earlier, this is not an inquiry into the conduct of the Office of Corrections. There is no provision under Victorian law for a review on the merits of administrative decisions made by the Office of Corrections; nor, for that matter, is there a procedure for merits review of administrative decisions made in most other government departments. There is provision for judicial review – that is, on a question of law – of decisions by the Office of Corrections.

29. If this were an inquiry into the conduct of the Office of Corrections in relation to Mr Rich, and I were asked by him to evaluate critically the conduct of the Office of Corrections over the last fifteen months, and in particular the last five months, I would inevitably have also to evaluate critically his own conduct in his dealings with the Office of Corrections. From what I have read and heard, it seems likely that neither Mr Rich nor the Office of Corrections would emerge unscathed from such a review. The magistrate's reasons of last Friday said as much. He attributed fault to both sides.

30. I view with very great concern what the magistrate has said about obstruction by the Office of Corrections and the view expressed by him that this may have been deliberate. I am in no position to express any view about that, precisely because I am not conducting, and cannot conduct, a factual investigation of which request was or was not acted upon, or what was and was not done, or whose fault it was. I express no view about the conduct either of Mr Rich or of Corrections in relation to their ongoing wrangles about access to materials. But let there be no mistake. Deliberate obstruction of a person in custody seeking to prepare to meet very serious criminal charges is as serious an abuse of power as I can imagine. The situation in which a prisoner finds himself when facing such charges is made very much more difficult by his dependency upon prison authorities for access to information. Of course, the relationship is a bilateral one, and there is evidence filed on behalf of the Office of Corrections about the conduct of Mr Rich which, if I were investigating it, would raise some questions about where fault lies in relation to any given failure of access.

31. In my respectful opinion, the magistrate has acted according to the highest principles of the criminal law in intervening when he apprehended that such obstruction was taking place, such that Mr Rich was not having sufficient, or sufficiently timely, access to material. I would respectfully encourage the learned magistrate – though he needs no encouragement from me – to remain as vigilant as he clearly has been, to ensure that there is no obstruction of any kind.

32. Mr Rich has to accept, as every citizen in our legal system has to accept, that it is not possible to investigate every grievance and every complaint. For the reasons I have given, it is not possible or relevant on this application to investigate to a conclusion every grievance and every complaint he has against Corrections. I have formed the clear impression that Mr Rich has unrealistic expectations as to what constitutes a fair hearing. It does not involve being heard uncontradicted. It does not necessarily involve having your arguments upheld. Having a fair hearing means having a fair opportunity to present your arguments and to have those arguments considered by a person who approaches them with an open mind.

33. In the course of the hearing on Wednesday afternoon, Mr Rich objected strenuously to the procedure I was following, of enquiring of him and of the prosecution what the matters in issue were about access, and then asking them each in turn for their responses to what the other said. At one point Mr Rich told me that he had specifically wanted an *ex parte* hearing and had not asked for the other parties to be present. He appeared at one point to be on the verge of abandoning his application because of what he perceived to be the unfairness of the hearing in this Court.

34. Mr Rich seemed not to appreciate that the very reason I had directed that notice be given to those against whom he makes such trenchant criticisms was in order to be able myself to conduct a fair hearing. I needed to be able to hear from both sides in order properly to understand and evaluate those criticisms, as far as possible within the limitations of an application such as this. All parties are entitled to a fair hearing but there is no such thing as perfection. Every day in every court, judges and magistrates strive to do the very best they can.

35. Given the issue which Mr Rich raises, this is an inquiry into the conduct of the committal – not a Royal Commission or a judicial inquiry or a merits review. The question is whether there will be a fair hearing. Everything I have read and heard leads me to the conclusion that Mr Rich has received, and will continue to receive, a fair hearing before this magistrate. The record of proceedings reveals a magistrate who has an acute sense of fairness, admirable courage and persistence, and remarkable patience, and a readiness to step in vigorously in defence of Mr Rich's interests when he judges that to be necessary. The extracts from the magistrate's statements which are set out in Mr Rich's own affidavit confirm all of those characteristics. Of critical importance is the judgment made by the magistrate that Mr Rich is not prejudiced despite the obstruction which the magistrate says has occurred. Despite that, the magistrate concluded, he will receive a fair hearing, while at the same time noting – if I might say so, quite realistically – that there are very likely to be issues which will arise which may require adjournment or other steps in the management of the committal to give Mr Rich a reasonable opportunity to deal with them.

