IN THE SUPREME COURT OF NEW ZEALAND SC 10/2010

VALERIE MORSE

Appellant

v

NEW ZEALAND POLICE

Respondent

Hearing:	5 October 2010
Coram:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	A Shaw, F E Geiringer and S J Price for the Appellant C L Mander and C J Curran for the Respondent

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CRIMINAL APPEAL

MR SHAW:

Good morning Your Honours, I appear with my friends Mr Geiringer and Mr Price.

ELIAS CJ:

Thank you Mr Shaw, Mr Geiringer, Mr Price.

MR MANDER:

May it please the Court I appear with my learned friend Mr Curran for the respondent.

ELIAS CJ:

Thank you Mr Mander, Mr Curran. Yes Mr Shaw?

MR SHAW:

Thank you Your Honour. Your Honours in May of 1792 an English pamphleteer who had lived in America for some 23 years was indicted in London for treason. Before he could be tried, the poet William Blake sped him out of England to France, there the pamphleteer took a seat in the French Convention, to which he had been elected by admirers of his revolutionary writings, but he was soon thrown into prison and barely escaped the guillotine. Your Honours will probably have worked out that I'm referring to Thomas Paine who –

ELIAS CJ:

I've never heard him referred to as anything but Tom Paine actually, but I suppose he was a Thomas.

MR SHAW:

He was a Thomas and according to the book that I'm referring to, he's referred to as Thomas –

ELIAS CJ:

Is he?

MR SHAW:

– throughout the book. Your Honours will be very familiar that in 1791 he published the first part of his celebrated, *The Rights of Man* to be followed by the second part in February 1792. And it was in respect of the second part that he was being pursued for treason by the United Kingdom authorities.

The relevance of Mr Paine for present purposes, is that in the first part he enumerates the various rights of man which he believed ought to have recognition and under number 10 he stated, “No man ought to be molested on account of his opinions, not even on account of his religious opinions, provided his avow of them does not disturb the public order established by the law.” And in my respectful submission, that formulation takes us to the heart of this case and this appeal because Your Honours will be considering the extent of the public order exception to freedom of expression and the right of peaceful assembly.

Your Honours, in the written submissions beginning at paragraph 51, I have attempted to articulate general Bill of Rights and international convenient principals pertinent to this case. All of the propositions that appear at paragraphs 51 through to 59 will be extremely familiar to you and I have simply included them as reminders of the building blocks upon which the appellant’s case is erected.

If I could just refer to a handful of propositions by way of summarising the entirety of part 2 of the written argument which runs from paragraphs 51 through to 84. The first proposition that I want to put to you Your Honours, is that the right of freedom of expression is an essential foundation of a free and democratic society. The hallmarks of such society include, in my submission, pluralism, tolerance and broad-mindedness and Your Honours, I think all of you at some point, have quoted from the famous case of *Handyside v United Kingdom* (1976) 1 EHRR 737 in support of that proposition. Apposite also in this connection is the proposition that one of the avowed purposes of a Bill of Rights is counter-majoritarian. And I would ask the registrar to hand up to you an authority to which I will now refer.

Your Honours this is the decision of the United States Supreme Court in *West Virginia State Board of Education v Barnette,* 319 U.S. 624 (1943) and colloquially it is known as the, “second flag salute case,” involving, as it did, Jehovah’s Witnesses who did not want to salute the flag and in that particular

case the Court, by majority, upheld their right not to salute the flag, reversing an earlier ruling of the Court.

As Justice Robert Jackson explained in his celebrated opinion of the Court in that case at page 638, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, a freedom of worship and assembly and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections."

Your Honours, in the same opinion at page 641, Justice Jackson went on to warn, "Those who begin coercive elimination of dissent, soon find themselves exterminating the centres. Compulsorily unification of opinion achieves only the unanimity of the graveyard."

Your Honours, a second proposition that is very much, I would think, to be non controversial, is that political speech which is the form of speech involved in the present case, is at the very core of the right of free expression. In tandem with that proposition is that peaceful political protest is the epitome of the exercise of this right and that of freedom of peaceful assembly. Your Honours, at paragraph 64 and 65 of the written submissions, there is reference to two decisions of the European Court of Human Rights that discuss the propositions that I've just referred to, namely firstly a decision of a Grand Chamber of the Court in *Surek v Turkey* (No 1), App 26682/95, ECHR and secondly a subsequent decision of the Court in *Sergey Kuznetsov v Russia,* App No 10877/04 EHCR and I appreciate that Your Honours will have read those passages previously, but could I just emphasise that the Court is stating very clearly that of necessity, in a free and democratic society, there is little scope for permissible restrictions on political speech or debate on matters of public interest or importance.

In the course of the submissions Your Honour, an attempt has been to emphasise a critical and pivotal aspect of the appellant's case which is encapsulated in the proposition that the right to free expression includes the right to shock, offend and disturb. Now Your Honours will again recall that that phrase is taken from the *Handyside* decision and repeated in countless subsequent cases following the *Handyside* principle and in New Zealand the Court of Appeal's decision in *Lange v Atkinson* [1998] 3NZLR 424, 457 expressly refers, with approval to the passage that contains the phrase, "The right to shock, offend or disturb."

Your Honours, at tab 20 of volume of the appellant's bundle, I won't take Your Honours to it, I'll just read the passage. It's at page 382 –

ELIAS CJ:

Sorry which case are you referring to?

MR SHAW:

Redmond-Bate v DPP (1999) 7 BHRC 375 (Div C) Ma'am, that's volume 2 of the bundle, tab 20. And I will take Your Honours to it now –

ELIAS CJ:

Well I just want to see what it's about. Oh yes, you cite it in the submissions.

MR SHAW:

Yes Ma'am, it's referred to at paragraph 77 of the submissions and if I could just take Your Honours to pages 382 to 383 which are the last two pages. And at the very foot of page 382, Sir Stephen Sedley with Justice Collins concurring, says, "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence."

ELIAS CJ:

Well do you accept that provocative speech tending to provoke violence is offensive and not, and not a – and a justifiable limitation on free speech?

MR SHAW:

In principle I think that is correct.

ELIAS CJ:

Yes, thank you.

MR SHAW:

Subject to the background consideration that the *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 Court affirmed, which there is that there needs to be a high threshold before the Court will intervene, amounting to some sort of serious disruption of public order.

ELIAS CJ:

Well violence –

MR SHAW:

Yes.

ELIAS CJ:

– would be a serious disruption?

MR SHAW:

Yes.

TIPPING J:

Of course your client wasn't charged under the violence section, was she?

MR SHAW:

No. And I think my friends are going to make some point of that when they discuss their various arguments with you.

I did have occasion Your Honours to turn up a quotation from George Orwell in the preface to *Animal Farm.*

ELIAS CJ:

Is it going to help us Mr Shaw?

MR SHAW:

Well just in the sense that it encapsulated this proposition. If liberty means anything at all, it means the right to tell people what they do not want to hear. I think that's pithy and I think that that encapsulates the degree of latitude that should be given to individuals in a free and democratic society. That the market place of ideas should be sufficiently robust to include rights of expression so as to tell people what they do not want to hear on particular occasions.

There are two final propositions that I wish to refer to Your Honours. They are the choice and method. Choice of method, place and time is integral to the exercise of the rights that are in play here. That is covered in paragraphs 66 to 69 of the written submissions and as an adjunct to that proposition, the right of peaceful assembly is a distinct complimentary right which buttresses an individual's and a groups' right to choose time, manner and place. And in that connection Your Honours, the written submissions at paragraphs 69, 71 to 75 relate. I do want to single out one case in connection with those two propositions that I have advanced and that is the case of *Öllinger v Austria* (2008) 46 EHRR 38 (Section I, ECtHR), a decision of the European Court of Human Rights which is reproduced in the appellant's bundle, volume 3 at tab 6. And it is plain, in my respectful submission from that decision, that time, method and place are important aspects of the basic right that is guaranteed. My friends, Messrs Geiringer and Price will refer in more detail to that decision.

Your Honours, as I indicated at the outset, my part of the argument for, oral argument, is simply part 2 of the submissions. The propositions in there are pretty standard propositions that I would expect Your Honours to be very familiar with and so the balance of the appellant's case is going to be argued

by, firstly Mr Geiringer and then Mr Price and if I could just very briefly summarise their arguments for you, if that would be helpful.

ELIAS CJ:

Yes Mr Shaw –

MR SHAW:

Yes.

ELIAS CJ:

– it is unusual for us to hear three counsel –

MR SHAW:

Yes.

ELIAS CJ:

– if that is the way you prepared matters, we will hear counsel as you propose but for the future I would expect that normally we will only be addressed by two counsel.

MR SHAW:

Yes, I'm obliged to you.

TIPPING J:

Are you saying Mr Shaw, just so that I understand what you are saying, that the right to free speech includes the right to choose the method et cetera?

MR SHAW:

Yes. Yes that's the, it's a critical

TIPPING J:

That's the essence of the proposition?

MR SHAW:

Yes because one of the counter arguments that the Crown may advance is, well the appellant could have exercised the right somewhere else and the appellant's case is that encapsulated in the right is, either further bundle of rights to choose time, manner and place. And the reason for that is otherwise it's not an effective right.

TIPPING J:

But the fact that you happen to choose a particular manner or place, must be relevant to the competing issues that are in play?

MR SHAW:

That is accepted Sir.

TIPPING J:

That is accepted?

MR SHAW:

Yes. It is.

TIPPING J:

All right.

MR SHAW:

So in other words Your Honour, it comes into the proportionality, but justification test that is involved here but –

TIPPING J:

That's all I wanted to illicit.

MR SHAW:

Thank you. Your Honours, Mr Geiringer has seven points that he's going to be putting to you –

TIPPING J:

Will he need to make them after you've made them?

MR SHAW:

I am happy for him to speak to Your Honours –

ELIAS CJ:

Give us the road map, if that will help us Mr Shaw so that we know where we're heading.

MR SHAW:

The road map is firstly he will submit that Judge Blaikie in the District Court did not apply the test for offensive behaviour as articulated by His Honour Blanchard J in his judgment in *Brooker,* and in any event that test needs to be modified in the case of Bill of Rights and covenant rights engaged situations such as the present case.

ELIAS CJ:

Well is that an argument about application or application and interpretation?

MR SHAW:

Yes interpretation and application.

