IN THE MAGISTRATES' COURT OF VICTORIA AT MELBOURNE **CASE NO. D13140768**

IN THE MATTER OF

CONSTABLE RICHARDS

V.

KYLE MAGEE

DEFENCE SUBMISSIONS & AUTHORITIES

Date of Document: **22 April 2014**

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1. Summary of Legal Argument

1. I, Kyle Magee, the accused, plead not guilty to the offence of Posting Bills etc. and Defacing Property under section 10(1) of the Summary Offences Act 1966. I accept personal responsibility for all the postering incidents outlined in the brief, except incident 16 which I had no involvement with. I submit that those actions, constituting political communication, are protected under section 15 (Freedom of Expression) of the Victorian Charter of Human Rights and Responsibilities Act 2006 (**the Charter**), which may establish my innocence.

2. In summary, it is argued that:

    a) I hold a genuine belief that for-profit advertising has a detrimental effect on individuals, our media and our democracy, and that intervention by the government to ban for-profit advertising from public media/space is required;
    b) My actions of postering over advertisement panels around the CBD of Melbourne are a symbolic, non-violent, non-damaging protest designed to express, in an artistic manner that includes literal explanation, my logically-justified objection to for-profit advertising that projects into public space;
    c) Section 15(2) of the Charter protects expression of ideas, even where the form of expression is abstract and the practice previously relatively unknown.
    d) My expression engages section 15(2) of the Charter and survives the preliminary limitations of section 15(3).
    e) If my engaged right to freedom of expression under section 15 is to be limited by the action of section 10(1) of the Summary Offences Act, it can only do so if that limitation can be justified by reference to section 7(2) of the Charter. It is argued that this limitation cannot be justified within a free and democratic society.
    f) Section 32 of the Charter protects my right to freedom of expression by operating to interpret criminal laws “so far as it is possible to do so consistently with their purpose” in a manner compatible with human rights.
    g) The offence of posting bills etc. and defacing property can be interpreted in a manner compatible with my human rights by considering the protection of the Charter as granting "the consent of... [a] body having authority to give such consent" necessary to exempt me from prosecution under section 10(1) of the Summary Offences Act 1966.

3. It is accepted that this argument is unusual and is reliant upon development of jurisprudence through use of the Charter. In relation to the development of human rights jurisprudence, President Maxwell has stated the following:

    I wish to emphasise, as follows:

    1. *The Court will encourage practitioners to develop human rights-based arguments where relevant to a question in the proceeding.*
    2. *Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.*
    3. *Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise.*

That there is a proper place for human rights-based arguments in Australian law cannot be doubted.[1]

2. R v Momcilovic – Applying the Charter

4. The Charter protects the rights enumerated in it by, amongst other things, section 32. Section 32 provides as follows:

> **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 that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

5. The Charter also outlines the criteria by which an engaged right may be limited in section 7:

> **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.

6. 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)[2]. 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

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1 Royal Women's Hospital v Medical Practitioners Board of Victoria [2006] VSCA 85 (20 April 2006), paragraphs 70 - 71

2 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]

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 limit the right in accordance with section 7(2); or
    ii. if the statutory provision can be interpreted to accommodate the right, in accordance with section 32(1); or
    iii. if the right cannot be limited by section 7(2), but can neither be interpreted consistently with the statutory provision under section 32(1), whether to refer the issue to the supreme court so that a declaration of inconsistent interpretation can be made.

7. These submissions follow the test set out by the High Court in Momcilovic.

3. Determine the content of the right under consideration – Section 15 of the Charter

3.a. Motivation for the Expression

8. Submitted as evidence are copies of the documents posted over the advertising panels in and around the Melbourne CBD. The documents cover, albeit very cursorily, my objection to advertising and the for-profit media system it sustains. The main points of this objection are:

- The advertising of profit-driven companies has come to dominate many of our public spaces and much of our public discourse in a way very detrimental to democratic processes & faculties and without democratic consent -- it has crept up to its dominant position over the last century, continuing due to a perceived powerlessness to resist its increasingly invasive techniques.
- The dominance of for-profit advertising has immediate, destructive psychological effects for individual citizens, as well as structural effects on the content and contextualising language of our mainstream media, which is centrally comprised of for-profit media companies funded by for-profit advertising -- this has a negative impact on how the majority perceive global political and economic systems and the changes that real justice and democracy require.
- The interests of for-profit organisations are the largest impediment to global justice and democracy facing the modern world -- to allow these very interests unrestricted and almost total dominance of our public spaces and public political discourses makes a mockery of the democracies of the developed world.
- Legal prohibitions on the paid advertisements of for-profit companies in our public space and media would benefit us all psychologically and politically -- it would totally

undermine the business model of the for-profit media that corrupts our democracy to an untenable degree.

- In place of the corporate/capitalist media/advertising complex, a media constitutionally bound to serve liberal democratic principles could be instituted -- this way issues of global justice, democracy and sustainability can become the priority political issues they should be, replacing our present priority number one, which is to 'ensure a strong and growing economy', a euphemism for unsustainable, destructive practices and doing everything to please the inhumane and profit-crazed future-eaters (global capitalist organisations).

