IN THE SUPREME COURT OF VICTORIA
AT MELOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CI 2013 05722

IN THE MATTER OF an Appeal on a Question of Law pursuant to section 272 Criminal Procedure Act 2009

BETWEEN

KYLE MAGEE

APPELLANT

V

SHAYNE WALLACE

RESPONDENT

OUTLINE OF APPELLANT'S SUBMISSIONS

Date of Document: 28th of March, 2014
Prepared and filed by the Appellant: Kyle Anthony Magee
Email: kyle@globalliberalmediaplease.net
Telephone: 0417 66 99 71
Postal Address: U 4 5 Creswick Street
Hawthorn VIC 3122

INTRODUCTION AND FACTS

1. On 14 February 2013 I was charged with committing on that day the offence of "*post[ing] a document on a structure*" under section 10(1) of the Summary Offences Act 1966. The alleged offending occurred in the main concourse area of Southern Cross railway station. At approximately 3:30pm I roughly covered over the images and text of an advertising hoarding by pasting black A4 sheets on the glass housing of the advertisement, and then affixed, over the top of the black sheets, white posters with printed text. The printed text posters stated that the postering was done in protest against for-profit adverting in public space/media and attempted to outline the reasoning behind the objection[1]. The protest was intended to be fully public, no attempt was made to conceal my activities and full admissions to the physical elements of the alleged offending were made immediately upon being questioned by police.

1 These explanatory posters are exhibited in the first affidavit and marked **"KM - 6"**.

2. I was first approached by security staff of Southern Cross station acting on their own initiative, who then called the police when I declined to desist as requested. No complaint was made by any member of the public at any stage. Many members of the public approached me to ask what was happening, and I spoke briefly to them to explain. Many others stopped to observe, read the posters and took pictures -- that this was effective communication can not be doubted.

3. The posters were simply hosed off that evening by cleaning staff on their regular shifts, with no damage being caused to the advertising structure. The advertising company were not interested in seeking restitution[2] and the prosecution did not allege any damage had been caused[3].

4. This action is a part of an ongoing protest. I have been convicted numerous times of criminal damage type offences dating back to 2007[4], all related to the peaceful obscuring of for-profit advertising in public space. This protest has been my only involvement with police, and I have always been peaceful in my dealings with the police. Amongst other penalties, I have been jailed for a total of 157 days, plus an additional 30 days on remand for which I was not sentenced. I strongly dislike prison and I have not enjoyed my engagements with the police, the courts, or the psychiatric analysts I have been referred to on occasion. I choose to make a meaningful peaceful protest against for-profit advertising because that is what my conscience requires me to do -- what the justice system of our 'liberal democracy' chooses to do in response to my peaceful protests against a fundamentally anti-democratic and anti-social practice is something that I hope triggers some serious thought and reflection on our values as a society, the nature of our media, the way our public space is used and exactly what it is that our justice system protects. However this case results, an important objective is achieved: a protection of democratic human rights to freedom of expression in this circumstance will allow a peaceful social movement to help advance democracy by placing media reform on the agenda; an absolute precedence of the 'property rights' of non-human, for-profit organisations to dominate public space, at the expense of the human rights of citizens to meaningfully express opposition to such a practice, will demonstrate to the community just what human rights mean if they in anyway threaten to undermine the destructive influence and illegitimate power of for-profit entities in our political/economic systems.

5. The main issues in this appeal are:

    1. Whether my actions were protected expression under section 15 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter); and

    2. Whether the restriction of this right by section 10(1) of the Summary Offences Act can be justified under section 7(2) of the Charter.

RELEVANT LEGISLATION

6. These submissions deal with the interplay between section 10(1) of the *Summary Offences Act* and sections 7(2), 15 and 32 of the Charter.

Summary Offences Act

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2 See exhibit "**KM - 10**", transcript 20 August 2013, page 7, line 13.
3 See exhibit "**KM - 10**", transcript 18 September 2013, page 56, line 30.
4 My full criminal record is marked **"KM - 7"**, exhibited in the first supporting affidavit.

10 Posting Bills etc. and defacing property

(1) Any person who posts any placard bill sticker or other document on or writes or paints on or otherwise defaces any road bridge or footpath or any house building hoarding wall fence gate tree tree-guard post pillar hydrant fire-alarm petrol pump or other structure whatsoever without the consent of the occupier or owner of the premises concerned or of any person or body having authority to give such consent shall be guilty of an offence.

The Charter

15 Freedom of Expression

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether --

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary --

(a) to respect the rights and reputations of other persons; or

(b) for the protection of national security, public order, public health or public morality.

7 Human rights -- what they are and when they may be limited

(1) ...

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including --

(a) the nature of the right; and

(b) the importance of the purpose of limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

32 Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way compatible with human rights.

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

METHOD OF APPLICATION OF CHARTER LEGISLATION IN THESE SUBMISSIONS

7. The Charter legislation provided above sets down clear statutory directives, but it does not explicitly describe the appropriate order and relations for applying these directives methodically in a proceeding. In Momcilovic v The Queen [2011] HCA 34 (8 September 2011) (**Momcilovic**), the majority held that once the content of the right has been established, then section 7(2) is relevant to the application of section 32(1)[5]. Neither the minority nor the majority questioned that the first step is to determine the content of the right, by paying attention to the specific section relevant to that right. These submissions follow the reasoning of the majority in Momcilovic. The resultant process for considering a right to freedom of expression under section 15 of the Charter is as follows:

    1. Determine the content of the right under consideration:
        i. Determine whether the expression qualifies as expression for the purposes of section 15(2) of the charter.
        ii. Determine whether the expression is limited by the action of section 15(3).

    2. If the right is engaged under section 15, Section 32(1) and section 7(2) are to be considered alongside, to determine:
        i. if the statutory provision can be interpreted to accommodate the right, in accordance with section 32(1);
        ii. if the statutory provision can limit the right in accordance with section 7(2); or
        iii. whether to issue a declaration of inconsistent interpretation.