ELIAS CJ:

Yes.

MR SHAW:

That's the first thing and then he will submit that a Bill of Rights consistent test needs to incorporate the rights, considerations up front, rather than leaving them to be addressed in the section 5 Bill of Rights justification process after a preliminary conclusion has already been reached as to offensiveness. So he's going to be nudging Your Honours towards a more upfront starting point in the analysis and not leaving everything to section 5 justification. And then he is also going to suggest that Justice Blanchard's test in *Brooker*

was still was still at its heart, a right-thinking person test and as articulated there, does not make it sufficiently clear to those applying it, that the test must be content-neutral. In our submission, Your Honours, content is irrelevant in all but limited and well-established exceptional cases such as hate speech and pornography and a generally applicable right-thinking person test based on the content of the expression in our submission will never be section 5 Bill of Rights justifiable. And those are the principal points that he will be discussing with you and I think I can just summarise in terms of Mr Price, his focus will be on section 5 justification issues, and he will be taken you through in some detail, the facts and aligning them to the relevant principles.

So Your Honours I think I have said all I need to say to open the case and I will now invite Mr Geiringer to address you.

ELIAS CJ:

Thank you. Yes Mr Geiringer?

MR GEIRINGER:

Can I have one moment to arrange my papers?

ELIAS CJ:

Yes, of course.

MR GEIRINGER:

Yes thank you, good morning. To clarify up front, in answer to an earlier question of Your Honours, it's really the intention of me to deal with issues of interpretation and for my learned friend, Mr Price, to deal with issues of application –

ELIAS CJ:

To deal with application, yes.

MR GEIRINGER:

– that's really the division. There is necessarily between those two some overlap and what I will do, I will do my best to do is to, in response to any questions that require answering in the interpretation section that really are at the heart are issues of application, to explain the thrust of the appellant's arguments without unduly infringing on the area of my learned friend Mr Price, who might otherwise be upset at me.

Your Honours have received the written submissions of the appellant and –

ELIAS CJ:

And we have read them, so you don't to take us through them all.

MR GEIRINGER:

So I'm not intending really to do that at all, my main purpose today, will in fact be, to try and tie the arguments of the appellant the respondent more closely together and avert the danger that we're going off on tracks in different directions, so I will do my best to address directly what's dealt with in the respondent's written submissions and as my learned friend Mr Shaw has outlined, there are some key points in order which I think do that, bring the two together and that was the purpose of his outline. I might mollify some of the language just ever so slightly as I go through and explain it in more detail. But let me begin, if I can, by taking Your Honours immediately to the decision because that's what we're here to discuss today. I'll reach over and grab the case on appeal and if we turn – the case on appeal, to pages 27 to 29.

Your Honours may have noticed that there are two copies of the District Court decision. That is because there were in fact two different versions that were produced, one around the scene at the time of sentencing and one in an earlier time. They are both dated with exactly the same date, and the difference them are minor and the appellant makes nothing of them, I'm taking you to the most recent and I'm ignoring the older one and I know of no reason why there's any need to refer to it, it's there for completeness.

So I'm taking you to the middle of Judge Blaikie's decision in the District Court starting at paragraph 21 and this is where he – the learned Judge adopts the test from *Brooker* that was articulated by His Honour Justice Blanchard, and attempts to apply it. And these we say in these few short paragraphs that follow are what this case is all about. And remembering that the question for today, the basis of the grounds is whether the District Court correctly interpreted and applied section 4(1)(a) of the Summary of Offences Act 1981. So here is the test – as is standard and not to be unduly criticised from a District Court decision, it's not necessarily 100 percent clear all the way through this, exactly which elements of Justice Blanchard's decision are being picked up on and applied, they're not – the Judge in the District Court doesn't go to lengths to say exactly which bits he's saying are relevant and to what degree, but he has quoted bits. The reason it's a little bit unclear in this case is because, of course, the decision in *Brooker* was a decision about disorderly behaviour and issues of offensive behaviour weren't squarely before the Supreme Court on that day, Justice Blanchard has done, in my submission a useful job of trying in analysis in section 4(1)(a) to distinguish between the words of, "offensive" and "disorderly behaviour," but it's over to dicta purely for the purpose of making that distinction, I am – Justice Blanchard will jump down my throat I am sure if I am getting this wrong, but I don't see, there was no argument on that day about the extent of offensiveness and it wasn't the purpose on that day to go into enormous detail about what the law on offensive behaviour was, but there is nevertheless some useful dicta which Judge Blaikie picked up on, starting in the paragraph 55 of Justice Blanchard's decision at, is quoted at the bottom of page 27 and this at its heart, picks up the test that was already overall accepted, established in New Zealand law in relation to offensive behaviour, that is the test, "That it must be behaviour that's capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the minds of a reasonable person." It goes onto say, "Of the kind actually subjected to it in the circumstances in which it occurs." I'll set that last clause aside for a moment. The remainder of the test is a test that was used in *R v Rowe*, it's a test that was used in *Ceramalus v Police* (1991) 7 CRNZ 678 (HC) and I believe *Ceramalus* decision imported, this is the first *Ceramalus*, the offensive behaviour, sorry in

this decision. And that decision of course imported it as I said in that decision from Australian law. I don't believe Your Honours have from either party, the Australian jurisprudence of – is *Worcester v Smith* [1951] ALR 660; [1951] VLR 316 and a *Ball v McIntyre* (1966) 9 FLR 237 case which also used it in which the New Zealand Courts looked to. Nevertheless that's the origin of that first part excluding the sentence. Justice Blanchard, as far as I'm able to see from looking back at the cases, is partially citing his own considerations in the case of *O'Brien v Police* HC Auckland AP219/92, 12 October 1992 in that last sentence. And I put that last sentence to one side but while I will say that the appellants don't –

TIPPING J:

But what are you referring to as the last sentence?

MR GEIRINGER:

Sorry in the last sentence – I apologise. The last clause, is of a kind – a reasonable person of a kind actually subjected to it, this is the audience, nature of the audience.

TIPPING J:

Right of a kind. Thank you.

MR GEIRINGER:

Sorry not a sentence, I must speak and apologise. The – I put that to one side, it was subject to some criticism by Justice Glazebrook in the Court of Appeal in this case and Justice Glazebrook, I will submit, makes some valid points about there are instances that where that clause does not necessarily make sense. I believe Justice Glazebrook's example was that the behaviour was directed towards a meeting of the KKK.

TIPPING J:

The difficulty I have, with respect, and I think I'll put this right up front, with looking at it through the mind of a reasonable person or testing it by a reasonable person is that if it is correct that free speech allows you to offend, I

wonder whether the – a more consistent approach would be to say it's a question of the degree to which you are offended or the degree of offence. You know, in other words, should not the Judge actually make the call as to whether or not this is at a sufficient level of offence, that's it's a justified limit. The idea of having a reasonable person making what is in a sense, a legal call of whether – I know you're dealing with interpretation but I find it very difficult to separate the two, do you see where I'm – I'm – I just, I'm a little uneasy about this whole concept of, "reasonable person," in this field.

MR GEIRINGER:

I think I understand it and it's an unease that the appellant shares and which I will go into in some detail –

TIPPING J:

All right you're coming to it?

MR GEIRINGER:

– provided I'm talking quickly enough to get through all my material. But the – in essence that's right except that there are issues in relation to degree and I'll plunge ahead if I can just, as an aside, the respondents talk about this being a continuum case and really that it boils down to a question of degree and to a certain extent I'm not going to challenge that idea, except to say this. It's a continuum case but it's not a linear continuum case. It's not the idea that we have a spectrum of offensiveness running along the line and there's a point on that line and we can decide things that are beyond that point are of a degree that at too offensive, things that are below that point, are not. The reason I say that's not right is because there are offensiveness's of I would say different types, so at the very least we're going to have a lot of lines running in different directions, if not a plane of offensiveness or maybe a three dimensional idea of offensiveness – I don't want to bend the Court's mind too much by trying to think of offensiveness in a three or more dimensional object. I'm not going to exploit my mathematical background to try and manipulate the Court in that way, but the point is simple is that it's a line, it's not a line – and a way of seeing this I think is if I could jump – I'm not

– it's not a case I want to make much of at this point, but I will make of later, if I could have a hand up as the common.... And this is a case that was cited by the respondents but has not appeared in the respondent's bundle. I just want to hand it up now for this particular point –

ELIAS CJ:

Mr Geiringer, can I just indicate that I'm getting a little lost –

MR GEIRINGER:

Sorry.

ELIAS CJ:

– and I wonder, not it's fine. I wonder whether that is because you are jumping into your supportive or explanatory material without telling us first what your propositions are –

MR GEIRINGER:

Certainly.

ELIAS CJ:

– and it would help me to know what they are.

MR GIERINGER:

I'll do my best to respond directly to Justice Tipping's question.

TIPPING J:

Well no I think Chief Justice has put it much better than I. I was partly responsible, but I too would like to know what your –

MR GEIRINGER:

I'm also being overly verbose, let me just make the one point in relation to something that is said by – or Justice Gleeson is citing the case as I said of *Ball v McIntyre* –

ELIAS CJ:

Oh, is this *Coleman v Australia* CCPR/C/87/D1157/2003 that you put in?

MR GEIRINGER:

Sorry *Coleman*, yes.

ELIAS CJ:

Well I actually wanted to ask the parties why we're not being taken to the UN Human Rights Committee report on Coleman and to *Coleman v Australia* because it does seem to me that there's material in it which is very helpful.

MR GEIRINGER:

The UN Committee decision is in the bundles.

ELIAS CJ:

Is it?

MR GEIRINGER:

Yes.

ELIAS CJ:

I'm sorry, I haven't picked that up.