9. This expression is rational and intentional. I make no attempt to hide or 'get away with' my expression as I am neither ashamed of my expression nor unwilling to defend it in the court of law. Initially I went out in the calm of night so that the paste would be dry by morning (precluding the possibility of members of the public coming into contact with wet paste) and to spare myself from repeated difficult and tiresome confrontations with police. I was sure I would be contacted by police for all incidents, as I left my name and website on all poster expressions and had been approached by police numerous times, providing identification and a contact phone number along with my admissions to all postering I was indeed responsible for. I began going out during the day once the cleaning staff of Adshel became so efficient that they were removing the majority of posters during the same night they were applied. Going out during the day had the disadvantages of busier public places and inevitable contact with confounded police; but had the advantage of the application of the posters being observable to members of the public and the assurance that the posters would be up until the night shift cleaners came. This expression is meant to be calm, peaceful and non-threatening to members of the public, as well as being totally unobtrusive to those uninterested in the expression (in contrast to the jarring imagery of modern advertising that is clambering for the attention of passers-by through any means available). That this expression effectively imparted ideas to some direct observers is unquestionable, and through my website the expression can reach an even wider audience.

10. I have turned to this avenue of expression through lack of effective alternative. In my opinion the method I have chosen is the only method with any real chance of effectively and appropriately raising this issue in the public sphere -- an issue which is often studiously ignored by even the most educated and intelligent among us, as if through some kind of cultural blindness, even where no direct conflict of interest exists (such as that created with systemic certainty within the corporate/capitalist media/advertising system). All unquestionably legal alternative methods of attempting to raise this issue in our corporate/capitalist-dominated mainstream media ('public' discourse) are doomed to fail for obvious reasons:

    If I was to attempt to raise the issue in our mainstream media:

    - No for-profit media company is going to give air to ideas that, if they took hold, would see its main source of income abolished. The owners and operators of for-profit media companies have aligning interests with the entire for-profit sector -- they would always attempt to suppress ideas, such as the one I express, that would weaken the illegitimate power of capitalist elites in favour of democracy.
    - The public media we do have is already beset with allegations of 'left-wing bias' and under constant threat of government funding cuts. The ABC is a minority that tends to adhere to the framework set by the dominant for-profit media in order to be seen as a

'legitimate' and 'reasonable' voice -- it is terminally insecure in its future funding, and unlikely to in any way promote ideas that would only redouble attempts to have its funding slashed.

If I was to write to or lobby politicians directly:

- No politician is likely to touch ideas that would set the entire for-profit media and for-profit sector against them -- even if they were to, their chance of being effective, without a large grassroots movement pressing on the same issue (such as I feel compelled to be a part of), is absolutely none.

If I was to become an 'expert' academic and write on my concerns:

- A 'successful' life of scholarly writings on this issue in academia would result in hardly a ripple on the surface of our mainstream public discourse -- I know this because it has been done repeatedly in the preceding decades by many very intelligent people, far more intelligent and scholarly than I, with no more than the tiniest impact on our mainstream political discourse.

If I was to write through any non-mainstream media that would carry my message:

- No amount of publishing in the alternative media could push this issue into the mainstream media -- which is what defines which ideas are credible and sensible and those that are not -- and which is exactly where this discussion needs to take place. Much alternative media exists (and has existed over the preceding decades) that decries the absurdity of a mainstream media controlled by the very for-profits whose power needs to be checked by the media, and it has had no significant impact -- to expect more of the same to suddenly have a very different and significant impact would be utterly foolish.

If I was to use the consciousness-raising techniques of the 1920's:

- The distribution of pamphlets outlining my ideas, speaking in public, utilising placards, etc. would simply be dismissed or washed over as the irrelevant babblings of an eccentric curiosity. Engaging in these forms of political action, implying that I believe that these modes of action are likely to produce change, would only add to the general feeling in the public that anyone who speaks or distributes materials on the street is likely suffering from some kind of delusion. Words made empty by being divorced from meaningful action that creates a substantive point of conflict, could not engage the public or their sphere. I would die only having wasted a lot of paper and a lot of time.

This issue is too important to remain outside our mainstream/'public' discourse any longer. This expression, whether allowed by the courts or repeatedly denied, has the potential to break this issue into the public sphere that is designed to keep such things out -- it could give those journalists and media commentators who possess integrity a context in which to discuss these long ignored yet blatantly unworkable conditions -- the elephant in the press gallery, so to speak.

11. I do not set out to in any way insult the police or the judiciary by choosing to act as I do. I simply see it as a moral imperative to express meaningful opposition to the corporate/capitalist media/advertising system that is railroading our democracy and which results, and will continue to result, in nothing less than the suffering and death of millions and extreme degradation of our ecosphere. The personal risk of further incarceration that I expose myself to, as unpleasant and traumatic as that happens to be, can be no deterrent when so much is at stake. My criminal

record, which I tend as evidence, details numerous convictions and several short jail terms totaling around 6 months, all relating to the obstruction of advertising in a similar form of protest. This record should not speak to any insolence on my behalf, simply the depth and strength of my convictions and the persistence I possess in relation to this issue. This is to be my life's work, I would not have set out on this path if I didn't believe it right, and as I continue to believe it is right, receiving no arguments or information that could lead me to consider that I may be mistaken, there is no reason for me to desist. In all my time before magistrates and judges there has never been a single substantive defence of for-profit advertising or the for-profit media it sustains, and I have not heard a single realistic assessment of how my actions negatively impact society -- only the pallid and one-dimensional assessment that I am infringing on the 'property rights' to public space of anti-social advertising companies that systemically and repeatedly negatively impact society. Magistrates and justices instead position themselves as the cold interpreters of legislation, and none of the moral judgments that accompany other sentencings have been heard in mine. As I am not harming anyone and am attempting to raise an issue of great importance, I can continue on in good conscience, despite the past insistence of the judiciary that the property rights of anti-social for-profit organisations to invade public space are more important than the democratic rights of citizens to express meaningful dissent and the progress of democracy. I mean no personal disrespect by admitting my frustration, but to conceal it would be disingenuous. Being repeatedly jailed tends to induce some level of resentment in people, especially in situations where the jailing is only to protect an unethical and undemocratic practice that entrenches systematised injustice.