SUMMARY OF THE MAGISTRATE'S DECISION

5 Gummow J at [168] who Hayne J agreed with on this matter at [280]; Heydon J at [427] (although Heydon J went on to find that this interpretation of section 7(2) had the effect of invalidating the Charter on constitutional grounds); and Bell JJ at [678] - [684]

8. My actions were an expression capable of imparting information and ideas for the purposes of section 15(2) of the Charter, following the reasoning of Justice Kyrou in Magee v Delaney (2012) VSC 407 (Magee v Delaney)[6].

9. My actions constituted a threat of damage, and as such did not engage the right to freedom of expression conferred by section 15(2) of the Charter, following Justice Kyrou's public policy consideration in Magee v Delaney, which excludes any expression involving damage, or the threat of such damage, from protection under section 15(2) of the Charter.

10. "*Interfering, by bill posting, with a third party's property*" can be equated and substituted for "*damage to a third party's property*" in Justice Kyrou's statement: "*Does the imparting of information and ideas by means of damage to a third party's property engage the right to freedom of expression conferred by section 15(2) of the Victorian Charter?*"[7] -- and Justice Kyrou's answer of "*No*" to the original question must hold for the question transposed with the facts of this case.

11. That there are many other ways that one can communicate a message without it interfering with the property of another is a relevant consideration.

ORDER OF APPROACH

12. The first question of law, whether it was appropriate to consider other unquestionably legal modes of expression in ruling on the lawfulness of the one chosen, is a stand alone question of a relatively straightforward nature, so will be dealt with first.

13. Questions of law 3 and 4 are most relevant if the determinations of Justice Kyrou in Magee v Delaney are found to be correct, so will be dealt with second, before questioning the determinations of Justice Kyrou.

14. Question of law 2, which challenges many of the determinations of Justice Kyrou, and which if accepted in part or in its entirety, would minimise the importance of, or make irrelevant, questions of law 3 and 4 in the determination of this case, will be dealt with last.

QUESTION OF LAW 1

When considering whether an expression should be protected pursuant to section 15 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter), should consideration of alternative, unquestionably legal modes of expression, be a factor in determining the legality of the expression chosen?

15. It has not been unusual for Magistrates to consider that I should have preferred other means of communicating my message. Magistrate Mealy, in the case of Magee v Delaney, which was later appealed to the supreme court and heard by Justice Kyrou, included in his decision a long list of alternative means of expression that he assumed I had failed to consider. In the current case, in front of Magistrate Capell, I included in my submissions the rationale for rejecting

6 See exhibit "**KM - 10**", transcript 7 October 2013, page 4, line 22.
7 Magee v Delaney (2012) VSC 407, Paragraph 3(b)

those modes suggested by Magistrate Mealy, which are unacceptably ineffective to me because, for various reasons, they are all destined to fail to raise this issue appropriately and satisfactorily in the public sphere[8]. My hope was that by explaining my reasons for preferring this expression, the consideration of alternative means of expression would not be used as partial justification for excluding my expression from the protection of the Charter. My rationale was not accepted by Magistrate Capell and my choice of expression, of questionable legality, was found not to be protected in part because of the existence of unquestionably legal means:

> *Mr. Magee argues that he has no other means of communicating his message, hence he has to take the action he has, I disagree. There are many ways one can communicate a message without it interfering with the property of another.*[9]

16. Magistrate Capell made two errors in his statement above. Firstly, he incorrectly characterised my argument for choosing the mode of expression that I did[10]. Secondly, such consideration of alternative, unquestionably legal modes of expression is not included in the Charter, or anywhere else, as a relevant consideration in determining whether a chosen expression is protected under section 15 of the Charter.

17. A recent decision, that I was unaware of at the time of the Magistrate's Court hearing, deals with the consideration of unquestionably legal alternatives in a freedom of expression context. In the case of Pointon v Police (2012) NZHC 3208 the Appellant, a genuine naturist, was charged and convicted of offensive behaviour for running naked through a public park where he encountered the complainant walking her dog. The District Court Judge who heard the first appeal and upheld the original finding of guilt, considered that it was unnecessary for Mr. Pointon to express himself in the way that he did as there were other areas in which he could do so without any question of legality being raised -- presumably such as any private property which Mr. Pointon was able to gain permission to run through.

18. Of this consideration of unquestionably legal alternatives Justice Heath wrote:

> *This aspect of the Judge's reasoning casts doubt on whether he applied the test to which he expressly referred in his judgment; namely, whether "a reasonable mature woman, tolerant of Mr Pointon's right to freedom of expression, would be inhibited in her recourse to the park to the extent that she would be unwilling to return?". The doubt arises out of his view that it was unnecessary for Mr Pointon to exercise his right to*

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8 See exhibit "**KM - 5**", page 6, paragraph 11, for my reasons for rejecting other modes of expression.

9 See exhibit **"KM - 10**", transcript 7 October 2013, page 4, line 9.

10 I was not arguing that I had no other means of communicating a theoretical objection to for-profit advertising in public space/media, but that no other mode of expression has any chance of raising the issue satisfactorily in the pubic sphere, and, equally importantly, other modes that are pure verbalism do not so clearly highlight and demonstrate the structural maintenance of this communicative inequality between non-human, for-profit entities and citizens with human rights. Any other unquestionably legal mode of expression leaves out the most important part of what I am trying to express, which is that I feel compelled to make a real interventionist protest about this, and that we all can and should make meaningful protests against the 'private' domination of our public spaces. Much of the message is contained in the way the in which the message is communicated, as such the method I have chosen is the only one that accurately and completely communicates my message. In paragraph 59 of Justice Kyrou's decision is a quote from Laws LJ: "[This] 'manner and form' may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protestors' message; it may be the very witness of their beliefs... ". This quote pretty well captures the reason I have chosen this mode of expression, and have rejected those modes Magistrate Capell refers to as alternatives.

freedom of expression in that way. That is beside the point. He did.[11]

19. The same can be said of consideration of unquestionably legal alternatives in this case -- it is beside the point, not a relevant consideration in the tests outlined in the Charter itself to ascertain if my expression is protected under the Charter. Neither judgement of the validity of my reasons for choosing this particular expression, nor the consideration of available alternative means of expressing similar ideas, are required for the tests that need to be carried out in order to determine whether or not my expression is protected under the Charter -- as such, any consideration of these alternatives, or the perceived invalidity of my reasons for rejecting those alternatives, raises doubt as to whether the necessary tests have been carried out appropriately or prejudiced by considerations which are entirely irrelevant to those tests.