36. Sitting in the Court of Appeal, I have had the opportunity to hear and observe a large number of unrepresented litigants. On two separate occasions I have upheld an argument by an unrepresented litigant that a decision was affected by a breach of natural justice.[7] I have had the opportunity since Wednesday to read the very substantial documentation prepared by Mr Rich and filed in various proceedings. I refer to the application for bail in February 2006, the application for judicial review in August 2006 (consisting of a 35-page motion and a 23-page affidavit), the affidavit in support of a further application for bail in November last year, and an affidavit of 19 January 2007 in support of his application to adjourn. One of the exhibits to the affidavit of August 2006 is a 19-page document containing a summary, analysis and critique of the case against him. This document shows that Mr Rich was in a position, some seven months ago, to prepare a sophisticated document of that kind in relation to the case against him.

37. On the basis of my experience as judge and counsel over more than 20 years, I regard Mr Rich's demonstrated capabilities, both procedural and substantive, as quite exceptional. Not only is he very fluent verbally, as he demonstrated in his submissions to me on Wednesday, but he has the very great advantage, which I have seen very rarely with other unrepresented litigants, that he can set out his arguments in writing, clearly, logically, coherently and forcefully. On the face of both the written material I have read and the submissions that he made to me on Wednesday, I am of exactly the same view as the magistrate about Mr Rich's impressive capacities.

38. Mr Rich has made a number of specific complaints. At my invitation he listed all the matters in respect of which there has been a denial of access. He referred first to the problem that he only ever has access to part of the documents in the police brief at any one time. At the same time he acknowledged, properly, that he had had access to the brief since November 2005, which is some fifteen months ago. He agreed with me that it is possible to make notes on whatever is being examined at the time, including things that need to be checked when other material is examined subsequently. He said he suffers from a lack of long-term memory but agreed with me that note-taking is a means of overcoming problems of forgetfulness. There is an unresolved dispute of fact about whether he has, or has not, been denied access to the folders held in storage. He does not, as I understand it, dispute that in the work station which he uses there are 24 volumes, five of which are marked "Brief of Evidence". In any event, given the very, very lengthy period during

which he has had access to the brief itself, any difficulties of not having access to it all at the one time would seem to be capable of being resolved in the manner I have referred to.

39. Mr Rich raised concerns about three audio-visual items. The first concerned the tape recording of D24 conversations. Senior Counsel for the Director told me that the Director places no reliance on anything said on those tapes and will be relying on direct evidence from co-accused implicating Mr Rich in the relevant events. Mr Rich has been given a log of those conversations. This occurred at least six months ago, when his then solicitor was given the opportunity to hear the tapes and have passages transcribed. That opportunity was not taken up, so I was told. Again, I make no findings about these matters.

40. Then a complaint is made about telephone intercepts and the record of interview of one Hogan. Mr Rich says he does not have the media necessary to enable him to listen to those things. Ms Mortimer says that is not the case and he does have the media. Naturally I cannot determine the factual position, nor is it necessary for me to. Again I would say, as forcefully as I can, that it is no good Mr Rich having the telephone intercepts and the record of interview if the audio-visual equipment available to him does not enable him to listen to it. That is a matter which the Magistrate can deal with, but it seems to me that the minimum access that Mr Rich is entitled to involves having available at reasonable times the media necessary to listen to things like the telephone intercepts and the record of interview.

41. Then he raises two topics about surveillance videos – one being the so-called Citysafe video, the other being the shopping centre video. Mr Ryan for the Director said these matters had only been raised in the last few days. Mr Rich acknowledged that that was so and said he was sorry it was raised late. Mr Ryan says that Mr Rich has, and has for some time, had the surveillance video of the day of the robbery. There is a dispute about whether that is an edited version and whether he should have the full tape. Again, this is not a matter I can rule upon. It is a matter perfectly within the Magistrate's control. Mr Ryan says there were 15 cameras filming each day for seven days leading up to the day in question. That is obviously a huge amount of material, which Mr Ryan says is of no evidentiary relevance. Again, these are matters amply within the competence of such a vigilant and conscientious magistrate to manage, as the need arises.

42. Then there is a dispute about access to copies of hard drives seized from Mr Rich's office. Copies were delivered to him in September 2006 by his partner. This matter was dealt with by the magistrate in October. There were affidavits from the Office of Corrections in October and a further hearing on the 23rd. I pause to mention that there have been in this matter some 29 mentions in relation to or leading up to the committal. That is on any view a very substantial amount of attention being paid to preparatory issues and is consistent with what I have said about the conscientiousness of the magistrate and about Mr Rich being given every opportunity to raise matters of concern to him. Further affidavits from the Office of Corrections were filed on 6 December 2006 and 14 February 2007. Certain conditions of access to the hard drives were imposed. They were initially refused, then later agreed to. It has clearly taken time. Each side says the other has been unreasonable. It seems to me, without deciding any question of unreasonableness, that Mr Rich has been given adequate opportunities to have access to the material. For his own reasons he first declined to agree to the conditions, then after some lapse of time proposed a modified condition which was accepted. I express no view about that, but it is quite clear to me that this is not a matter which creates an apprehension of an unfair hearing. The magistrate can deal quite satisfactorily with that matter.