12. I seek to make my point in a way that creates no damage to any property. What the advertising corporation and police may refer to as 'damage' is only the reversible prevention of its advertising from reaching its targets (citizens) who exist in the public space nearby. No damage has been caused to the property of the advertising corporation, which exists completely unharmed behind the posters. The dissatisfaction on the part of the advertising corporation with their advertisement being prevented from reaching public space and being replaced by meaningful political expression leads them to think that the posters need to be removed, and I am to be held responsible for the actions their poor taste and materialistic motives dictate they carry out. The cleaning (just like the advertising it reveals) is not necessary by any objective measure, it is only the corporations responsible for the advertisement that deem it necessary, the cleaning process itself arguably unduly interfering with my right to freedom of political expression. The statement made by Annette Parry of Adshel containing cleaning costs of $43,093.60 is a gross overestimate. I will be producing evidence from a previous case of Adshel quoting the cleaning cost of two advertising panels painted over with acrylic paint at $40.17 (revised down from an initial figure of $200) -- that is roughly $20 per panel, in stark contrast to the $341 claimed for the removal of one panel of posters. Considering that the posters are hosed off by cleaners already employed to clean the tram stop shelters, even the figure of $20 could be too high, and no proof of costs, such as a receipt was produced in the earlier matter. If the cleaners on their ordinary shifts, using their ordinary cleaning equipment, are doing the cleaning, it is possible that no extra expense is incurred by Adshel.

13. This expression is not restricted to the particular advertising panels I obscured and replaced with meaningful political comment -- the expression is a criticism of for-profit advertising in public media/space as a whole, across the world, in all its forms and its every negative impact on society. The reaction of the police and judiciary to this situation is also an important part of

the expression, as it reveals who and what it is that our justice system sets out to protect. This case is a clear instance of the human rights of a citizen with legitimate concerns for the health of individual citizens, our democracy and our planet, versus the property rights of non-human profit-driven entities that use their 'private' property to project into public space which they do not own -- profit-driven entities the likes of whom have shown time and time again their disrespect for the health of individuals, our democracy and our planet. The decisions of the judiciary will determine whether the 'public' space of our democracy is exclusively for the private use of those who possess great wealth, as it has hitherto, inexplicably, been held. Whatever the result, I hope to stir thoughts and conversations amongst members of the public regarding the whole occurrence, the reactions from all parties involved, and what this says about our society. I place information about my protest on my website is to make it available to anyone, anywhere in the world (if they are wealthy enough to have internet access) who is interested but did not witness the protest first-hand. This is a truly global issue and I believe action is necessary on this issue worldwide -- also, in the age of the internet, to make a protest public is to make it publically available online in digital form.

3.b. The consideration of unquestionably legal alternatives

14. It has not been unusual for Magistrates to consider that I might have preferred other modes of expression, which are unquestionably legal, in ruling that my expression is not protected. In paragraph 10, I outline my reasons for rejecting the modes which were suggested to me by a Magistrate in his written decision on a previous case. I provide these reasons to satisfy what has been a common curiosity amongst magistrates, and to demonstrate that I have indeed considered those modes, and have intelligible reasons for rejecting those methods and preferring the one I have chosen. These reasons, which are advanced to help the presiding Magistrate to understand what has proven to be a curiosity, are ultimately of no legal significance when determining if the expression I have chosen is protected.

15. Whether other legal modes exist that I could have chosen, or whether a Magistrate disagrees with me and believes that those modes are likely to influence change, is all beside the point -- all that matters is applying the legislation and appropriate tests to see whether the expression, the one that has been made and is under determination, is protected or not. Nowhere in the legislation is the existence of unquestionably legal alternatives, or the rationality behind the choice of expression, mentioned as a consideration in the process, therefore those things should not be considered.

16. A recent decision of the New Zealand High Court deals with the consideration of unquestionably legal alternatives in a freedom of expression context. In the case of Pointon v Police[3] 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 naked through.

3 Pointon v Police (2012) NZHC 3208

17. 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 freedom of expression in that way. That is beside the point. He did.*[4]

18. Similarly in this case, all consideration of alternatives must be put aside as irrelevant to the determination of whether or not this particular expression is protected. The only things to consider are the legislation of section 15, the interpretative task outlined in sections 32(1) and 7(2), and any tests appropriate to make findings based on the terms used in that legislation.

3.c. Application of Section 15 of the Charter to the Expression

19. Section 15 of the Charter provides:

> **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.

20. It is submitted that given the above explanation of the expression in section *3.a. Motivation for the Expression*, I clearly hold opinions and ideas and was communicating them through demonstration. The purpose of imparting these ideas is to encourage other people to consider these issues, to seek information in relation to them, to believe we have the power to create change on these issues, and hopefully adopt similar ideas. By expressing myself in this way I hope to elevate this issue into mainstream political thought and create political pressure on the government to seriously engage these issues -- in the hope that this will ultimately lead to a ban on the paid advertisements of for profit companies in public space and public media.