20. It follows that the Magistrate erred in considering the availability of unquestionably legal alternatives of expression in finding that my expression was not protected under the Charter.

QUESTIONS OF LAW 3 AND 4

21. These two questions of law could more precisely be described as questions of linguistics and logic. With the limited legal research skills I possess, I was unable to find any relevant precedents for these questions, but as both questions concern the correct, logical application of basic terminology, the need for precedents to support what I submit as the correct interpretation is not great.

QUESTION OF LAW 3

Can an expression that causes no damage be equated with an expression ruled to have caused damage?

22. This question is raised by the following component of Magistrate Capell's decision:

> *If one returns to the second question posed by Mr. Justice Kyrou, and and transposes it to the facts of this case, it reads: 'Does the imparting of information and ideas by means of interfering, by bill posting, with a third party's property engage the right to freedom of expression conferred by section 15 subsection 2 of the Victorian Charter?' I am bound to follow the reason of Mr. Justice Kyrou, and the answer would have to be no.*[12]

23. The "*second question posed by Mr. Justice Kyrou*" that Magistrate Capell refers to is this:

> *Does the imparting of information and ideas by means of damage to a third party's property engage the right to freedom of expression conferred by section 15(2) of the Victorian Charter? No*[13]

24. The act of taking the second question posed by Justice Kyrou and "*transpos[ing] it to the facts of this case*" is to change an operative term of the question, essentially changing the question so that the answer to the first question cannot be relied upon as an answer to the second.

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11 Pointon v Police (2012) NZHC 3208, Paragraph 50
12 See exhibit "**KM - 10**", transcript 7 October 2013, page 4, line 22.
13 Magee v Delaney (2012) VSC 407, Paragraph 3(b)

25. I would otherwise find it unnecessarily patronising to illustrate this point further, but as it is entirely necessary to adequately address the question raised by this appeal, take the following accurate question and answer set:

> What is the capital of New South Wales? Sydney.

If we transpose the facts of a new question onto the old question but retain the answer of the first we get this:

> What is the capital of the Australian Capital Territory? Sydney.

26. One could correctly state that the A.C.T. in entirely enclosed by N.S.W., and from there argue that the A.C.T. is effectively a subset of N.S.W. and so the terms can be used interchangeably in a question of geography, but this is obviously incorrect -- an operative term of the question has been substituted for one which indicates something quite different (regardless of the geographical inter-relatedness of the states indicated by the terms substituted), so that the answer to the first question cannot be relied upon to answer the second accurately.

27. Similarly it could be stated, correctly, that in practical terms, the bill posting in this case achieved a similar objective to the damage of $40.17 caused by the painting in the case of Magee v Delaney, and from there it could be argued that the two methods can be used interchangeably in a question of law -- but this is incorrect, there are important and substantial legal differences between an expression that was ruled to have caused damage and an expression in which no damage was caused or alleged, regardless of any practical similarity in effect.

28. Magistrate Capell also made this statement in delivering his judgement:

> *During the course of argument at the hearing on the 18th of September, Mr. Magee agreed with me, that the circumstances of his behaviour were exactly the same in the other matter, save that a different method was used, his whole purpose was to be seen in a busy area and was to interfere with advertising which had been payed for and which was in a private place, freely used by the public.*[14]

29. This statement implies that Magistrate Capell thought it appropriate to regard these two expressions as basically identical, and therefore it was inappropriate to distinguish between the two expressions just for the trivial difference in method and the absence of any damage. While some of the circumstances were the same, the different method constitutes a significant legal difference in the circumstances of each case -- the different method gives rise to a different, much less serious charge, and a charge in which damage is not an element -- these are important legal distinctions which cannot be ignored in a courtroom for the 'common-sense reasoning' that they are brought about in similar circumstances and bring about a similar effect.

30. Elsewhere in his decision, while considering the lawful restrictions necessary to protect public order, Justice Kyrou uses the term 'unlawful physical interference' in place of damage[15]. This

14 See exhibit "**KM - 10**", transcript 7 October 2013, page 2, line 14.

15 Magee v Delaney (2012) VSC 407, Paragraphs 3(d), 128, 151 & 153.

seems to have lead Magistrate Capell to consider the postering expression as a type of unlawful interference, and helped him to conflate postering with damage. It was not appropriate or possible for Magistrate Capell to consider my postering expression as unlawful interference, phrased as "*interfering, by bill posting*" meaning "interference by postering, guilty of bill posting", before considering the Charter defence presented before him that sought to prove the expression's legality. Simply asserting that the expression is guilty of the offence of bill posting, and can therefore be considered as damage, is no way to dismiss my claim that I was exercising my right to freedom of expression which can find me not guilty of the offence of posting bills.

31. While postering over an advertisement interferes with its projection into public space, there are many ways one could 'interfere' with the projection of for-profit advertising into public space that are not unlawful. Standing in front of an advertisement while waiting for a tram is interference with the projection of private property into public space, and that is not unlawful. Even erecting a banner in the public space in front of an advertisement, with the expressed intention of blocking that advertisement for the reason of political expression, is also interference which is not unlawful.