43. Then, finally in this list of specific matters, there was the issue of preparation materials, a database which Mr Rich said he had prepared in Microsoft Access, and which his current computer cannot read. As I have just said, and repeat as strongly as I can, computer access for a person in Mr Rich's position is meaningless if that computer and the software on it do not enable him to have access to the documents he needs to examine. That seems to me to be particularly important where the document which he wishes to read is a document containing his own annotations in respect of witness statements.

44. I made it very clear in the course of Wednesday's hearing that the preparation materials seemed to me to be peculiarly important. No submission was made on behalf of the Office of Corrections that I was wrong so to characterise them. I would expect that matter to be resolved

without delay. As I say, the irreducible minimum for someone in Mr Rich's position is either to have a computer which enables him to read in electronic form material relating to the committal, including material prepared by him, or – as Ms Mortimer suggested late on Wednesday – to have access to that material in printed-out form. But again there is nothing in that issue which, in the circumstances, leads to an apprehension that the committal proceeding beginning on Tuesday will be unfair.

45. I have already referred to the analytical material which Mr Rich has set out in his affidavits and exhibits. There is quite enough in that material to satisfy me that Mr Rich could quite adequately commence to cross-examine and make submissions next Tuesday. If he says, "I am not in a position to deal with all of the 70 or 80 witnesses as at next Tuesday," then that would only put him in the position of any barrister appearing in such a matter. A barrister would prepare by reference to the order of appearance of witnesses, and would not expect to be in a position on the first day to be on top of all the material in relation to all of the witnesses. Of course, if there were a particular difficulty about a particular witness, the magistrate has made it perfectly clear that that can be raised by Mr Rich and will be resolved by him.

46. In the meantime, it seems desirable in Mr Rich's interests that he turn his considerable talents and energies to finalising his preparation for the committal over the next three days. Some of his submissions to me the other day were expressed in the language of, "Well, barristers wouldn't be expected to have to deal with a case with these sorts of difficulties." A barrister representing Mr Rich, and hence Mr Rich now representing himself, could reasonably be expected to draw together, in the final days before the proceeding began, notes for cross-examination, outlines of submissions and so forth. As I have said, Mr Rich's written material reveals that there is quite enough in his appreciation of the case against him, and in his critique of the evidence, to enable that preparation to be continuing.

47. Paradoxically, the failure of this application may be the best thing that could happen to Mr Rich, though I am sure Mr Rich will not share that view. At least he now has a ruling from this Court that this is not the place for a review on the facts of his dispute with Office of Corrections or a review on the facts of his dispute with Victoria Legal Aid. That cannot and will not occur in this Court. That having been made clear, and this Court having expressed its complete confidence in the capacity of the magistrate to conduct a fair hearing, Mr Rich should now be able to concentrate his formidable talents solely on the questions which arise in the committal, without the distraction of having to think about arguments that he might wish to present in this Court.

48. For those reasons, the application for injunctions is refused.

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[1] See, eg, *Onus v Sealey* [2004] VSC 396; (2004) 149 A Crim R 227 at [37] per Kaye J.
[2] [2000] VSCA 227; (2000) 2 VR 612; (2000) 121 A Crim R 318.
[3] At 617-8 [20] per Batt JA, with whom Tadgell JA agreed.
[4] At 621-2 [26] per Batt JA.
[5] *Re Refugee Review Tribunal; ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82; (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6; *Re Minister for Immigration & Multicultural Affairs; ex parte Miah* [2001] HCA 22; 206 CLR 57; 179 ALR 238; 75 ALJR 889; *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; (2003) 211 CLR 476; (2003) 195 ALR 24; (2003) 72 ALD 1; (2003) 77 ALJR 454; (2003) 24 Leg Rep 2.
[6] *R v Dietrich* [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176.
[7] *Luck v Renton* [2005] VSCA 210; 24 VAR 1; *Gao v Mack Towing Transport Pty Ltd & Anor* (Unreported, Victorian Court of Appeal, 20 February 2007). In *Gao*, the Court nevertheless concluded that observance of the requirements of natural justice "could not possibly have produced a different result", and ultimately refused the application for leave to appeal.

APPEARANCES: The applicant Rich appeared in person (via video link). For the Crown: Mr CJ Ryan SC with Mr TC Wallwork, counsel. Office of Public Prosecutions. For Corrections Victoria: Ms DS Mortimer SC, counsel. Corrections Victoria, solicitors. For Victoria Legal Aid: Ms R Ellyard, counsel.