4 Pointon v Police (2012) NZHC 3208, Paragraph 50

21. This is fundamentally a political expression, any artistic components are practical devices aimed at a precise political end. I have expressed myself both in print and by way of art, but considering the unusual nature of the art, it could be said that I have expressed myself in another medium chosen by myself. As all these types of expressions are able to be protected, it is not necessary to assign labels to this particular expression.

22. Section 32(2) of the Charter provides that “international law and the judgments of... foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision”.

23. There is Canadian authority for the proposition that freedom of expression includes postering.

24. In Ramsden v Peterborough (City)[5] (the **Ramsden Case**) the Full Court of the Canadian Supreme Court considered a municipal by-law prohibiting the placing of posters on any public property within the city of Peterborough. The defendant in that case had put up posters advertising an upcoming performance by his band on utility poles within the city. He was charged with an offence under the by-law. He claimed the law was unconstitutional because it violated his right to freedom of expression. The offence created was a summary offence, punishable by a maximum fine of $2,000.

25. Similar to section 15 of the Charter, section 2(b) of the Canadian Charter of Rights and Freedoms provides that “Everyone has the following fundamental freedoms:... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

26. Iacobucci J gave the judgment of the unanimous Court in the Ramsden Case. He considered whether postering constitutes expression under section 2(b). It was held that it did, as it is an activity which conveys or attempts to convey a meaning. The by-law prohibiting all postering in the city was ruled unconstitutional and struck down, as it could not be justified by reference to section 1 of the Canadian Charter, which guarantees rights only subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". He made the observation that :

> “*postering has historically been an effective and relatively inexpensive means of communication. Posters have communicated political, cultural and social information for centuries. Postering on public property including utility poles increases the availability of these messages, and thereby fosters social and political decision-making.*[6]”

27. 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:

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5 Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084.
6 Ramsden Case, page 16

- 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)

28. In the case of this postering expression: there is no chance of damage, as the posters are easily removed with a pressure hose from the smooth surface of the advertising panels; there is no denigration of the beauty of public spaces, as the obscuring of crass corporate advertisements is, at worse, equally ugly, but arguably an improvement; there is no public safety risk; there is less of a road safety risk when eye-catching imagery is deleted and replaced by black sheets and text too small to read from automobiles. All this means there is even less reason to believe the limitation on this expression is appropriate for the above reasons, which proved inadequate to limit the expression in the case of Ramsden.

29. Iacobucci J further referred to a decision of L'Heureux-Dubé J in Committee for the Commonwealth of Canada v. Canada (1992), 17 Queen's L. J. 489 that emphasised that for those with scant resources, the use of public property may be the only means of engaging in expressive activity[7].

30. In the case of my expression, it is not only scant resources that make use of public space the only means of engaging in expressive activity. The inherent conflict of interest in the mainstream commercial media, as well as inexplicable cultural dismissal of this issue as one beyond democratic control are both factors that make the direct physical action of postering my only option for effective expression. It is a logical extension of freedom of expression that such expression should not be limited to modes of expression that can have no considerable effect.

31. It is important to note that in Ramsden's case the Court was considering expression that essentially constituted promotion of the accused's own band. Such expression is largely self-interested and commercial in nature -- the cumulative effect of allowing such expressions may produce a stronger musical culture, but in the accused's particular case it was aimed at getting more paying patrons through the door. An analysis of cases related to freedom of expression demonstrates that political expression is generally to be afforded the greatest protection of all types of expression (see paragraphs 33 and 57). Accordingly, the principles which were applied in Ramsden's Case should be applied with greater force here, because of the fact the expression is political.

32. That my ideas, opinions or expression may be unwelcome to those possessing a punitive conscience should not be a limiting factor. In the case of Sanders v Kingson [2005] EWHC 1154 (Admin) the UK High Court quoted the following with approval:

> "*[T]he court has to recall that freedom of expression... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self fulfillment. Subject to paragraph 2 [similar to section 15(3)*

7 Ramsden Case, page 17

discussed below], it is applicable not only to "information or ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb"[8]

For some people, particularly the police, the shock comes from the fact a citizen is intervening with the private domination of public space, which is, strangely, widely accepted, and seeking to make an competing statement. The very fact that, in an apparently democratic society, people may be shocked that someone would question the undemocratic private domination of public space, is one of the reasons such demonstrations are necessary, but any shock caused should not be a further limiting factor.

33. At paragraph 84 of that judgment the Court states that political expression "attracts a higher level of protection" than other expression.

3.d. Magee v Delaney - findings and distinctions with this case

34. In the case of Magee v Delaney (2012) VSC 407, a case in which I was the appellant, Justice Kyrou made several findings on the interpretation of the Charter in regard to Freedom of Expression.

35. In Magee v Delaney Justice Kyrou was concerned with a charge of criminal damage. The damage consisted of painting over a double-sided advertising panel. His Honour held that any expression involving damage could not be protected under section 15 of the Charter for public policy considerations[9], over and above the specific limitations of the Charter itself. Central to Justice Kyrou's decision was that the political expression was made by way of committing an act of damage.