32. To restate it another way, my postering expression interfered with projection of for-profit advertising, but that is not make it guilty of an offence, and doesn't make me guilty of "interfering, by posting bills". As, before completing a full Charter analysis, there is no interference that has yet been proven unlawful, this interference cannot be branded unlawful interference, equated with damage, and thereby excluded from the protection of the Charter. As there is no damage and no unlawful interference capable of being equated with damage, Magistrate Capell should not have excluded my expression on the basis of Justice Kyrou's findings. To do so is to say: the accused is guilty of the offence because he is guilty of the offence.

33. Magistrate Capell erred by equating and substituting, in a question of law, the interference caused by the expression in this case with the damage caused in Magee v Delaney. The two occurrences have important legal differences that make substitution in a question of law unacceptable. If the two types of expression were equated by considering the interference in this case as unlawful physical interference, referred to by Justice Kyrou in Magee v Delaney, such consideration was improper before considering the human rights defence which was presented before him.

QUESTION OF LAW 4

Can political expression that does not cause damage, carried out fully as intended and not resulting in damage, constitute a threat of damage?

34. In his decision, Magistrate Capell stated:

> *At footnote 9, Mr. Magee makes reference to paragraph 97 of Mr. Justice Kyrou's decision to support his contention, it ignores that Mr. Justice Kyrou also said that would not apply to threat of such damage. In other words, there does not actually have to be damage caused for there to be a limitation on the expressive conduct.*[16]

16 See exhibit "**KM - 10**", transcript 7 October 2013, page 3 of 6, line 11.

This oblique statement, which left me in some doubt as to it's actual meaning and subsequent bearing on the decision, has to be read as an assertion that my expression constituted a threat of damage and should not be protected on account of that. I was not 'ignoring' Justices Kyrou's ruling on threats of damage, hoping it would pass unnoticed, I just foolishly believed it was inconceivable that a non-damaging act, carried out completely as intended, could be held constitute a threat of damage.

35. While a threat of damage due to a certain activity may exist in the absence of any actual damage, there must exist a considerably high likelihood of damage occurring due to an activity for that activity to be considered a threat of damage. A deliberate negligence or indifference to any damage that could conceivably be caused by a given action could also contribute to that action being ruled an unacceptable threat of damage.

36. If an action has been carried out completely, fully as intended, without any intention to cause damage, with a deliberate attempt to avoid causing damage while achieving the desired end, and, on examination of the completed action, no damage is found to have been caused -- then it must be said that that action does not pose a threat of damage. These were precisely the conditions under which my postering expression was carried out, and as such, I see no reasonable grounds for ruling that my actions constitute a threat of damage.

37. Magistrate Capell did not outline in what way my actions posed a threat of damage -- for this reason it is hard to know what I am arguing against, especially as I struggle to imagine a way in which my actions could be construed as a threat of damage -- unless the threat is said to be posed by the threat of another action, one which I did not carry out and had no intention to carry out.

38. Perhaps Magistrate Capell would say that using those materials it is possible that damage could be caused if used in a different way. If for instance, instead of using my materials on the hard smooth surface that I knew would result in no damage, that would be simply hosed off, I had entered a train and thrown the paste all over the upholstery of some seating, that would cause damage. But that scenario, and any other imaginable scenario where damage could be caused using the materials I possessed, is totally irrelevant -- my intention was to do exactly as I did, which I believed would result in no damage, and which, on completion, resulted in no damage, completely as expected. To say a threat is posed by an action because I could have done something different is absurd, and would see everyone guilty of posing a threat of damage if it is possible that they could somehow cause damage, regardless of their intentions.

39. I'll use another example to further illustrate this point. Imagine a person who, on a hot day, decided to take a folding chair and a cold bottled beverage to sit under a tree in a public park. This person has no intention of causing damage, plans to try to avoid damage, and on completion of the activity it happens that no damage has been caused. If a threat of damage was said to have been caused by my postering expression, due to the possibility of damage somehow arising out of other possible actions involving the materials I possessed that day, then that threat of damage would apply equally to this hypothetical park-goer. There are any number of ways damage could be caused with a folding chair and a glass bottle -- that the park goers intentions were to do exactly as they did and did not cause damage would be an irrelevant consideration -- this is clearly an irrational position.

40. Another possible explanation for regarding my action as a threat of damage could be that the action could be alternatively considered as damage exactly as it happened, but even if this is true (and it may have been if restitution was sought), it is irrelevant to the facts of this case. I was charged with posting bills, a charge that does not involve or allege damage - I was not charged with any of the available offences that do allege damage, such as willful damage or criminal damage. The prosecution itself did not allege damage[17] and the advertising company, the cleaning staff of whom were tasked with hosing off the posters, did not seek any restitution[18], presumably because it was very standard cleaning carried out by cleaners on their regular shifts at Southern Cross station.

41. There exists no valid reason for Magistrate Capell to rule that my actions constituted a threat of damage, and no reason was given. The ruling that my actions posed a threat of damage was unjustified, and, it follows, so too was the exclusion of my expression from protection under the Charter by reference to the findings of Justice Kyrou in Magee v Delaney relating to threats of damage.

QUESTION OF LAW 2

Can an expression involving damage to a third party's property, or a threat of such damage, be protected by section 15(2) of the Charter?

42. The broad public policy considerations that Justice Kyrou applied to expressions involving damage in Magee v Delaney lead him to conclude thus, at paragraph 3(b):

> Does the imparting of information and ideas by means of damage to a third party's property engage the right to freedom of expression conferred by s 15(2) of the Victorian Charter? No.

At paragraph 97, Justice Kyrou further expands:

> For the purposes of the present case, it is not necessary for me to decide whether, as a matter of public policy, the forms of exercise of the right to freedom of expression that are protected by s 15(2) of the Victorian Charter exclude any expressive act which constitutes a criminal offence. It is sufficient for me to state my conclusion that the exercise of the right in the form of damage to a third party's property or a threat of such damage, is not protected by s 15(2).

43. The first mentioned finding above, at paragraph 3(b), was subsequently transposed with the 'interfering, by bill posting, to a third party's property' in this case by Magistrate Capell, precluding the proper operation of the Charter legislation as clarified in Momcilovic.