MR GEIRINGER:

The *Coleman v Australia* decision was one that was referred to by the respondent but is not in the bundles but I'm going to rectify that and I will be taking you to it. But for a very small point, just directly in answer to Justice Tipping's question, it's on page 26 of the decision itself and it's part of the dissenting opinion of Justice, Chief Justice Gleeson and, but really what I'm picking up on is what he is taking out of the case in *Ball v McIntyre* which is one of the seminal Australian decisions that gave rise to this test and he says, it's in the third, on the left-hand side of the piece of paper on page 26, and it's the first part after the quote. And this is referring to what Justice Kerr says in that early Australian decision. And he said, this is a quote, he said,

"That what was involved had to be behaviour that would produce in a reasonable person, an emotional reaction such as anger, resentment, disgust or outrage, beyond a reaction that was no more than the consequence of a difference of opinion on a political issue." And what I want to pick up is, is that really correct, can we really think of offence in that way. And my challenge to that idea is this. Is there such a thing as a degree, a point on a line, where a disagreement on political opinion will always be below it, but some other things might be above it and the reason I challenge that is because, in my submission, disagreements on political issues can go as high as you like. If it's purely a question of degree, of amount of offensiveness, there is no limit to the amount that two people can get upset at one another for disagreeing on political issues. They can come to blows in political issues, they can kill each other on political issues, they can go to war on political issues. Certainly if we add in religious issues, if we're going to talk about having a degree which protects people's right to express views, political, one would expect also religious, if we think that what we can do is set a point and disagreements below that point will only be the merely, the kinds of disagreements you get because people don't like each other's views and things above that point are more serious ones that we can get rid of with criminality, because they're less justifiable or less protected, I would challenge that idea –

ELIAS CJ:

Well are you talking about content, content of speech?

MR GEIRINGER:

What I will be saying is that the Court needs to consider what it is, in the impugned conduct is causing the offence, and the Court needs to be very careful if what, at the end of the day, is being in fact impugned is not, is merely the message, is what's being said – it's that we don't like what's being said.

ELIAS CJ:

But there's no absolute right. We are talking here about a limitation and are describing a limitation that is consistent with the Bill of Rights Act protections

of free speech. I thought that you had accepted the Sedley formula that provocation, tending to provoke violence, for example, would be an acceptable limitation on free speech, so why are we talking about disagreements in which people kill each other? Surely you've tipped over there into a justifiable limitation or well before it.

MR GEIRINGER:

Certainly that there are exceptions, even to content. There's no absolute right to say, even whatever, to say whatever message. There are carefully circumscribed areas of content that are internationally recognised as either falling entirely outside of the right of free expression as are, as those in Article 20 of the ICCPR where not only are those issues not include in free expression, but there's an obligation on states to ban this, this is war propaganda and hate speech. But there are also other areas where it's been internationally recognised that an absolute ban on that type of conduct will never be an unjustified infringement. So obscenity and in America they'd use the word, "fighting talk."

ELIAS CJ:

Never be an unjustified –

TIPPING J:

Unjustified –

MR GEIRINGER:

Unjustified limitation. To say that you can – nobody can ever –

ELIAS CJ:

Never be a justified limitation?

MR GEIRINGER:

Never be an unjustified limitation – to ban it, to banning obscenity is okay, is what I'm saying. So it's definitely content related, it's looking at the content of the message and saying if you – if the content is within what we say this

tightly defined area of obscenity, then it's okay for there to be a blanket ban on that type of conduct, of the content. That will be a justifiable limit to ban it. And across the whole context is the point. But there are carefully considered circumscribed areas. Another one is, "fighting talk," recognised in relation to the first amendment jurisprudence. And there fighting talk is content that is intended to provoke violence. Now certainly the appellant will accept that something akin to a "fighting talk behaviour," that is intended to provoke violence is within an acceptable limit that's content based.

ELIAS CJ:

But why are we, why are we jumping into all of this. Why don't we start with the legislation –

MR GEIRINGER:

Okay let's go back –

ELIAS CJ:

– because the legislation, it seems to me, sets out some sort of hierarchy and we're not into intention to provoke violence in our legislation. In section 3, we are into likelihood that violence will be provoked and arguably in section 4, I would have thought, we were in an area where disruption of public order – where talk tends to produce disruption of public order. You're not into the likelihood of violence which pushes you into the more serious offence.

MR GEIRINGER:

No, the point here in relation to content is that the Court, in my submission, needs to tread very carefully – is as high as I'm going to put it, when what is seen to be the thing that's causing the offence is the content. And there, there is a line between something that might provoke violence because it is within a classification of which we would call "fighting talk," it's type of communication that was intended to provoke violence and communication that might provoke violence or was likely or it did provoke violence simply because it's not fighting talk, but it's simply because its audience really didn't like it and they didn't like it so much that it had the ability to provoke violence.

McGRATH J:

It's really the content though, they didn't like the content so much – that's what your focus is here –

MR GEIRINGER:

Exactly.

McGRATH J:

– isn't this case really though in the end about the manner in which the content was communicated?

MR GEIRINGER:

The appellant will say not, for two reasons, I'll – do I want to divide it that way. Because firstly the two are intertwined in this case. We say inextricably intertwined, the message was the – the manner was the message. How could this message, this exact same message have been conveyed in a way that didn't involve burning the flat at an Anzac Day commemoration. There's talk in several judgments about, well you know she could have done it some other way but could she have done the same message some other way or would it have been a different, would it have been a lesser or a different message? If one looks in fact at the decision, if I can open your pages again, the same page – page after of the case on appeals, is page 28 – and getting down to Judge Blaikie's conclusion in paragraph 23 – let me quote, "In conducting the balancing exercise, I make these following observations. The burning of the New Zealand flag in these circumstances is an act of considerable symbolism. Others may say extreme symbolism, others may say desecration." So it is in my submission, right at the heart of Judge Blaikie's decision, that he is saying it is the message, it is the burning of the flag in these particular circumstances is a particular symbol, there's a particular context, a particular message and it's that message that people don't like – he goes on, the, "That act is capable of evoking," wounding, "Of evoking wounded feelings, real anger, resentment and outrage," so the point there is that it is the manner that is the message and I will take Your Honours to another case –

ELIAS CJ:

Well I must say I – doesn't this overcomplicate things because surely the thing about symbols is that their use or abuse is speech, that's the whole point of symbols. So waving a flag is making a statement. Burning a flag is the counter to that statement?

MR GEIRINGER:

I'm not disagreeing with anything Your Honour's saying but the point is that when assessing whether or not something is offensive, one has to ask oneself, is what I don't like the manner in a way that is able to be separated from the message or is it the message itself that I don't like? And if it's the message that I – itself that I don't like, one needs to be very careful about banning it because then one is banning a point of view.

ELIAS CJ:

Yes.

MR GEIRINGER:

So if the court is of the view that the burning of a flag on Anzac Day commemoration was entirely gratuitous and the message was not racked up as we say with it, then one might say well that can be limited where we wouldn't have limited the message. And I would submit there are two little tricks that one could employ to try and see if this is possible, this is the case. One I believe is in some of the American case law and that is to try and think of a situation that's as close as possible to the situation in question but where the element of the message is taken out. And I would submit that an example in this case is imagine if Ms Morse, instead of on that day had been burning a New Zealand flag in the Anzac Day commemoration, let's suppose she had been burning a t-towel at an Anzac Day commemoration. Now would we have found or would the Judge or the audience have found to the same extent, the burning of a t-towel at the back of an Anzac Day commemoration as offensive and if one looks at all of the evidence in this case, it's all quite closely pinned to the idea of burning a flag in the Anzac Day commemoration,

so the point of that hypothetical exercise is it takes out the thing that makes it the message, but otherwise leaves the behaviour exactly the same. Leaves the manner exactly the same. And it's, in my submission, quite potent because one can immediately see that it turns it from something that one can understand why somebody not like it to an observed situation where anyone who takes offence to it is, I mean we don't really understand why. And that tells us that what people don't like about this is not the manner in which it occurred, because the manner of the two is exactly the same, what people really didn't like about this was the method. And if that's the case, if what is being impugned is in fact the message, then all I am saying at this point is that the Court must be very careful about that and must be confining the limitations in such a way that they are carefully justifiable and it's very difficult to justify banning points of view. It can be done, it has been done, it's accepted that it's, that there are limits within issues of obscenity, there are limits within issues of provoking – deliberately provoking violence, there are other limits. There's incitement, there are limits in relation to incitement.

TIPPING J:

Mr Geiringer there is a social purpose presumably behind section 4. What do you say it is?

MR GEIRINGER:

Well the first proposition I'm going to make is at a reverse order from how they appear in the submissions is that this is a public order statute. It's not that startling a submission I would suggest, given that the relevant provisions are under a heading that says, "Public order". So it's not, it's not a huge leap. The question is what does that mean, in fact in part in the respondent's submissions they appear to accept that proposition, but they put public order issues at a very low level so they talk about public order issues in relation to disturbing tranquillity and that immediately becomes a public order issue. I don't, in the name of the appellant, don't accept that, don't accept that the mere infringement on a tranquil life is a public order issue but the fact that this is a public order –

ELIAS CJ:

Are you saying that the difference between you and the respondents then is a matter of degree?

MR GEIRINGER:

The – in relation to what amounts to public order, well no, my primary submission is that in fact the merest infringement with tranquil life has nothing to do with public order. If I turn on my motor mower at 2.00 pm in the afternoon on a Sunday to have a quick go over my lawn, I am going to be creating a loud noise, it's going to bother my neighbours who are sitting there trying to watch the rugby, that is not a public order issue, it is a mere, it is the lowest infringement on a tranquil life.

TIPPING J:

But what is Parliament trying to stop here? Obviously the simplicity answer, it's trying to stop offensive or disorderly behaviour but there must lie something behind that. In section 3 it's clearly – you're trying to stop violence?

MR GEIRINGER:

Yes.

TIPPING J:

Now what are we trying to stop here?

MR GEIRINGER:

My primary submission on the issue of public order would be that they're trying to stop something that is lesser –

TIPPING J:

Yes.

MR GEIRINGER:

– but not that much lesser. The question is what happens –

ELIAS CJ:

Well isn't the key perhaps that section 3 is concerned with a manner that is likely in the circumstances to cause violence to start or continue?

MR GEIRINGER:

Could I take you back to *Coleman v Power* (2004) 220 CLR 1 and again to Justice Gleeson, again he's, he's in the – it's not his final judgment that I am pushing on this Court but he has some useful dicta just a couple of pages earlier on page 24 and I think he gets to the heart of this and my complaint is that it doesn't lead him to the right conclusion. This is the first complete paragraph on page 24. "It is open to Parliament to form the view that threatening, abusive or insulting speech and behaviour may in some circumstances constitute a serious interference with public order, even when there is no intention and no realistic possibility that the person threatened abused or insulted or some third person might respond in such a manner that a breach of the peace will occur". And his example, "A group of thugs who intimidate or humiliate somebody in a public place may possess such an obvious capacity to overpower their victim or any third person who comes to the aid of that victim, that a forceful response to their conduct is neither intended nor likely," and I think Justice Gleeson, Chief Justice Gleeson has there got to the heart of the issue.