36. The present charge concerns a charge of postering over an advertising structure. Unlike criminal damage, it is not an element of the present charge that damage occurred. The charge sheet uses the word 'damage' when speaking of my website which documents my postering protests, but the use of this word in the summary of offence has no particular status.

37. If the prosecution sought to allege damage they should have preferred either the charge of Wilful Damage or Criminal Damage, both charges more serious than the one I was charged with. The Court cannot take into account an aggravating feature which, if proved, would render me liable for a more serious crime – see the principles in R v De Simoni (1981) 147 CLR 383.

38. For these reasons, the public policy limitation imposed by Justice Kyrou on expressions that involve damage or threats of damage has no application in this case.

39. Justice Kyrou went on, after already having made his decision, to assert as dictum that the limiting considerations within section 15(3) of the Charter itself were sufficient to limit the right to Freedom of Expression in that case. As the Magistrates' Court is not bound, but can be influenced by the dictum of Justice Kyrou in relation to section 15(3), these statements will be addressed where relevant.

8 At paragraph 69

9 Magee v Delaney (2012) VSC 407, Paragraph 97

3.e. Limitations on Section 15(2)

40. Of course, the Charter does not protect all types of expression, such a situation would be absurd, and accordingly the Charter sets out a broad set of limiting factors. Each expression must pass a number of hurdles to be protected under the Charter.

41. These hurdles easily capture any expression that is in any way damaging to our democratic society. The protection of one specific expression by no means opens the flood-gates -- If one expression passes through, it is no easier for other expressions to pass through, they will only pass through if they are similarly positive for a vibrant liberal democratic society.

42. The right of freedom of expression outlined in section 15(2) is followed directly by the preliminary limitations of section 15(3). Accordingly, the first hurdle when considering freedom of expression is to ensure the freedom in a specific instance is not limited by the operation of section 15(3). If the expression is limited by section 15(3), it does not progress into the next stage of consideration, where the right may be limited by the action of section 7(2).

3.f. Limitations on Section 15(2): Section 15(3)(a)

43. Section 15(3)(a) provides that the right to freedom of expression may be limited subject lawful restrictions reasonably necessary to “respect the rights and reputation of other *persons*” [emphasis added].

44. Section 3 of the Charter carries the definition ""person" means a human being". Section 6(1) of the Charter states that “only persons have human rights” and further clarifies "Note: Corporations do not have human rights".

45. Justice Kyrou found that section 15(3)(a) of the Charter, when referring to the rights and reputations of other *persons* (clearly defined as human beings), was in fact referring to the rights and reputations of all non-natural persons[10]. The magistrates' court may be influenced by Justice Kyrou's interpretation, during dictum, of what is meant by the term *person* in section 15(3)(a), but in my submission, there is no scope for interpretation where a term has been clearly defined in the very same statutory provision, and the court should adopt the proper meaning of the term *person*, in line with the legislation of parliament. If the correct definition is accepted, section 15(3)(a) has no application in this case, as the advertising company that may claim to have had its rights violated, is not a human being.

46. If the court adopts Justice Kyrou's interpretation, we must determine whether the rights of any legal entity have been infringed.

47. I expect it will be argued by the prosecution that my actions fail to respect the rights of the multinational, multi-million-dollar advertising corporation Adshel (In 2013, Adshel had a revenue of $149.3m and an EBITDA[11] of $40.3m). Justice Kyrou's ruling that the rights and reputations of all non-natural legal entities are to be considered in section 15(3)(a) does not

10 Magee v Delaney (2012) VSC 407, paragraphs 109 - 126

11 Earnings before interest, tax, depreciation and amortization

grant non-natural legal entities rights under the Charter, as "only persons have human rights". The rights which Justice Kyrou ruled were infringed, the only rights it could be argued have been infringed, were the rights under criminal law to private property.

48. As no damage has occurred to the property of the advertising corporation, no infringement of the property rights of the corporation has occurred -- it is just that the public space that the advertising company's private property normally projects into has been put to a different use. There exists no legal right that the advertising corporation should be able to project whatever image it likes into public space from their private property without competition from other legitimate uses of that public space. The fact that the posters blocked such an image from reaching public space does not infringe the property rights of the advertising corporation, it may annoy them, but as a corporation they have no right to Freedom of Expression. For instance, a member of the public standing in front of an advertising panel obscures its projection, but this obstruction of projection is not an infringement of the advertising companies property rights. Section 15(3)(a) has no application in this case.

3.g. Limitations on Section 15(2): Section 15(3)(b)

49. Section 15(3)(b) provides that the right to freedom of expression may be subject to “lawful restrictions *reasonably necessary* for the protection of national security, public order, public health or public morality” [emphasis added].

50. It is submitted that my expression does not place national security, public health or public morality at risk. Public morality may arguably be jeopardised by writing or actions of a profane or obscene nature, however no profanity or obscenity attends my actions. The removal of for-profit advertising from our society is more likely to improve public morality -- lessening the materialistic scourge that for-profit advertising seeks to promote and profit from could slow our rush toward ecocide, freeing mental energy to work towards more admirable goals. Public health could also stand to be improved by the removal of for-profit advertisements -- advertising and the superficial, over-indulgent consumer culture it promotes inducing a range of mental and physical illnesses in our society, often the victims being vulnerable children with limited ability to defend themselves.