44. The result of Justice Kyrou's findings is that any expression involving very low levels of damage, or even the threat of such damage, should be immediately excluded from protection under section 15 of the Charter, without individual consideration of the expression itself and its circumstances, and with no regard to any of the specific limitations included in the Charter for that exact purpose. Magistrate Capell's decision shows how such a finding can be extended to

17 See exhibit "**KM - 10**", transcript 18 September 2013, page 56, line 30.
18 See exhibit "**KM - 10**", transcript 20 August 2013, page 7, line 13.

expressions that do not create any damage, or even a credible threat of damage.

45. In the case of Ramsden v Peterborough[19] (the **Ramsden case**) the full court of the Supreme Court of Canada considered whether a municipal by-law prohibiting all postering on public property was a justifiable restriction of freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms. The unanimous court found that the postering expressions were protected and that the by-law was not a restriction justifiable by section 1 of the Canadian Charter, even though postering could:

    - damage public property (through the application of adhesives to porous surfaces)
    - create litter (if posters are left to fall)
    - denigrate the beauty of public spaces (much like for-profit advertising does)
    - create a public safety risk (when attached to utility poles that need to be climbed)
    - create a road safety risk (when posters faced the street and could distract motorists, as for-profit advertisements frequently and deliberately do)

46. As the above authority shows, expressions that create low levels of damage can in certain circumstances be protected. A blanket ban on all levels of damage, or even a perceived threat of the lowest levels of damage, unduly abrogates the right to freedom of expression and prevents a court from taking a wide analysis which attempts to balance all interests, such as that undertaken by the Supreme Court of Canada.

47. A broad and detailed analysis on a case-specific basis is what the Charter demands, and what will maximise human rights while at the same time insuring the protection of the public interest. The case-specific approach avoids the errors involved in applying generalities clumsily across the full gamut of possible human rights conflicts with the criminal law, by carefully considering the unique facts and circumstances of each individual case.

48. Justice Kyrou made the following statement in his decision in Magee v Delaney:

> *Even persons who commit the most heinous crimes may claim to be exercising their right to freedom of expression in performing the acts that constitute those crimes. A mass murderer may claim to be conveying a political message about immigration policies by killing innocent people and a rapist may claim to be conveying a message about the role of women by sexually assaulting them. It is inconceivable that the Victorian Parliament intended to protect all forms of expressive conduct, no matter how egregious and inimical to the welfare of society, subject only to the specific restrictions recognised by s 15(3) of the Victorian Charter.*[20]

Such a statement -- on top of being highly personally insulting, by placing my actions alongside those of a rapist and a mass murder whose actions clearly deserve no protection -- reflects a profound misapprehension of the function of the Charter. People who commit the most heinous crime may claim to be exercising their right to freedom of expression, but the argument for both the rapist and the murderer would be captured by section 15(3)(a) for grossly infringing the rights of other persons. If it were necessary, which it is not, the conduct of the rapist and the murder would also be limited at section 15(3)(b) on the basis of public health, public morality

19 *Ramsden v Peterborough (City)*, [1993] 2 S.C.R. 1084

20 Magee v Delaney (2012) VSC 407, Paragraph 87.

and public order, and would also definitely be limited by the action of section 7(2). All the ill-advised claim to a right of freedom of expression for the rapist or the murderer would achieve would be a substantial aggravating factor in sentencing. Justice Kyrou's statement reveals that he doesn't understand that section 7(2) acts to restrict any expression that passes the preliminary hurdle of section 15(3). It also reflects a hysteria that if any element of the criminal law is ever 'compromised', 'invalidated' or put right by the protection of the charter, the sky will fall down and the entire legal system will collapse -- this is certainly not the case and there is no reason to believe so. If a certain expression is protected, and thereby exempted from prosecution under any criminal law, it is only because it has been found to on a broad analysis to be best for a democratic society based on human dignity, equality and freedom. Any other expressions will only be found to be deserving of protection and be exempted from minor offences if, on the analysis outlined by the Charter, they are similarly positive for a vibrant and participatory liberal democracy. The protection of one expression from a minor damage charge does nothing to help the rapist or the murderer validate their crimes. As the analysis of the Supreme Court of Canada in the Ramsden case shows, a level-headed approach to balancing important interests can protect human rights in situations where the expression of these rights can bring about a criminal charge, and is not without down-sides in some regards or for some parties.

49. It may well be that the majority of freedom of expression arguments seeking exemption from prosecution over elements of damage involved in their expressions will fail to be protected, but a blanket ban on all expressions involving any element of damage, or the threat of such damage, goes too far, and may dangerously encroach on people's rights to engage in what is currently accepted as legitimate rights to expression, such as public assembly, street marches, etc.

50. The first sub-question that arises from this question of law is whether broad public policy considerations as applied by Justice Kyrou, as a first step over and above the Charter legislation containing limitations, are appropriate when considering a right under the Charter -- I'll be arguing that they are inappropriate.

51. I will then put forward what I consider to be the correct approach -- one dictated by the Charter legislation itself -- sections 15, 7(2) and 32(1) -- and the clarification contained in the case of Momcilovic[21]. It will then be submitted that individual expressions must be considered on a case-by-case basis and that, following precedents from the Supreme Court of Canada, expressions that cause minor damage can, on occasion, be ruled protected expression which should not be limited by criminal law.

52. It is impossible to answer this broadly phrased question of law and its broadly phrased sub-questions without focusing on particular expressions, such is the case-by-case action of the Charter. To answer this question I will focus only on the circumstances of the case presently before court and those of the expression in Magee v Delaney, as it is the decision in Magee v Delaney that has direct implications for this case. Although no restitution was sought and no damage was alleged in this case under appeal, it is conceivable that damage may be considered an element of similar poster expressions where restitution is sought. A posting bills charge involving many postering incidents across the city, where restitution is sought and the word 'damage' used in the charge sheet, is, at the time writing, awaiting hearing in the Magistrate's court. Considering the circumstances of Magee v Delaney, where damage was alleged, will aid Magistrates in future cases where damage is alleged as part of a postering expression.