ELIAS CJ:

Well that's what I said in *Brooker*.

MR GEIRINGER:

Yes. I thought I'd find other support – in fact I believe Your Honour went straight to *Coleman v Power* as well. I am supporting Your Honour's conclusion on that and to put it another way – let's look –

ELIAS CJ:

But you really do need to make out the statutory interpretation argument, particularly against the background of the legislative history of these provisions.

MR GEIRINGER:

Yes and what's happened and Chief Justice Gleeson makes a point of this, both in relation to the New Zealand Statute because it bears a similar pattern to what happened in the Queensland Statute, is that Parliament had that element, it was actually a higher element than is now in section 3, in that there used to have to be a breach of the peace or an intention.

ELIAS CJ:

Or an intention.

MR GEIRINGER:

So you've got an intention or whereby a breach of the peace actually occurred. Parliament got rid of it, Parliament intended to get rid of it – it is gone and I am not going to come here and argue that it needs to be read back in, especially as it would take section 4 to a higher point than section 3 even sits. And the solution by the three Justices in the Australian High Court who did read back in a public order element won't work here either because –

ELIAS CJ:

But I thought you were arguing it is a public order –

MR GEIRINGER:

Sorry?

ELIAS CJ:

– matter. I thought you were arguing it is public order?

MR GEIRINGER:

Yes. But the element that they read in won't work because it's the same element as –

ELIAS CJ:

Yes –

MR GEIRINGER:

– as we now have in our section 3.

ELIAS CJ:

It doesn't have to be fighting talk?

MR GEIRINGER:

No.

ELIAS CJ:

Yes.

MR GEIRINGER:

Well it doesn't have to be likely to provoke a breach of the peace.

ELIAS CJ:

But does it have to tend to cause, at least, the disruption to public order that Justice Gleeson was, Chief Justice Gleeson was talking about?

MR GEIRINGER:

Yes.

ELIAS CJ:

Yes.

MR GEIRINGER:

Yes.

ELIAS CJ:

Thank you.

MR GEIRINGER:

And the – and Gleeson J I think has hit the nail on the head, especially if you remember the quote from *Hansard* that was in my submissions at the time that this element was got rid of, it was expressly said that the problem was that you previously had to prove actual fisticuffs or you couldn't get a conviction –

ELIAS CJ:

Or intent.

MR GEIRINGER:

– and that's wrong. Or intent.

ELIAS CJ:

Yes.

MR GEIRINGER:

And here we have exactly why it's wrong, because you have bullying behaviour, somebody behaving in exactly the same way as might otherwise provoke violence but doing to somebody who's vulnerable and unable to respond and the law, if it was left in the old state, instead of protecting the vulnerable would be saying, because of your vulnerability, because you didn't have the power to take things into your own hand, the law offers you no protection – that's wrong and Chief Justice Gleeson hits that on the head and points out why that's wrong but the question is where does that take you, and my learned friends for the respondent will be saying that takes you to having essentially no public order element whatsoever, so it takes you from what was previously a law that required a breach of the peace or an intention to breach the peace down to nothing, or not nothing if you accept the respondent's submissions that the least infringement on tranquillity which

obviously is there in some degree as a public order issue which the appellant does not accept. But the appellant's position is that yes it takes you below where we were before, yes it takes you below the requirement in section 3, but it doesn't take you all the way to nothing, it takes you to the level that Chief Justice Gleeson is getting at in that, in that speech. It takes you to the level of saying you don't have to prove actual fisticuffs or an intention to provoke actual fisticuffs because –

ELIAS CJ:

Or a likelihood, because that's the statutory test in section 3.

MR GEIRINGER:

You don't have to prove a likelihood.

ELIAS CJ:

No.

TIPPING J:

So it's a tendency to cause a disruption to public order, short of a likelihood of violence?

MR GEIRINGER:

Yes.

ELIAS CJ:

Short of a likelihood of violence.

MR GEIRINGER:

Yes. And what does one, but one should say what one means by that and in my submission, what one means by that, is to capture the kinds of situations where Justice Gleeson, Chief Justice Gleeson's talking about that, that protect the vulnerable just because they, in the circumstances, were never likely to respond with violence doesn't mean they deserve any less protection, in fact probably means they deserve more. And it needs to capture that and it does

capture that if we talk about it in terms of a serious disruption to public order and we understand that that's what we're after and that's what we mean.

ELIAS CJ:

Or it could have a tendency to provoke violence. I agree that there has to be the protection of ordinary public use and people are not to be intimidated, but also it might have a tendency, as Lord Justice Sedley said to provoke violence but there isn't a likelihood of violence.

MR GEIRINGER:

Well, one – I'd accept that except with the caveat that going back to my point before about being cautious about contents and this wasn't an issue before Sir Stephen, so it's not remarkable that it wasn't read into his dicta, but I'm absolutely certain that he wouldn't be suggesting that just something akin to a heckler's veto, that just because the reaction to a view is so anti that view that violence might result, that there's any intention to ban views.

There are many views around today which could easily fall within this. I mean, I'll just reach out there for paedophilia. It's about as emotive as you can get, and outside a courtroom where issues of paedophilia are being discussed, one could easily imagine a perfectly legitimate view on the subject, being yelled down and maybe resulting in violence.

Now, I want to have an aside here and give the Court some comfort that if I'm saying that one cannot arrest and criminalise someone because their view, merely because their view is so unpopular it's going to provoke violence, then aren't we going to have streets full of violence because the police can't do anything about it? And the answer is no, and Justice Arnold, in the Court of Appeal, in my submission, quite correctly sets out the process. What happens if the person who's making the speech, giving the opinions, is not committing a criminal offence themselves, but there is a likelihood to promote violence? Firstly the policeman can go ask them. If it falls short of there being an imminent breach of the peace that the police, in my submission, need to stand by and allow it to happen. If it reaches the point

where it there's an imminent breach of the peace, the first thing a policeman should think about is, am I – do I have the capacity here to protect the person who's legitimately expressing their views and not committing a criminal offence? So, if it's one heckler who's trying to be violent the first thing the police should do is turn and deal with the one heckler.

TIPPING J:

We have on the table Justice Blanchard's definition of offensive behaviour, or articulation of the considerations. Do you have one for our consideration that would meet your client's needs?

MR GEIRINGER:

Sorry, the test?

TIPPING J:

Yes. What is it?

MR GEIRINGER:

Well we have, in the submission –

TIPPING J:

In your submission.

MR GEIRINGER:

We have proposed two. The first I have outlined is that it requires a substantial obstruction to public order.

TIPPING J:

Are they in your written submissions?

MR GEIRINGER:

Yes they are in the written submissions.

TIPPING J:

Could we be taken –

MR GEIRINGER:

If I could take you – I've jumped around a bit, I'm sorry, but this is starting at 113 in the written submissions.

TIPPING J:

Is this a tendency to create a, to cause a serious disruption to public order is it, or what is it? I'm sorry, I'm just looking at your heading above 113 at the moment. Do you articulate it in a definitional sort of way somewhere through here? I'm sorry, I should remember but I don't.

MR GEIRINGER:

I take Your Honour's point and possibly not. It talks about confining it to issues involving a serious disruption of public order.

TIPPING J:

I mean, offensive just means, in a layman's sense, it just means having a tendency to offend.

ELIAS CJ:

Well, I wonder. I have an issue with that too, which I'll perhaps put to counsel shortly.

MR GEIRINGER:

I'm doing my best.

TIPPING J:

With great respect, I'm trying to get some daylight into this.

MR GEIRINGER:

I'll do my best to – sorry.

TIPPING J:

I'm trying to get some daylight into it as to what actually the appellant submits the approach ought to be. You've got an awful lot of learning in here.

MR GEIRINGER:

Yes.

TIPPING J:

But my simple mind wants you to tell me what it is you say is the correct approach.

MR GEIRINGER:

The simple answer is this. Firstly, the test requires a confining on areas of subject area and on a level. So it needs to be a raising of the bar in terms of degree, but it also needs to be a tightening on scope. In relation to the section as a whole, the appellant says that the section, section 4(1)(a) as a whole as a public order offence and should not be triggered unless there is a serious disruption to public order.

McGRATH J:

Is the key to your test in paragraphs 125 to 127 essentially saying, this is a public order provision?

MR GEIRINGER:

Yes, but there are complications to that, and as they're set out in paragraph 126, it goes without saying this is the *Redmond-Bate* issue and this is the content issue, that the disruption to public order must not simply flow from the behaviour but it must be attributable to the defendant. And when one asks whether it's attributable to the defendant, one is bringing in the issues of content because in a tolerant society, just because you don't agree with somebody's point of view, you're not entitled to stop that point of view being expressed, particularly not with violence.

So, if what is occurring is merely the audience not liking the view to such a degree that there might be a result in violence, or serious disruption to public order as we've defined it to be something lower than violence, if it flows from the act of the defendant just because the message is not being well received then that, in my submission, except for carefully defined areas of content,

which we accept can be banned per se, except for that, it should not be a crime. The fact that the crowd responds badly, the obligation is to, firstly to stop the crowd and, secondly, as I was going to say, there is an ability for the police to say, "We can't stop the crowd. The person who's causing this disruption I'm sorry, there's going to be violence if you don't stop. You've got to stop." It's a common law power. It's respected in this country. It's been acknowledged in cases such as *Minto and Cuthbert v Police* (1991) 7 CRNZ 38, and if the person doesn't obey that common law power, presuming it was legitimately exercised, then they can be arrested for obstruction.

ELIAS CJ:

But why do you need to go to the common law? This argument goes too far it seems to me, Mr Geiringer, given the language of sections 3 and 4, because it doesn't require – section 4 clearly doesn't require a likelihood of violence.

MR GEIRINGER:

No, sorry I do refer back to violence because it's a simpler way of describing hypothetical situations but, I agree, it – certainly, I'm not suggesting that violence is the touchstone. The touchstone is a serious disruption to public order, which is lesser than violence and I would say that it –

ELIAS CJ:

Along the lines that Chief Justice Gleeson was indicating.

MR GEIRINGER:

Exactly.

ELIAS CJ:

Yes.