51. The only conceivable justification under section 15(3)(b) for restricting my right to freedom of expression might be that the offence of Posting Bills etc. and Defacing Property is a lawful restriction reasonably necessary for the protection of public order. Public order is not defined in the Charter.

52. Public order is certainly jeopardised by any breach of the peace. No violence or apprehension of violence is caused by my expression at any stage. I have 29 priors for criminal damage, and two for posting bills, all relating to the obscuring of for-profit advertisements as a peaceful political expression. In all that time I have no history of violence, or of resisting police, or even of speaking disrespectfully or insultingly to the arresting officers. I have received more expressions of support and gratitude from the public than I have of disapproval. At no point has a breach of the peace occurred, or threatened to occur, as an unlawful response to my actions.

53. 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.

54. 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[12]. He continued to sing for 25 minutes before his arrest for declining to desist.

55. 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".

56. 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[13].

57. 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"[14].
>
> 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"[15]. Furthermore, "public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour"[16].
>
> 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"[17] 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"[18].

12 Brooker's case, paragraphs 13-15
13 Brooker's case, paragraph 4
14 Brooker's case, paragraph 42-47
15 Brooker's case, paragraph 56
16 Brooker's case, paragraph 59
17 Brooker's case, paragraph 90
18 Brooker's case, paragraph 92

58. It is submitted that this test should be followed in this case. 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.

59. My conduct caused no interference whatsoever to the ordinary and customary use of the public places in question when I completed the postering overnight. When I went out during the day, my activity caused little interference and, being calm and unobtrusive to anyone without interest, was unlikely to cause any anxiety or disturbance, and no anxiety or disturbance of the public was reported. Until the paste dries, there is a small risk that a member of the public may lean up against the advertising hoarding and get paste on their clothing, yet this would wash out easily, and for an attentive person, being unable to lean against the advertising panel is only the slightest inconvenience.

60. The interference doesn't go beyond being disruptive or seriously annoying. It is a very minor and temporary one, lasting only until the paste dries. Once the paste is dried, the posters could provide reading much more interesting, real and politically relevant than the advertisements they obscured, perhaps enhancing the the experience of waiting for a train.

61. Importantly, there was no complaint made by the public at any stage, implying no member of the public found my activities disturbing or the cause of anxiety. The police were contacted by advertising company staff, security staff and tram company staff as part of their paid duties.

62. Furthermore, because my conduct is intended to convey information or express a political opinion, public order should less readily be seen to be disturbed by my actions.

63. The test outlined in Brooker's case -- which was outlined while considering the impact on public order of an auditory expression -- fails to consider one aspect of my expression that has in the past been considered a possible threat to public order. Because my expression involves the obscuring of commercial advertisements, it may be seen that this kind of challenge to the exclusive and ever-expanding 'right' of advertising corporations to dominate public space through the projection from private property poses a threat to public order, by undermining private property rights.

64. My actions do not challenge the private property rights of advertising corporations. What they do challenge is the exclusive 'right' of advertising corporations to use their private property to project their images into public space. My actions do not damage the private property of advertising corporations, they simply temporarily and reversibly prevent the private property from projecting into public space, as I believe they should not have the right to do. This 'right' to project into public space from a strategically-placed, thin slice of 'private property', which has become culturally accepted for some strange reason, has no legal basis -- there is nothing explicit or implied in private property law that grants the right to property owners to project whatever image they would like into public space. Just as there is law against noise pollution, so should their be against visual pollution. There is no abrogation to any actual private property rights of persons or non-natural legal entities -- the only 'right' I set out to challenge is the culturally-accepted, self-imposed right of non-human advertising corporations to dominate public space through the abuse of private property law. This issue should become a political

question to be determined by an engaged community -- hence my expression.

65. Any concern that protecting this expression could lead to the widespread abrogation of private property rights under the protection of Freedom of Expression is unfounded and alarmist. If an expression unduly interfered with or damaged the private property rights of any person, it would be excluded from protection by section 15(3)(a). If an expression involved actual and considerable damage to property, whether owned by a person or a non-natural legal entity, in such a way that public order was threatened, it would be limited by the action of section 15(3)(b). Any expression that passes through the limitations of section 15(3) is by no means out of the woods, it must then face the main limiting clause of the Charter, section 7(2).

66. In Magee v Delaney, Justice Kyrou stated:

> *For the purposes of s 15(3)(b) of the Victorian Charter, does the expression '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? Yes.*[19]

It should be noted that this statement was made as *dictum*, was not *ratio*, not part of Justice Kyrou's findings necessary to make his decision -- it is therefore influential, at best, and not binding as non-hypothetical findings of the Victorian Supreme Court are on the Magistrate's Court. Justice Kyrou made several errors in the above statement, he speaks of citizens engaging in their personal and business affairs when what he means is advertising corporations which are not citizens, have no personal affairs, and do not have human rights. He uses the term 'unlawful physical interference' to invalidate the argument seeking to protect any action which might otherwise be considered unlawful, which is inappropriate. Physical interference with the projection of advertising is not illegal in all circumstances, and in cases where laws exists that would seem to proscribe that action, consideration of a person's human rights to that action should proceed without the existence of that law acting as a reason-in-itself to limit the right.

67. Public order, as the name suggests, is primarily regarding the order of the public in public places. Precedents for considering postering as a threat to public order do not exist, because it has not been considered a threat to public order as precedents have defined it. In the detailed analysis of the Supreme Court of Canada in Ramsden v Peterborough, no concern for public order was raised by any party.