21 See paragraph 7

2.1 - Are broad public policy considerations, as a first step over and above Charter legislation, appropriate when considering a right under the Charter?

53. In Magee v Delaney, Justice Kyrou preferred broad public policy considerations, brought in before even considering section 15(3), to following the process defined by the Charter legislation itself and clarified in Momcilovic. His reasoning was that:

> It is inconceivable that the Victorian Parliament intended to protect all forms of expressive conduct, no matter how egregious or inimical to the welfare of society, subject only to the specific restrictions recognised by s 15(3) of the Victorian Charter.[22]

Following his public policy ruling that decided the case, Justice Kyrou entered into over 100 paragraphs of dictum, where he demonstrated that the specific limitations in section 15(3) could be interpreted to exclude even the trivial $40.17 worth of totally reversible damage before him, on more than one clause -- totally undermining his premise for invoking his own public policy considerations in the first place. As I've mentioned above, Justice Kyrou also ignored, or failed to consider, that passing section 15(3) of the Charter, and thereby engaging the right to expression under section 15 of the Charter, is only the first hurdle for an expression seeking exemption from prosecution under a statutory provision of the criminal law -- section 7(2) can limit a right to freedom of expression that has survived section 15(3).

54. The Charter itself defines a process -- clarified in the case of Momcilovic[23] -- in which specific public policy considerations are considered at the appropriate stages in a freedom of expression case: first under the operation of section 15(3); finally with reference to the terms laid out in section 7(2) of the Charter itself while attempting the interpretive task outlined in section 32(1). If an expression can be considered expression for the purposes of section 15(2), section 15(3) contains public policy limitations for the expressed purpose of excluding certain types of expressions from even engaging the right to freedom of expression under section 15. If the expression survives the limitations in section 15(3) it can be said that the expression is engaging a right under section 15 of the Charter -- however, engaging a right under section 15 is by no means a guarantee of protection under the Charter as a whole. The next stage is to apply section 32(1) -- attempt to consistently interpret the engaged right with the statutory provision -- with the considerations of section 7(2) in mind, which give reasons to prefer limitation of the right. An expression found to be limited by a statutory provision in accordance with section 7(2) of the Charter cannot be said to be a protected expression under the Charter.

55. The problem with Justice Kyrou's decision is that it has inhibited the proper case-by-case action of the Charter. It has made general rulings regarding the very broad concepts of damage and threat of damage which are totally inappropriate, without deriving authority from the clear directives of the Charter legislation by which rights can legitimately be limited, instead finding that "*public policy considerations are inherent in s 15(2)*"[24] which are more compelling than the explicit public policy considerations outlined in the Charter. Justice Kyrou's decision effectively writes into the Charter a strict restriction on anything causing, or threatening to cause, damage to a third party's property - disabling the proper case-by-case action of the Charter legislation

22 Magee v Delaney (2012) VSC 407, paragraph 87.
23 see paragraph 7
24 Magee v Delaney (2012) VSC 407, paragraph 89.

and any argument or consideration to be made on its terms, terms put in place for that exact reason. Damage is too broad an offence for a blanket prohibition to be placed on it in a freedom of expression context, the Charter itself did not do that, it instead provided section 15(3) and 7(2) which outlines the criteria judges are to use to balance the facts and circumstances of each individual case.

56. As Magistrate Capell's decision has shown, even an act that poses no real or credible threat of damage can be automatically excluded from Charter consideration for posing a threat of damage. Conceivably, following Justice Kyrou's ruling, a political expression carried out on a public lawn could be invalidated for posing a threat of damage because, if allowed to go on for long enough, the lawn would be worn away and perhaps, eventually, a shallow hole could form.

57. Section 7(3) of the Charter provides:

> *Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.*

Justice Kyrou's broad public policy consideration, preceding and excluding application of sections 15(3) and 7(2), which excises all expressive acts that include any level of damage or the threat of such damage from protection under section 15 of the Charter, acts to limit a right to an extent greater than is provided for in the Charter. According to section 7(3), nothing in the Charter gave Justice Kyrou the right to do that, negating Justice Kyrou's contention that the right comes from "*public policy considerations inherent in section 15(2)*"[25].

58. It follows that Justice Kyrou's broad public policy consideration excluding all acts involving damage, or the threat of such damage, from protection under section 15 was incorrectly decided. It also follows that Magistrate Capell fell into error, in part, by following a precedent wrongly decided.

2.2 - Can an expressive act that involves some level of damage, or the threat of such damage, engage the right to freedom of expression under section 15 by surviving the limitations of section 15(3)?

59. Section 15(3) reads:

> Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary --
> (a) to respect the rights and reputations of other persons;
> (b) for the protection of national security, public order, public health or public morality.

60. Section 15(3)(a) speaks of the rights of other persons. 'Person' is a term defined under section 3(1) of the charter: *"person" means a human being*.

61. Justice Kyrou found, during his 100 paragraphs of dictum following his decisive finding, that section 15(3)(a) was referring to the rights of all legal personalities, ignoring the use of the term

25 Magee v Delaney (2012) VSC 407, paragraph 89.

'persons', which is clearly defined in section 3(1) of the Charter. Justice Kyrou found correctly, in my view, following the findings of Nettle JA in Noone [2012] VSCA 91 (11 may 2012), that section 15(3)(a) speaks of all the rights enjoyed by persons, not just those human rights outlined in the Charter[26]. From that quite separate point, Justice Kyrou moved, without clear explanation and with marked obfuscation, to the finding that section 15(3)(a) is speaking of the general rights of all legal personalities, not just those of natural persons -- he found his rationale in obscure places[27], but did not broach how it was permissible to ignore the meaning of a term which is clearly defined within the very same statutory provision.