MR GEIRINGER:

Now, I'm sorry, I don't mean ever to suggest, when I use examples of violence, that it goes that high. It does, however, go that high in relation to using obstruction powers to stop protesters. The police don't have a

common law power to tell a protester to stop just because – if all it is that they don't like their view, just because people are getting annoyed at them.

ELIAS CJ:

Well, we're dealing with the statutory power. I really don't think there's any need to go into the common law.

MR GEIRINGER:

I apologise, I don't mean to divert the Court to unnecessary areas.

Perhaps it we go back to the statute itself. There is a second argument that the appellants are putting before the Court, and this stems from trying to understand the difference between disorderly behaviour and offensive behaviour.

ELIAS CJ:

Well, and that's your obscenity or indecency thing.

MR GEIRINGER:

That's the obscenity.

ELIAS CJ:

Before you get on to that, because are you leaving now the public order domain?

MR GEIRINGER:

Well, let's stay with public order if there are more public order issues.

ELIAS CJ:

Well, I just – I have a query about in the context of offences against public order, whether, and particularly an offence that needs to be construed in accordance with the Bill of Rights Act, whether one should jump too readily to thinking that offensive behaviour is behaviour which offends, which has that consequence rather, because offensive can – I mean the fighting talk thing is an aspect of the meaning of offensive, and I think it's really dealing with what

Chief Justice Gleeson was talking about in terms of provoking response, which is why I think you go too far if you say that it has to be sheeted home to the defendant.

It seems to me that sections 3 and 4 are about provocative behaviour, section 3 about behaviour which is likely to cause violence to break out, and section 4 about behaviour that tends to disrupt public use of the public space in the way that Chief Justice Gleeson was talking about.

MR GEIRINGER:

I'm not going to back down on saying that it requires it to be sheeted home to the defendant, and if there is anything in sections 3 or 4 that suggest otherwise that the likelihood if it's – if Your Honour's interpretation of section 3 is that the behaviour simply has to simply give rise to a likelihood, irrespective of who's at fault, then I would suggest in the strongest terms that to be consistent with *R v Pora* [2001] 2 NZLR 37 –

ELIAS CJ:

Beatty v Gilbanks (1882) 9 QBD 308 –

MR GEIRINGER:

It needs to be read down. It needs to be read down along a *Redmond-Bate*-type line because it cannot be right, in my submission, that there is enshrined in law a heckler's veto.

ELIAS CJ:

But that *Redmond-Bate*, whatever it was, decision, was tending to provoke violence so it wasn't violence by the person who's the defendant, and in public order, surely that's a legitimate concern that you don't want.

MR GEIRINGER:

But don't look at one sentence of Sir Stephen's judgment and forget the facts of the judgment and the conclusion of the judgment. This is a hellfire and brimstone creature on the steps of a church, trying to tell an audience what

they don't want to hear about going to hell and other issues, and the crowd reacts badly, and there is, in the view of the policeman on the scene, a possibility of a breach of the peace and Sir Stephen's point is that this is because of unreasonable behaviour of the audience. So there he has a trigger of the likelihood to provoke a breach of the peace, arguably, an actual provocation of a breach of the peace.

But this is a quashing of a conviction because at the end of the day, one looks at fault as well, and in this situation, it might have been unpopular speech with the audience, but it was not an unreasonable thing for the person to do within their freedom of expression rights. I don't – you know, I'm mis-speaking there. I'm certainly not suggesting the test is whether the behaviour is reasonable. It's within the rights of the person to make their expression and it wasn't reasonable for the crowd to respond in the way that they did.

TIPPING J:

Are you really saying that in our Bill of Rights framework, recipients of speech have to be prepared to tolerate something that they may well be offended by in the interests of freedom of speech?

MR GEIRINGER:

Absolutely I say that, absolutely, and I will –

ELIAS CJ:

What about fighting talk?

MR GEIRINGER:

Ah, well, there are exceptions. I'm not saying it is a rule without exceptions. I want to make that very clear if I haven't already. All I'm saying is that when it's content-based the Court must be very careful, and what I mean by very careful, is look at whether the speech is itself within an area that it is justifiable to ban because of the content, like fighting talk. But, generally speaking –

ELIAS CJ:

But the reason fighting talk is banned is because it is likely to provoke violence. That's the reason it's banned.

MR GEIRINGER:

It's because it's intended to provoke violence, in my submission.

ELIAS CJ:

Well...

MR GEIRINGER:

Let's turn - if I can, let's bring in some case law at some point in this. If I have volume 2 of the appellant's bundle and some American case law, in particular the case of *Cohen v California* 43 US 15 (1970).

ELIAS CJ:

Just before you go to that, I'm sorry, but just while it's in our mind, that decision of the English Court of Appeal, where do we find it again?

MR GEIRINGER:

Oh, the *Redmond-Bate* decision?

ELIAS CJ:

Yes.

MR GEIRINGER:

In fact, it's a divisional Court decision I believe, and it is in the appellant's bundle.

TIPPING J:

Tab 20, volume 2.

ELIAS CJ:

Thank you.

MR GEIRINGER:

Volume 2, tab 20.

ELIAS CJ:

I just wanted to check whether it is as – yes thank you, that's fine.

MR GEIRINGER:

So taking you to tab 11 of the same bundle, it's the case of *Cohen v California*. Advise me how to deal with this? I think as grown adults I should say what this case is about in open Court because we are dealing today with issues of offensiveness. So I apologise in advance for any language. I will make my best not to use it gratuitously, but this is a case about somebody in a courtroom, with a jacket, who had written on the jacket the words, "Fuck the draft," and was done, in fact, for a provision involving offensive conduct, and the Court of Appeal, who had upheld the conviction, had already decided that, in order to be offensive conduct it must be behaviour that has a tendency to provoke others to acts of violence, or to, in turn, disturb the peace. So, in fact, they'd already read the provision down to the extent that for the purposes of a general rule, the appellant's suggesting that we need to read the provision that we have today down.

But the point here is that this is quashed as unconstitutional, and the Court – reasons relevant is that the Court – to the point that we're discussion, the Court goes into the fact that there are carefully confined areas which it's been decided it's justifiable to ban on their content, and the relevant parts is really on page 20 of the decision. I will say that, to the extent that it's not an intention, I will accept what is set out there, in relation to fighting talk, namely that it's something inherently likely to provoke violent reaction. This is in the first complete paragraph starting, "This Court..." There is dealt with in the previous paragraph issues of obscenity, but the point is that they highlight those two areas as areas in relation to offensive conduct that are in play. Those are the two kinds of conduct that one might describe as offensive conduct, where there has been a carefully circumscribed area of content related ban that has approved to have by the Court, but outside of that there

is no general right, or no general ability to ban speech on the basis of its content.

If I could turn your attention to page 23, this speaks volumes, in my submission, in relation to the idea of a heckler's veto, and it sets the bar quite high in relation to what is required before one can say that this is something that is going to be provoking violence. It's not merely evidence that there is somebody out there who doesn't like it, or there's somebody out there who might react in a violent way. This is the paragraph, first complete paragraph, it starts with, "The rationale of California Court is plainly untenable. At most it reflects and undifferentiated fear or apprehension of disturbance, which is not enough to overcome the right to free expression. We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by *Cohen*. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect consistently and with constitutional values, a governmental power to force persons who which to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that, to avoid that to avoid physical censorship of one who has not sought to provoke such a response by hypothetical coterie of the violent and lawless, the states may more appropriately effectuate that sensorship themselves." And I think this really gets to the heart of why there has to be some consideration of who's at fault, because otherwise what are we saying? We're saying that the vigilantes out there would have stopped free expression, so to stop them from doing it, the government's going to stop it, and it doesn't work, it doesn't work. And while I'm on this case, and to stop me coming back to it, I want to draw your attention, though I believe my learned friend, Mr Price, is going to take you to it for a different purpose, I want to turn your attention to a dicta on page 26, which goes to the issue of separating manner and message.

This is at the start of page 26, the sentence beginning, "In fact." This is, I think, the first complete sentence in the top. "In fact words are often chosen

as much for their emotive as their cognitive force." So, remember that the issue here is that the obscene word used by Mr Cohen on his jacket, and the suggestion is that he could have made his message without using this obscene word. We cannot sanction, as a Court, the view that the constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function, which practically speaking, may often be the more important element of the overall message sought to be communicated. And in the next paragraph, "Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." So what they are saying, in my submission there, is that you can't, in this instance, separate the manner and the message. That might be more easy to understand in the *Cohen* situation where the manner is a choice of words but, in my submission, it runs equally for the Morse situation where the manner is the burning of the New Zealand flag at an Anzac Day parade. You cannot ban that without, in fact, banning the message.

Sorry, I've diverted us onto the – back into the previous topic but the point stands, also from *Cohen*, that it's necessary and otherwise self-defeating if one doesn't look, not just at whether there is a likelihood of violence or some possibility of violence out there in the world at large, but more importantly whether what's happening is merely the free expression of ideas that may be unpopularly received.

TIPPING J:

But Justice Gleeson was at pains, wasn't he, to suggest that public order can be disturbed or, other than through violence.

MR GEIRINGER:

Yes.

TIPPING J:

I don't think we should be hung up by violence because here, your client wasn't charged under the violence section.

MR GEIRINGER:

Sorry, no, and I keep doing it and I apologise and I don't mean to do it as to suggest that that's the level, but even if one has it at the lower level, or more particularly if one has at the lower level, one needs to be careful if one is saying that it is merely that the disruption akin to the disruption that Gleeson is talking about is occurring merely because people don't like what's being said.

I have jumped about a bit and not followed either my submissions or those of my learned friend. Let me take us back, in fact, take us back to the statute, which is tab 1 of volume 1 of the respondent's submissions, of the respondent's bundle. There are some interesting things we can learn from this. Firstly I will say in relation to whether or not offensiveness in section 4 is, in fact, a public order issue. I draw Your Honours' attention to the fact that in section 3 offensive behaviour is one of the five kinds of behaviour listed and, in fact, section 3 has a requirement for a likely breach of the peace. So, it is clear, if one accepts that offensive is meant to have the same meaning in section 3 and section 4, it's clear there that Parliament intended to use offensive behaviour to be describing a kind of behaviour that is at least capable of breaching the peace. If it's not capable of breaching the peace, then what is it doing in section 3, which has a breach of the peace element requirement. Do Your Honours take the point?