68. I submit that the meaning of public order should not be expanded to capture arguments against this expression that are really the consideration of *'the importance of the purpose of the limitation'* in section 7(2). These arguments should be considered in section 7(2) and there be weighed against the nature of the right, instead of acting as an immediate disqualification that does not take everything into account.

69. I do not deny that my intention in trying to have this kind of expression protected is that it would allow a peaceful social movement to make a real issue out of the negative influence of for-profit advertising in our democracy. That would be democracy in action, opening up discussion and debate on an issue that has been kept off the radar by the owners and controllers

19 Magee v Delaney (2012) VSC 407, paragraph 3(d)

of the radar tower, those that will continue to profit and exert illegitimate power for as long as the present situation remains unchallenged. In a democracy, the radar tower of our mainstream media should belong to the people, should have an agenda set by an empowered populace. If the justice system acts to uphold the present 'public order' of for-profit dominance and punish those that seek to demonstrate against it in the only meaningful way they can, that would be to act as an obstacle to the progress of democracy rather than an advocate, only to protect the depraved interests of the rich and their organisations.

3.h. Conclusion

70. It is submitted that my expression constitutes political expression, the type afforded greatest protection under the Charter. Canadian Supreme Court authority supports the proposition that postering can constitute protected expression.

71. Furthermore, it is submitted that section 15(3), which is a limit on the right to freedom of expression, doesn't operate in this case to restrict my freedom of expression. The only limit which could potentially apply is the need to preserve public order under section 15(3)(b). Any disturbance to public order is minimal and well below the threshold of acceptable disturbance as outlined in Brooker's case. There is neither any threat to public order engendered by any perceived abrogation of private property rights, such concerns for the importance of the purpose of limitation on postering should be considered in the application of section 7(2). For surviving the test outlined in Brooker's case, and because postering poses no threat to public order in any other way, I submit that there exists no threat to public order sufficient to limit the right in this instance.

4. Applying section 7(2) and 32(1) of the Charter to a right to Freedom of Expression engaged under section 15.

4.a. Can a restriction be justified by section 7(2)?

72. As it is somewhat unclear where to start while attempting to apply section 32(1) and 7(2) simultaneously, I will start by first exploring whether or not the right can or should be limited by the action of section 7(2). It makes less sense in my mind to try and interpret a statutory provision to be compatible with a human right under section 32(1) before establishing if that right is indeed engaged and beyond the limitation of section 7(2).

73. Section 7(2) provides as follows:

> 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 the 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.

74. 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'*

75. This was quoted with apparent approval in the case of *The Queen v Vera Momcilovic & Ors* [2010] VSCA 50 at paragraph 144.

76. In this case, it is submitted that the prosecution would fail in this task for the following reason. There is no evidence that political postering of this kind constitutes a significant problem which needs to be addressed by the criminal justice system. The criminal justice system declines to address commercial postering which is currently prolific and which has no defence under Freedom of Expression as the companies responsible are not human beings. Given the importance of Freedom of Expression, especially where the expression is political, and given the difficulty of effectively raising this extremely important issue in the current media climate, the Court would need to be satisfied that using the criminal law to limit this expression, only to save multi-million-dollar advertising corporations from what is to them a minor inconvenience was "demonstrably justified in a free and democratic society based on human dignity, equality and freedom", while that same law is not used to prevent postering companies, that are the main serial offenders, from doing a similar thing. The advertising industry wastes around $550 billion dollars annually as it increasingly invades our lives, psychologically corrupting us as it corrupts our media -- in a world where so many live and die in poverty, no society based on human dignity, equality and freedom could use its justice system to put the advertising industry further beyond question, by outlawing the one effective, peaceful and totally harmless expression of discontent available. Neither the media itself nor politicians are going to raise this issue, and coupled with combination of complacency and defeatist attitudes that decades of corporate media dominance has induced in the public, this issue will not see political light unless citizens are allowed to express meaningful and direct opposition through this peaceful and harmless method.

77. The prosecution is calling no evidence to establish that the prohibition on postering, created by the offence of posting bills, where the postering is a genuine case of political expression under Freedom of Expression, is "demonstrably justified in a free and democratic society". Absent this evidence, it is submitted that the court does not have the "cogent and persuasive" evidence necessary for it to agree to impose a limit on the right to freedom of expression by reference to section 7(2).

78. Any evidence called would be massively contradicted by the fact that many 'legitimate' poster advertising businesses can continue to operate, fully in the open, without the police prosecuting them out of business, as they could easily do. The practice of these 'legitimate' businesses falls directly under the activities proscribed by section 10(1) of the Summary Offences Act, and these companies, not being human beings with the right to Freedom of Expression, have no recourse to protection under the Charter. Perhaps because these postering companies are themselves advertising for-profit companies much of the time, they do not offend the police enough to prompt them to press charges, as they are simply carrying on the socially accepted absurdity of private companies selling access to public space which they do not, and by definition cannot, own.

4.b. Interpretation of Posting Bills etc. and Defacing Property under section 32(1)

79. Having determined the content of the right under consideration, being the engagement of the right through section 15, and finding that the right can not be limited by the statutory provision in accordance with section 7(2), the Court must then attempt to interpret the statutory provision in accordance with the right as outlined in section 32(1).