62. In my submission the definition of the word 'person' in section 3(1) of the Charter legislation, as used in section 15(3)(a), leaves no room for alternative interpretation -- only the rights of other human beings, Charter rights and all other rights, are to be considered under section 15(3)(a) -- as such any damage, or threat of damage, to the property of non-natural legal personalities is not to be considered in section 15(3)(a), and Justice Kyrou erred by including within section 15(3)(a) the rights of all non-natural legal personalities.

63. A point that the prosecution neglected to press in Magee v Delaney was raised "*in passing*" by Justice Kyrou[28]:

> *Mr. Magee's act of painting over the advertisement affected the human right to freedom of expression of members of the public, in the sense that the act prevented them from receiving the information in the advertisement.*

This idea was reiterated by Magistrate Capell in his decision in this case[29]:

> *Here the owners of southern cross railway station are entitled to rent out space that they own to advertisers, advertisers who have rented that space are entitled to convey their message, as members of the public we can consider that message and accept or disregard it, the public have that right, it is not for Mr. Magee to assume ownership of what the public see or don't see by posting over that message.*

To these types of argument I answer that, even if section 15(2) sets out to protect the 'right' of citizens to receive unsolicited advertising from profit-driven, non-human entities, which is doubtful, corporations have no rights to freedom of expression under the Charter -- the political expression of one citizen to other citizens engages many more rights of a higher order, because of the political and personal nature of the expression. In a balancing act of human rights, the temporary disruption of a tiny fraction of the thousands of commercial messages targeted at citizens across Melbourne is not nearly enough to justify the restriction of meaningful political communication between citizens. The disruption itself is an integral part of the political expression of a citizen, asking other citizens to seriously question how we allow our public spaces to be used for private purposes in such an undemocratic and psychologically destructive fashion. Citizens are bombarded with thousands of commercial messages per day as they pass though public space that has been sold off under the auspices of 'private property' -- to stifle meaningful demonstration against this undemocratic practice, only to protect the 'right' of

26 See Magee v Delaney [2012] VSC 407, paragraphs 114 - 126

27 Such as the fixation on use of the term 'reputations' in paragraphs 118 - 120, which was simply adapted from article 19 of the International Covenant on Civil and Political Rights which section 15 of the Victorian Charter was modeled on.

28 Magee v Delaney [2012] VSC 407, paragraph 127

29 See exhibit "**KM - 10**", transcript 7 October 2013, page 4 of 6, line 31.

citizens to receive nothing but the most alienating one-way conversation from those wealthy enough to buy access to public space, is not what was intended by section 15 of the Charter.

64. In section 15(3)(b), in most circumstances the only conceivable concern raised by low levels of alleged damage caused by an expressive political activity, is that of public order. There is no threat to national security, public health, or public morality for an expression such as in this case, neither was any alleged by any party in Magee v Delaney[30].

65. Public order is not defined in the Charter.

66. In Brooker v The Police [2007] NZSC 30 (4 May 2007) (**Brooker's Case**) the Supreme Court of New Zealand considered the meaning of public order in a freedom of expression context. Similar to this case, no violence or apprehension of violence was caused by the expression.

67. Brooker was convicted of offensive behaviour or language by making a public protest outside the house of a police constable. This was done by Brooker standing outside the constable's address at 9:20pm (after the constable had been on night shift) and singing with a guitar accompaniment. The lyrics were not profane, but suggestive that the constable had engaged in illegal searches and malicious prosecutions[31]. He continued to sing for 25 minutes before his arrest for declining to desist.

68. The Charge was "Offensive behaviour or language" and provides "every person is liable to a fine not exceeding $1,000 who, in or within the view of any public place, behaves in an offensive or disorderly manner".

69. The Court considered that this offence had to be interpreted in light of the right to Freedom of Expression contained in section 14 of the New Zealand Bill of Rights Act 1990 (NZ). The Court acknowledged that the right to expression was limited by the need to protect other important interests, including public order[32].

70. In this context, the New Zealand Supreme Court, composed of 5 separate Justices, gave five separate judgments. These judgments had a tendency to concur as to the question of what constituted a threat to public order.

- Elias CJ stated that behaviour threatening public order had to go beyond being disruptive or seriously annoying. Instead, it requires "an overtly manifested disturbance which constitutes an interference with the ordinary and customary use by the public of the place in question"[33].

- Blanchard J held that behaviour "must cause a disturbance of good order which in the particular circumstances of time and place any affected members of the public could not reasonably be expected to endure because of its intensity or its duration or a combination of both those factors"[34]. Furthermore, "public order will less readily be

30 Magee v Delaney [2012] VSC 407, paragraph 133
31 Brooker v The Police [2007] NZSC 30 (4 May 2007), paragraphs 13-15
32 Ibid., paragraph 4
33 Ibid., paragraph 42-47
34 Ibid., paragraph 56

seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour"[35].

- Tipping J held that "conduct... is disorderly if, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear"[36] and went on to hold that "where, as here, the behaviour concerned involves a genuine exercise of the right to freedom of expression, the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case"[37].

71. It is submitted that the judgements in Brooker's case should be followed in this case as a test. On any of the definitions provided above, it is submitted that my expression falls short of being a sufficient threat to public order to limit the right. To my knowledge no members of the public were made anxious or disturbed by my expression and none made complaints to security or police -- the only reactions I got from the public were curious interest or outright endorsement. There was no disruption to the ordinary and customary use of the public place in question.

72. What the above test does not specifically account for is the interference with the private-to-public projections of the for-profit advertising companies, but there is no reason to believe such interference constitutes a threat to public order as precedents have defined it. Public order fundamentally involves the order of the public, the citizenry, and the interruption of the commercial activities of a non-human entity in this case has no relation to the order of the public. Even if the advertising companies were to be considered as fellow citizens, the easily reversible obscuring of their advertising does not go beyond seriously annoying, and it should perhaps be considered an occupational risk for a business that invades public space in such a seriously annoying way. On the above definitions it is conceivable that for-profit advertising itself disrupts public order, because it has caused anxiety and disturbance beyond what this reasonable citizen can expect himself to bear, especially because of it's intensity and duration.