McGRATH J:

But it's just one term in section 3.

MR GEIRINGER:

Sorry?

McGRATH J:

It's just one term.

MR GEIRINGER:

It's just one of many, but if it's incapable, if it has the same meaning in section 3 and section 4, and it is something that the Court considers incapable

of being a public order issue, of raising a breach of the peace in this case, then what is it doing in section 3 if section 3 are only things which, in the government's view, were capable of it, and would be banned if they were likely to do so, likely to result in violence.

I will accept, however, that it is quite difficult to match sections 3 and section 4. We have behaviour in section 3 with five, of five different types and section 4(1)(a), which is the part of section 4 dealing with behaviour, we have only two, and that asks the question, what has happened to the other three if you have behaved threateningly or insultingly or riotously, in a matter that falls below the threshold of being a likely, likely to cause violence, then is that not a crime at all, whereas if you've behaved disorderly or offensively in a manner that falls below that threshold, are you now pinged by section 4(1)(a)? Does that make sense?

It's hard to rectify. I will suggest a method of rectifying and it is this. That riotous does not make sense if it falls below that threshold. If it falls below that threshold it is not riotous. In relation to threatening or insulting, my submission is that those terms are, in relation to behaviour alone, enveloped by disorderly and offensive, and section 4 makes it clear that threatening or insulting words are still otherwise to be punished. So my submission there is that what "harms" is meaning by threatening and insulting, is something that largely takes place with words. It's possible to imaging behaviour that has no words that one might describe as threatening. And my submission essentially is that that was intended to be encapsulated within disorderly behaviour. And it's equally possible to have behaviour without words that one would describe as insulting, and there I would suggest that it's ambiguous depending on how one interprets offensive and disorderly that, but to say that it's enveloped between one or other of those.

So, if Your Honours' take the point that somehow it seems that behaviour that is threatening or insulting, but is not likely to cause violence, it doesn't make sense that that is suddenly immune from any crime where behaviour that would otherwise be described as disorderly or offensive, is still a crime under

section 4(1)(a), and how does one make sense of that. The suggestion is that threatening and insulting in section 3 necessarily carry with them words, or to the extent that their behaviour alone there enveloped within disorderly and offensive.

It's not an easy argument, I'm sorry, but it's not an easy couple of sections to make sense of together. Looking –

ELIAS CJ:

It's a question of degree, isn't it? Section 3 is concerned with much more serious likely consequences.

MR GEIRINGER:

Certainly.

ELIAS CJ:

And then section 4 separates out some of the elements that are grouped together when they reach that level of seriousness in section 3.

MR GEIRINGER:

Certainly, but section 3 expressly talks about behaving, and the only use of threatening and insulting in section 4 is in relation to words alone.

ELIAS CJ:

Yes, but they have to be addressed to a particular person, right?

MR GEIRINGER:

Yes.

ELIAS CJ:

I think it's really quite a, probably not irreproachable, but it is a provision that does make some good sense and as I tried to suggest, it's the alarm element that seems to come through in section 4.

MR GEIRINGER:

Certainly and that's –

ELIAS CJ:

Not going as far as violence or likelihood of violence but causing alarm to people.

MR GEIRINGER:

Certainly, and that is reflected in the UK equivalent legislation, which if Your Honours' are familiar, that the equivalent there of section 5 of the Public Order Act, which requires the behaviour to cause harassment, alarm or distress.

TIPPING J:

But doesn't the whole thrust of this suggest that people are entitled to use public spaces without being subjected to whatever factor it is your concern is without being threatened, alarmed, offended or whatever.

ELIAS CJ:

Yes.

MR GEIRINGER:

Yes.

TIPPING J:

Yes, but the key point is that the Court has to balance that viso doratum with the equal importance, if not greater importance, of allowing people to speak appropriately, and in the end I don't see how one can do otherwise than make a value judgment.

MR GEIRINGER:

One makes –

TIPPING J:

That only the Court can make. Not the right thinking person, only the Court can make it in administering this section consistently with the Bill of Rights.

MR GEIRINGER:

Well, what I will say in relation to how to articulate the test. My learned friends for the respondent are suggesting that the test, as it was taken out of *Brooker* by Judge Blaikie is right in that what it does is have the old test up front and then it makes sure that it doesn't infringe on rights and engage situations by suggesting that if a section 5 justification process is performed afterwards, and what I will say is that that's not right because, with respect to the statement Your Honour just made that it's for the Courts to make this judgment, in reality this judgment needs, before it gets to the Courts, to be made by the prosecutors, before it gets to them it needs to be made by the police, and let's not forget because it seems to be –

TIPPING J:

Well that's all very theoretical and fine but ultimately if it's in Court, my point is that, provisionally and for debate, is it not the Judge that makes the assessment directly, not through the right thinking person or anyone else.

MR GEIRINGER:

Let me make my last point, which is that before it's even a judgment that's made by the police and this is pretty much neglected in the case law and it's pretty much neglected in the writings by eminent professors. It's a judgment that has to be made by the protestor.

TIPPING J:

Yes.

MR GEIRINGER:

And that points towards, as far as possible, a black-line test that includes the Human Rights considerations up front, that makes it clear to the world what those considerations are. So, yes it is a judgment, there is certainly some

judgment to be made, and I've taken on board your point about is it different from a right thinking person test.

TIPPING J:

Sorry, I shouldn't have said that because everyone accepts that a right thinking person is not the right, reasonable person.

MR GEIRINGER:

Well reasonable person. We face, of course, the difficulty that every test in law faces, which is that all Judges are, of course, right thinking or reasonable people - reasonable people and right thinking people. If they aren't, in fact, they most certainly are on their own assessment of themselves. So, how does one distinguish for a Judge between what they themselves think, and anything else in relation to being reasonable?

TIPPING J:

Well that's my point. Is it not more open and direct to say, "This is what I think. In my judgment this is going too far or it isn't."

MR GEIRINGER:

The solution, in my submission, is this, to pin it as much as possible back to concrete, objective standards that avoid the judgment, avoid the discretion.

ELIAS CJ:

Well –

TIPPING J:

Oh, we're never going to do that.

ELIAS CJ:

Well, one might do it by looking at the legislation.

COURT ADJOURNS: **11.34 AM**

COURT RESUMES: **11.50 AM**

MR GEIRINGER:

Thank you Your Honour, I'm going to try and take your point and draw us back to something a little bit more structured and particularly straight back to the statute which is at appellant's – respondent's bundle number – volume 1, tab 1. The – and so the words, and I have put on madam registrar's desk two more hand outs. The top one is OED and I'd just like to hand it out. Not of great use in deciding the case but in my submission, shows us where the starting point is and therefore shows us sort of what the job is in deciding the case. The point is, I take you to the second to last page and the last page which deal expressly with offensive. I included there the pages that deal with what it means to offend which I have referred to in case Your Honours sees some worth or value in them.

But going straight to offensiveness at the bottom right-hand corner of the third page, there are the first four interpretations, the first four definitions, are definitions which, in my submission, are definitions which somebody may, in common Parliaments, accept would be attributed to offensive even in a modern standard, certainly going back within the lifetime of this provision and the first is of course to do with attacking and it comes down with synonyms about attacking, aggressive or adapted for the use or purpose of attack. The second is a very general about causing harm, hurtful, harmful or injurious. The third is talking about the nature of giving offence of displeasing, annoying or insulting and the fourth is causing painful or unpleasant sensations in reference to taste or smell, moral feelings and that's the really important one for our case, disgusting, nauseous or repulsive.

And those I would say tell us this. That offence is a very, very broad term in two ways. First it's broad because it's very subjective in what is offensive to one person may not be offensive to other and this is the point that's focussed on by my learned friends but it also has a very wide range of meanings and it captures all sorts of kinds of behaviour and that, if one was going to start and say this has its natural meaning as people use it. If that's how we start, how interpret section 4(1)(a) and offensiveness in that section, then we start from

such a broad definition, such a wide definition that nobody in this room is going to be advocating for it and in fact, as I understand the submissions of my learned friends, nobody is advocating for it.

So that tells us something right there and then, that even on the definition that's been defined in the Courts, that my learned friends are putting forward today, it is already raising the bar and it is already narrowing it from the potential breadth of a meaning following a dictionary of Oxford English production.

So where does that get us? Well how does one attack – attack – attempt to analyse this section? My learned friends would say that because it is a term of such breadth that the right approach is to have a core term which means what it's in gist meaning in relation to this offence and that they say is embodied in the existing test aimed at deciding whether it's – how it's affecting people and to add onto that a section 5 justification. And they say that this is supported by the decision in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 and it's supported by the writings of Mr Rishworth.

I must, at this point, draw your attention to the writings of the eminent scholar and jurist, Claudia Geiringer, who addresses in her article this exact point. It's in appellant's bundle, volume 2 at tab 5. I draw your attention to pages 18 to 19. If I can find my own. This is an article addressing exactly this issue of what does *Hansen* and what it says about sections 5 and 6 of the Bill of Rights Act, tell us about other kinds of situations and the respondent's position is that it is not a case that falls easily within the technique set out in *Hansen* because of this broad and nebulous term that we're trying to analyse and what Geiringer says at 18, I draw your attention to the second paragraph after the new heading, "Can this be transformed into an ambiguity type situation?". Second paragraph starting at the second sentence, "Consistently with the premise underlying *Hansen* however, the key question with respect to this ambiguity resolving exercise ought to be whether the tests that have traditionally been propounded to elucidate section 4(1)(a) have the potential to limit freedom of expression in a manner that is unjustifiable. If so,

as these four Justices conclude...", this was referring to the four Justices in the *Brooker* decision that propounded new tests in relation to disorderly behaviour, "then section 6 requires those tests to be discarded and new ones formulated unless the offending tests are unavoidably compelled by the text and purpose of the legislation".

So this, in my submission, is not the process that my learned friends for the respondent are pushing on the Court, which is to leave the old test but to require a section 5 justification. This says quite the opposite. It says that what we must do is try and formulate a new test and the respondents also try and find support for their methodology in the decision of *Brooker* by saying that this is supported by a number of Your Honours' decisions where you say that a section 5 justification is required but as Geiringer points out in her article, yes Your Honours said that a section 5 justification was required but you were talking about then and there in your own deliberations, your own processes and that what you went on, Your Honours went on to do, is to attempt to articulate, at least in the case of four of you on that bench, attempt to articulate a new test that embodied the human rights considerations and that are applied to disorderly behaviour under section 4(1)(a) and that is what the appellants submit is required now for offensive behaviour and in essence what the appellants are saying is that it has to be something that mirrors the same considerations that went into formulating a new test for disorderly behaviour and that many of the same considerations are there and the same elements need to be included in a test for offensive behaviour.