80. Section 32 of the Charter is set out at paragraph 4 above. In R v Vera Momcilovic, the Victorian Supreme Court of Appeal 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.*[20]

81. The relevant statutory provision in this case is section 10(1) of the Summary Offences Act 1966

20 The Queen v Vera Momcilovic & Ors [2010] VSCA 50, paragraphs 102 - 103

(Vic). Section 10(1) creates an offence entitled "Posting Bills etc. and Defacing Property". It provides that:

> *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.*
>
> *Penalty: 15 penalty units or imprisonment for three months.*

82. The offence provides the defence of having been granted the consent of "any person or body having authority to give such consent".

83. It is submitted that the Victorian Government is a body having authority to give such consent. If the conduct in question is deemed to be protected under the Charter of Human Rights and Responsibilities Act 2006, then consent can be said to be granted by virtue of that Act on behalf of the Victorian Government.

84. As courts are not to "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"[21], this is the necessary interpretation of section 10(1) of the Summary Offences Act, where it is ruled that actions that would otherwise fall under it are protected by the Charter.

4.c. Why this Interpretation is Consistent with the Intention of Parliament

85. It was the clear intention of parliament to protect the rights of citizens to effectively express themselves. The statement in section 15(2) of the Charter, that citizens may express themselves "in another medium chosen by him or her", reflects the desire of parliament to protect expression in any unforeseen future form that a reasonable citizen in our modern society may deem necessary for effective communication, including forms that go beyond the style of political expression familiar to the people of the 1920's, which are now in many cases unacceptably ineffective. Many limitations apply of course, and the limitations of section 15(3) and 7(2) exclude from protection all expressions of an anti-social nature. Once clearing these limitations, as I submit my expression does, statutory provisions further limiting that right can only do so explicitly, making particular mention of the right to be curtailed, which the Summary Offences Act does not do. If parliament had meant that this type of protected expression be limited by the action of section 10(1) of the Summary Offences Act, they would have amended the Act appropriately.

86. A legitimate concern is that protecting this expression would open the flood-gates to postering type offences, and that this is contrary to the intention of parliament in creating section 10(1). This concern is unjustified in light of the fact that commercial companies are openly pouring through the open flood gates presently, plastering both public and private property all over the

21 Momcilovic, paragraph 103

city with all kinds of advertisements, and the police do not see fit to prosecute them as they easily could. If anything, protecting only the postering expressions of human beings that have real political or cultural value, including those directly opposing corporate advertising, while clamping down on commercial poster advertising companies under existing laws, would close the flood-gates considerably. The effect of this would be a more vibrant and participatory culture, instead of one where the alienating expressions of non-natural for-profits dominate, owing to their financial advantage, in the most undemocratic of ways.

87. Another legitimate concern is that protecting this expression could abrogate the private property rights of persons and non-natural legal persons in a way that parliament would never have intended. This concern is not justified either, as only the legitimate expressions of human beings that temporarily, and without any real damage whatsoever, prevent the property of non-natural corporations from projecting into public space could be similarly protected by the action of any precedent set in this case. This would not serve to abrogate the actual private property rights of non-natural persons in any way, it would only serve to democratically limit the illegitimate ability of non-natural corporations to project into public space from their thin slices of private property.

88. Protecting the freedom of expression of citizens carries an implicit wish to further democracy. In the current media and political landscape, protecting the peaceful freedom of expression of citizens seeking to address a vital issue, one excluded by a number of factors from our political agenda, could be the only way forward. It is not inconceivable that truly democratic politicians would welcome media systems being made a real political issue by concerned and active citizens, especially as they are unable to raise the issue themselves lest the entire might of for-profit media system be turned against them.

6. Declaration of Inconsistent Interpretation & referral to the Supreme Court

89. This section is only relevant if the Court finds that the limitation on freedom of expression is not justified by reference to section 7(2) and it cannot interpret the offence of posting bills etc. and defacing property consistently with the Charter.

90. In this instance, the Supreme Court is empowered to make a declaration of inconsistent interpretation. The Magistrates' Court does not have this power. Should the Court reach this point the defence requests that the matter be referred to the Supreme Court pursuant to section 33 of the Charter for determination.

91. The leading case on this matter is De Simone v Bevnol Constructions and Developments Pty Ltd & Ors [2010] VSCA 231. This case suggests that section 33 referrals by Court's should only be made in circumstances where findings of fact have been made. This prevents the Court from dealing with theoretical questions.

92. The Court of Appeal also suggests that it would benefit from the reasons of a first instance decision maker.

93. Accordingly, prior to the referral being made the defence requests that the Court make findings of fact and law in relation to whether:

a. My conduct constitutes expression under section 15(2) of the Charter
b. My right to freedom expression is limited by section 15(3) of the Charter
c. The offence against posting bills justifiably limits my right to freedom of expression by reference to section 7(2)
d. The law against posting bills can be interpreted consistently with my right to freedom of expression

94. Having made those findings, the defence would seek an order under section 33 to the effect that:

> Given the preceding findings, the following question is referred to the Supreme Court for determination pursuant to section 33 of the Charter of Human Rights and Responsibilities Act 2006:
>
> "Can the offence of Posting Bills etc. and Defacing Property be consistently interpreted with the right to Freedom of Expression protected by section 15 of the Charter of Human Rights and Responsibilities Act 2006 and, if not, should the Supreme Court issue a Declaration of Inconsistent Interpretation"

Kyle Anthony Magee
The Accused
22 April 2014