73. It is submitted that the meaning of public order should not be expanded to capture any reasoning which would deem this expression unacceptable because of its minuscule interference to the multi-billion-dollar business of for-profit advertising -- instead those reasons should come to light through the broad public policy considerations of section 7(2), which properly weigh those interests against the nature of the right and the importance of the limitation.

74. Justice Kyrou made the ruling that "'*lawful restrictions reasonably necessary ... for the protection of ... public order' include laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property*"[38]. This finding uses the term 'unlawful' as a prejudicial reason to dismiss an expression from the very process with could establish its lawfulness. It also speaks of the 'personal and business affairs' of 'citizens' while actually referring to the business affairs of non-human, for-profit advertising companies -- an advertising corporation has neither personal interests nor any status as a citizen.

75. The only parties to be disturbed or adversely effected in any way by this expression are the

35 Brooker v The Police [2007] NZSC 30 (4 May 2007), paragraph 59
36 Ibid., paragraph 90
37 Ibid, paragraph 92
38 Magee v Delaney [2012] VSC 407, paragraph 3(d)

companies within the advertising industry that are being protested against -- it is hardly surprising that those being protested against would prefer the protest didn't occur. To say that a political protest that inconveniences the target of the protest poses a threat to public order, by the existence of that inconvenience, stretches the concept of public order so far as to invalidate all political protest.

76. It is important to note that genuine expressions engaging with important political themes are to be awarded the highest protection. In Sanders v Kingston [2005] EWHC 1145 (Admin), Justice Wilkie states[39] that political expression attracts a higher level of protection, similar to the findings of J Blanchard in Brooker's case. This means any disturbance of public order caused by a political expression would have to be of a higher order to justify the limitation of that right. This makes it even less likely that the mild inconvenience caused to the advertising companies should be sufficient to justify a limitation of the right, either as part of public order or as part of the consideration in section 7(2).

2.3 - Can an engaged right to freedom of expression, involving very low levels of 'damage', be limited by section 7(2)?

77. This question is to whether 'reasonable limits' exist that 'can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. At this point, the onus falls upon the party seeking to limit a right, in this case the prosecution, to ‘demonstrably justify’ the restriction. Chief Justice Warran stated the following in DAS v Victorian Human Rights & Equal Opportunity Commission [2009] VSC 381:

> *The onus of ‘demonstrably justifying’ the limitation in accordance with s 7 resides with the party seeking to uphold the limitation. In light of what must be justified, the standard of proof is high. It requires a ‘degree of probability which is commensurate with the occasion’. King J observed in Williams that the issue for the court is to balance the competing interests of society, including the public interest, and to determine what is required for the accused to receive a fair hearing. It follows that the evidence required to prove the elements contained in s 7 should be ‘cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit’*[40]

78. Section 7(b) of the Charter speaks of 'the importance of the purpose of the limitation'. It would be hard for the prosecution to prove the importance of the limitation they seek to impose in light of the disinterest the police show in stamping out the poster advertising industry that currently operates in Melbourne. Presently many 'legitimate' businesses turn a profit by charging to provide exactly the services prohibited by section 10(1) of the Summary Offences Act, posting without permission on any desirable surfaces throughout the city. On the spot fines may occasionally be issued, but such costs are factored into the charge for providing the service. Matters rarely, if ever, wind up in court, and no attempt is made to hold the companies, who profit from their employees offending, responsible for the degradation apparently engendered by posting bills. These non-human companies, with no recourse to protection under the Charter, are allowed to continue their business fully in the open, with no attempt by police to prosecute them out of business, as they could easily do. Such a situation negates the assertion that

39 at paragraph 84.

40 at paragraph 147, this was quoted with apparent approval at paragraph 144 of The Queen v Vera Momcilovic & Ors [2010] VSCA 50.

postering is a considerable threat which must be dealt with by the criminal law. The postering business is now so accepted that even political parties engage their services at election time.

79. If the prosecution was concerned about the degeneration of our public spaces caused by posting bills offenders, they would do better to tackle the professional offenders who have no recourse to protection under freedom of expression -- because they act as employees of a non-human, for-profit entity and not as a person legitimately exercising their human rights. If the poster advertising industry was prosecuted out of business, and only the legitimate expressions of individuals adorned our public spaces, this would be a much richer and participatory democratic public order than the one currently held in place by the poster advertising industry. Often the companies advertising through postering are the same who advertise in conventional advertising spaces -- it would be hard to maintain that my postering, constituting a right to political expression, should be limited and punished while the postering of for-profit advertisers has been allowed to continue unabated.

2.4 - Can a protected right to freedom of expression, which is not limited by the action of either section 15(3) or 7(2), be interpreted as lawful excuse or the consent of an authority necessary to exempt an accused from prosecution under the charge of criminal damage or of posting bills, respectively?

80. In The Queen v Vera Momcilovic & Ors [2010] VSCA 50, the Court found that section 32(1) has the same status as the Interpretation of Legislation Act 1984 (Vic):

> *It is a statutory directive, obliging courts (and tribunals) to carry out their task of statutory interpretation in a particular way. It is part of the body of rules governing the interpretive task. 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. That is a powerful presumption, as Gleeson CJ made clear in Plaintiff S157/2002 v The Commonwealth, for example:*
>
> > *[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. ... [I]n the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'.*
>
> *As this passage makes clear, the presumption does not depend for its operation on the existence of any ambiguity in the statutory language.*[41]

81. There is no linguistic impediment to an interpretation that a protected right to freedom of expression constitutes a "*lawful excuse"* for criminal damage or "*the consent of ...[a] body having authority to give such consent"* for posting bills. If the right is protected, passing both

41 Paragraphs 102 -103

section 15(3) and 7(2), this is the interpretation that section 32(1) demands, through the presumption against interference with rights, in absence of any indication of a conscious decision to abrogate or curtail the right.