So we've gone to the provision, we've seen how broad it could be if we take a dictionary definition, talked about the fact that offensive – that this is an offensive against public order, as it says in bold on that page in volume 1, tab 1. Talked about the fact that it must be a public order offence given that the same term is used in section 3 which must be an issue of violence.

I would like to talk about the position in relation to offence being an issue of decency for a moment and this is attempting to address the question of what do the two terms in section 4(1)(a) mean alongside one another. The obvious

suggestion is that they must mean something different. They have, until now really, and possibly arguable until *Brooker*, been left sitting there as very nebulous subjective terms that it's free for people to decide which they think most appropriately fits the situation. In fact there is at least one example of a case which was charged as offensive or disorderly, went on appeal and nobody took exception to that formulation of the charge. If I could have another hand up –

ELIAS CJ:

Well maybe they're both two sides of the same coin. Disorderly post-*Brooker* has to be of a certain degree of disruption and offensive is behaviour which tends to provoke that disorder. So you can either behave in a disorderly way to the *Brooker* standard or you can behave in a way that tends to provoke such disorder. That's why they're coupled together perhaps.

MR GEIRINGER:

I would not object to that as a possible interpretation. I'm going to put forward another possible interpretation. I make it clear that this submission and the submission in relation to it being a public order offence, both are independent submissions that stand on their own and Your Honours could take one or both or neither, though I'll try my best to persuade you not to do the latter. If I could have this hand up. This is quite telling. I hope that the form of it is acceptable to Your Honours. It is – what the appellant's is done to be as helpful as we can without unduly burdening the Court with every decision that's ever bee done. My learned fried Mr Price has gone through the LexisNexis database and the other databases he has access to and as closely as he can, sorry he informs me it's the LexisNexis database that we're seeing here. So sorry, he's gone through the LexisNexis database and he's found every report of a case under 4(1)(a) as offensive as opposed to disorderly behaviour.

ELIAS CJ:

Well what's the submission you make based on this because we can read this.

MR GEIRINGER:

The submission based on this is to ask the question, if there is a more limited interpretation of offensive than the one that appears in the dictionary, that is actually out there in common use, and we say there is. If you are somebody on the street the first way that they would define offensive, we say that offensive are matters of sex and nudity and about the excretory functions of the body and that's what people immediately describe as offensive. And whilst that might seem startling and arbitrary at first glance as a way of refining this, we will go on to say, and there is good reason, and here it is in these pages, to show that in fact this is how the police and the prosecutors and indeed the Judges in New Zealand have been treating these two words in the last 40-odd years. So in fact, we would submit that with two exceptions that I'm ready to argue away, every single case that we are able to find a report of in this country charged under offensive behaviour, section 4(1)(a), fits clearly, distinctly within that confined definition of offensive. So this – it's not a, I'm not suggesting that the District Court and the High Court decisions of this country in any way binding on this Court and how it interprets offensiveness but the point is this: if one asks the legitimate question of how is offensive actually used as a term, this is very telling information. It's sexual, it's nudity. We extend that to excretory. It's disgust in cases but it's not necessarily highlighted in the facts of any of the ones that are before Your Honours, it's an obvious extension.

There is another extension which is arguable and I will put it out there and accept it is arguable and it may be seen to come from the scheme of the Act and this is insulting behaviour. Insulting behaviour in my submission it is equally arguable to say that it falls within disorderly behaviour or it falls within offensive behaviour. But it certainly not how it has been charged and viewed by the Courts and the two cases I will draw attention too to say that they are the exception that prove my rule are firstly the case of *Hazelwood* on the third page, *Hazelwood v Police* (CRI-2007-476-000019, HC, Timaru, 20 November 2007, Simon France J) which is a case that involves simply making a Nazi salute, calling out white power. This is a case that was overturned on the basis that it didn't reach the threshold. So it was overturned

for a completely different purpose but we would say that it also doesn't fit within our definition and if it had been charged at all it would have to have been charged with disorderly behaviour on this interpretation. And the other case is the case on the first page of *Derbyshire v Police* [1967] NZLR 391, and this is a 1960s case of flag burning and most squarely, without wishing to attempt to pander to anyone on the Bench, the appellant's view is that this case was wrongly decided and we couldn't say otherwise because it is right in the heart of this present case.

So those are the two, and only two, exceptions that we are able to find with our best endeavours, though best endeavours it seems limited to the LexisNexis database. The other thing that one might draw attention to is whilst while no real issue was taken in to whether which term was the right term until *Brooker* most certainly since *Brooker* the Courts have noticed the distinction and have been making a point of it. To give an example of a case that does not give a point of it, it's the case of *Ceramalus* too. It's not in your bundle, it's in the bundles, it's not in the list. It's not in the list because it was charged as disorderly behaviour and the point I make on that, and I won't bother taking Your Honours to it, you can refer to it later if it's necessary, but the point is this, that the Court of Appeal says that really the behaviour in that case, this is walking down the street naked, is more appropriately described as offensive and not disorderly but they don't think that the decision – that the difference between those two necessitates quashing the conviction. They accept that it's possible to be charged as disorderly behaviour. The other –

ELIAS CJ:

Is there a specific offense about nudity? I see that for excretion there is a specific offense, section 32, I was trying to work out whether there's any pattern to this legislation. It doesn't seem to be anything like the offense that was prevalent in my youth in the District Court or the Magistrates Court of casting offensive matter in a public place but is there anything on nudity?

MR GEIRINGER:

Well there is indecent exposure.

ELIAS CJ:

Yes.

MR GEIRINGER:

But that's nudity which reaches a particular threshold and as Your Honour pointed out –

TIPPING J:

That's a quaint way of putting it.

MR GEIRINGER:

It's as Your Honour, I understood to be suggesting earlier, this is a low level crime and it's meant to catch areas where the criminality is lesser than perhaps other more serious but lie in a range of areas and it's our submission that it is able to catch behaviour that one would describe as warranting an interference with a criminal law but is less of a nudity example than indecent exposure and on that issue can I say at this point, can I ask the Court not to forget that very key point. That this – there's got to be something that warrants the interference of a criminal law and that phrase is often thrown out there but I ask the Court not to forget how serious and how big a deal having a criminal conviction can be, even to have a criminal conviction under section 4(1)(a). Criminal convictions are not things to be taken lightly. They are a big deal, they should be a big deal and unless we want to make them something other than that, which in my submission the criminal justice system does not want to make them something other than a big deal, then one has to look very carefully at behaviour and ask the question, is there something really that the criminal Courts should be dealing with and again I go back to my point that the police have other ways of dealing with protestors where there's a likely cause of public disturbance of some kind. There are other methods and my learned friend Mr Price is going to deal with an application the issues of proportionality and don't forget, is what I'm saying,

that criminal sanction is a really quite a substantial interference and just because a behaviour might not be good, it might not be behaviour that we like, it might not be behaviour we want to approve of, doesn't necessarily mean it's behaviour we want to criminalise.

ELIAS CJ:

Mr Geiringer, I'm just conscious of the time. Do you want to expand further on your submissions on the indecency point?

MR GEIRINGER:

The point is that there is an obligation, we say, on the Court in order to interpret and according with BORA, to seek to confine the behavior to those areas that it's genuinely intended to cover and we have in this country talked in terms of results that a behaviour may have on those who see it and it was a kind of predictive test, what results are likely or might happen. We would submit that the better approach as far as it is possible for the Court to do so is to confine it with direct description of the actual act and that's what will most assist everybody who's attempting to apply these provisions, because if the Court can say this is a provision about. And if one looks out there as to how this term's actually used by everyday New Zealanders today, and how it's being applied by the police prosecutors in Courts, one would say that this definition, which restricts it to matters of sexuality, nudity and expression, is in fact the way that it is being used and applied and therefore it's quite appropriate for the Court to, in order to protect expression which we would say is generally protected by such a limit, I'm not saying the two are without clash, certainly in the area of nudity there's a strong argument that many people are nude for purposes of expression, but by limiting it in that way it's certainly assists in protecting issues of speech.

The – I want to draw your attention to another piece of writing by a jurist, this is volume 3 of the appellant's bundle and it's right at the end in tab 23 and it's very useful on this particular point. This is Weinstein and he's discussing the views of the learned hand – this is starting at the front of four on page 40 –

TIPPING J:

I'm sorry the tab was?

MR GEIRINGER:

Sorry page 40, this is tab 23, the very last tab.

TIPPING J:

Thank you.

MR GEIRINGER:

Sorry that was the words taken to you of the authority I've done yet, but there we go, tab 23, page 40 starting at section 4. "The dangers of an uncertain legal standard for deciding whether participants in public discourse maybe punished for controversial speech is demonstrated by the clear and present danger test formulated by Justice Oliver Wendell Holmes, to deal with convictions under the Espionage Act of protesters against American involvement in World War I for interfering with the war effort. The problem with the test is that it required the finder of fact, which in a criminal case would typically be a jury, to make guesses about the likely consequences of speech. In contrast two years earlier in his masses opinion, Judge Learned Hand had engaged in a more objective and manageable analysis focusing upon the nature of the utterance itself. To determine whether the speech was immune from punishment because part of that," I think there's an, 'it was,' missing there, but it was, "Part of the public opinion which is the final source of government in a democratic state." So it's focusing on the speech, on the nature of the speech, and not on its result. And then there's a quote from Learned Hand himself, as Hand explained in a letter to the Harvard law professor Zechariah Chafée, "I am not in love with the Holmes' test and the reason," for this and, "The reason is this," sorry. "Once you admit that the matter is one of degree you give Tom, Dick and Harry DJ so much latitude that the jig is up at once. The nine eldest statesmen have not shown themselves wholly immune from the heard instinct. I own, I should prefer a qualitative formula, hard, conventional, difficult to evade." And he goes on, I'll let you read this in your own time, given the time constraints, he goes on to

show that this distinction was the cause of some significant injustice in America at the time.

