

Chapter 11

The Charter of Law and Order

Jeremy Gans

Arguably, the impact of the Canadian Charter of Rights and Freedoms is most visible in the field of criminal law. It has changed the way crime is investigated in this country. It has changed the way offences are prosecuted. It has changed the way that criminal law is practised. And, it has changed the way that due process is valued in society.¹

M Rosenberg, 'Twenty-five years later'

So said 'arguably the best judge the Supreme Court [of Canada] never had'² on the 25th anniversary of Canada's Charter. Victoria is an awful long way from Canada, and not just geographically or temporally. In its first decade, it is hard to identify a single respect in which Victoria's Charter is 'visible' in the field of criminal law, let alone has changed criminal investigation, prosecution, practice or, least of all, social values in that state.

Faced with the task of analysing a legal vacuum, this chapter will focus on a relatively minor case that is nevertheless the most visible instance of the Charter's interaction with Victorian criminal justice. Kyle Magee's first act to reach Victoria's higher courts took place literally in front of them, 18 months after the Charter's full commencement:

On 25 June the applicant, Kyle Magee, applied paint to an advertisement located in a tram shelter in William Street, Melbourne. The shelter is located outside the County Court building.³

It was also nine months after I gave a paper at the 2008 'Protecting Human Rights Conference' at Melbourne Law School warning that the Charter's role in Victoria's criminal law risked being undermined by its proponents' fear that the rights law will come to be seen as a rogues' charter.⁴ Magee personifies this fear in many ways. He is brazen, committing his crime in daylight in view of no less than three Victorian courts. He is a recidivist, with six prior convictions for criminal damage in the preceding two years and many more to come. And he is contemptuous of the criminal justice system, committing his latest actions not only while on bail (and in breach of a bail condition

1 M Rosenberg, 'Twenty-Five Years Later: The Impact of the Canadian Charter of Rights and Freedoms on the Criminal Law' at <www.ontariocourts.ca/coa/en/ps/publications/twenty-five_years_later.htm>.

2 K Makin, 'Supreme Ontario appeals judge Marc Rosenberg never sat on top court', *The Globe and Mail*, 4 September 2015.

3 *Re Magee* [2009] VSC 384 at [1].

4 J Gans, 'The Fear Factor', paper delivered at the *Protecting Human Rights Conference*, Melbourne Law School, 3 October 2008. See also <<http://insidestory.org.au/charter-of-frights/>>.

This is a preview. Not all pages are shown.