There's a number of other authorities in there which again, given the time, I'm not going to take you through, but they make what I would submit is a very obvious point, is that the more discretion that's out there, the more it's a matter of judgment and I believe I'm taking on Your Honour, Justice Tipping's point here that the more this is a matter of judging the degree of the behaviour or its result, the more room there is for injustice, the more the liberty of the citizens to express themselves into state views is left up to chance and possible bias. And that is why scholars like Geiringer say that there's a necessity to, as far as possible, and I would accept on the appellant's behalf that to some degree it may not in the end be possible and that some section 5 justification process might need to be there. But so far as possible, the Court should be articulating a test, a hard black line test. Insofar as possible it should be a test that directs itself not at the possible consequences of the speech but at the nature of the speech itself and that is what the appellant is doing to the, as a greater degree as we are able in confining the term, "offensiveness," to be within those particular fields. I do however take Your Honour, Your Honour's point earlier that that's not the only way that you can define between those two points. But it is certainly in our submission, an available one and it meets all of the requirements of restricting this to what is really being, sought to be curtailed under the term of, "offensive," and is a way that reflects and supports human rights and rights of expression and interest. That is not, don't take my submission to be saying, that everything that fits within those categories should be curtailed and everything that fits outside of it is as free. What I'm suggesting is that this is a first test, this has got to be within those fields or it's not offensive, it doesn't fit within the term offensive. There's still a question of degree and we have put forward if the Court is minded to believe that this is a – that offensiveness is aimed at public morals and not at public order, then we have put forward a test which mirrors the test in public order to say it's got to be a serious disruption to public decency and there, we're not just mirroring, but we're bringing in ideas from the Siracusa Principles which talk about when one can or cannot limit on the basis

of public morals. And it's very important to tie into that test an understanding of what one means. Anything and everything can be morals to society at some point. The point in – that the Siracusa Principles make is that it should not be the morals that change with time, it's got to be something more important than that, it's got to be something more solid than that and to tie it to something more solid, it's got to be something that is fundamentally at the heart of society and it's got to be something that does not shift over time. And if we say, if a serious disruption of public decency is understood in that way, that this would be a good test of degree.

I might suggest, and this is not in my submissions, but I might suggest that there is a way to tie these two submissions, the public order submission and the public decency submission together which is there is nothing to say that the subject matter of offensiveness cannot be as we have said but ultimately that this is a public order provision and it must be something of that elk, sexual, nude or about excretory functions that disturbs the public order to the point that it creates a serious disruption to public order as we've previously discussed. There's nothing to say that it can't be both within that scope but that the level, the degree is one of public order because the provision is that its whole is one of public order.

I think I've said all I want on public order, on public decency. I'm trying my best to move through all of my submissions.

ELIAS CJ:

What do you need to take us through before you pass over to Mr Price?

MR GEIRINGER:

I will going back to my point on content, I will take you to one New Zealand decision I have, there are a range, I think all of the American decisions pretty much deal with this issue, particularly the cases of *Cohen* and the case of *Texas v Johnson* 491 US 397, 408 (1991) which of course may have been the case. I'll take you to one New Zealand case which is in the appellant's bundle

at volume 1, this is the case of *Police v Beggs* [1999] 3 NZLR 615 (HC, FC), it's at tab 11.

ELIAS CJ:

Now what are you taking us to this for?

MR GEIRINGER:

This is on the issue of content.

ELIAS CJ:

Well do you need to go back over the submissions you've already made on this. I'm just very conscious that we're running out of time.

MR GEIRINGER:

All I want to do, Your Honour, and I'll do it without taking you there if necessary, is to say that this is not a novel idea to New Zealand law, it's an idea that was embodied in the decision of *Beggs,* it's expressed there and it's expressed in exactly the terms that I've been putting forward today, that the Court should be very cautious of content. I'll just read out this one sentence, "The content of what is being expressed is somewhat obviously not normally a circumstance to be taken into account but it may be where the message is one of hatred, racial abuse, intolerance or obscenity".

So exactly what I was saying before that there are recognised areas of content and it is okay to limit those recognised areas but outside of limiting those recognised areas, generally speaking, with possible exceptions that we can't really think of or put forward an example of today or ever, in my submission, their content should not be taken into account. If you take into account content you are doing exactly the opposite of what free expression requires one to do and if I could tie this back to the underlying principles that my learned friend, Mr Shaw, set out at the start. The point, in my submission, he talked about the right to offend was being part of the right of free expression. Allow me to go one step further and say it is essentially the only operative part and I say that for reasons that are right through all of the same

dicta that says that it's part of it. That is that the right to say things that people want to hear or are happy to hear is not a right that needs protecting.

ELIAS CJ:

I think we understand that, that submission.

MR GEIRINGER:

Of course you understand that. But then – but then think of how that relates to the provision of offensive behaviour. If the level is one, set at one where a reasonable person or anybody else has decided that they don't want to tolerate it, that it's above the level that they want to tolerate, then are we forcing society as a whole to be tolerant of ideas or are we saying that we allow people to say things until the point that they're offending people and the people don't want to tolerate it and then we're stopping them and if we're doing that, are we giving any genuine weight whatsoever to section 14 of the Bill of Rights Act. Section 13 – 13? Fourteen, I'm getting it right. In my submission we're not. If we set the level there, if we say that this is something that can be assessed on the basis of what a reasonable person would – how a reasonable person would view it and as soon as a reasonable person doesn't want to tolerate it, that's where our limit of tolerance stops.

ELIAS CJ:

We understand this.

MR GEIRINGER:

Sorry I'm driving home something.

ELIAS CJ:

Yes.

MR GEIRINGER:

I won't therefore read the very famous John Stuart Mill quote which says exactly that, that one person in mankind has no right to stop everyone else, the same way and I won't go through all the authorities on that point.

I think I have covered in essence the submissions in my topics. Unless Your Honours have any further questions on the issue of interpretation.

My learned friend, Mr Shaw, is reminding me of the case of *Coleman* which Your Honour referred to earlier. This is the United Nations opinion on *Coleman.*

ELIAS CJ:

You said we haven't got it in the materials.

MR GEIRINGER:

You have it in the bundle.

ELIAS CJ:

That's fine.

MR GEIRINGER:

At 11 in the appellant's bundle of authorities 3. You have at 11 and the one point I will draw Your Honours' attention to is in 7.3

ELIAS CJ:

Bundle 3 is it?

MR GEIRINGER:

Bundle 3, at tab 11 and in 7.3 and it's back to the issues of public order but this is – remembering that this is a case about somebody handing out – making a protest in a mall without a permit to do so, the requirement being for him to get a permit.

ELIAS CJ:

Oh so it was the permit aspect of the case that went to the Humans Right Committee, not the wider?

MR GEIRINGER:

I understand, though I'm going from extraneous information, I understand that these are two different incidents. That this is in fact the incident that started this man's trouble with authorities. First he wants to make his speech in a mall.

ELIAS CJ:

That's fine, it's not commenting on the Australian High Court determination?

MR GEIRINGER:

No it is not.

ELIAS CJ:

That's fine. Yes thank you.

MR GEIRINGER:

It is not, it is I understand separate and the point out of it is in the middle of 7.3 "On the evidence", starting "On the evidence", this is one, two, three, four, five, six lines down. "On the evidence of the material before the Committee there was no suggestion that the author's address was either threatening, unduly disruptive or otherwise likely to jeopardise public order in the mall". And that's the basis on which, having accepted that a requirement of a permit before you protest is a public order issue, so it meets the threshold of a legitimate objective and presumably of a rational connection to that objective, this is the basis on which the Committee says, in my submission, that it wasn't a proportionate response.

ELIAS CJ:

That's fine. It's not on point, this decision.

MR GEIRINGER:

I'll leave it there, thank you.

ELIAS CJ:

Now Mr Price we are seriously running out of time.

MR PRICE:

Yes Ma'am.

ELIAS CJ:

So if you could bear that in mind please.

MR PRICE:

I will Ma'am.

ELIAS CJ:

Because I am anxious – we are anxious to hear the Crown on this matter.

MR PRICE:

To some extent I'm in your hands Ma'am. My part of the argument essentially draws a line under the question of interpretation. It says whatever approach is taken to interpretation it's possible that that might go wrong, it might be applied wrongly, as Justice Wild points out in the *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654 (HC) case, and it's possible that whatever test is applied might well leave some room. So the assumption I'm making is that in order for an outcome to be demonstrably justified, it must be demonstrably justified in application.

I'm also making the assumption that the Court accepts that this is a question of law which I would see is implicit in the question that we've been asked.

ELIAS CJ:

Well the Crown takes issue with that and I suppose the president in the judgment appealed from, says quite firmly that in his view it's a matter of fact.

MR PRICE:

That's why I paused a little –

ELIAS CJ:

Yes.

MR PRICE:

– because I made that same assumption in Court of Appeal and you're right. Well in that case I don't quite understand the Crown to be disagreeing that this is raising – that the application raises a question of law. In fact the submissions may be understood as the question of – this balancing matter being a question of law and being basically the whole ball game. But if I could take you to one of the Crown's authorities, which is in volume 2 of the Crown's materials at tab 26. Professor Rishworth from Auckland University is commenting on the Morse case and talking about who he agrees with, really. At pages 93 to 94.

ELIAS CJ:

Sorry what tab?

MR PRICE:

Tab 26. I'm looking down to the bottom, toward the bottom of page 93. He essentially agrees with Justice Glazebrook who says it's either a question of law or a question of mixed fact in law and he puts the question as, and this is the second to last paragraph on that page, "Whether the legal principles, properly applied to the facts as found, could legitimately have led to the conviction," and he says he agrees with that and he restates it again right toward the bottom of the page, "Whether on the facts found the appellant's actions were expression of a type that, were it to be included within the concept of offensive, would amount to a breach of her right to freedom of expression."

That's not a question of fact, that's at best a question, mixed question of fact in law and he cites the *Bose* case from the Court of – sorry the United States Supreme Court at the top of the next page, where they say that it's the duty of the Court as – the Judges as the expositors of the constitution, his is down

the bottom of that quotation, “They must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold,” because that’s – they’re dealing with precious liberties as they put it there and nothing less than that will suffice.

ELIAS CJ:

And I suppose you can pray in aid the fact that the judicial branch of government is subject to the Bill of Rights Act which would impose a similar obligation, even though we don't have the constitutional background?

MR PRICE:

Yes Ma’am. In fact I would say that that’s what Your Honours were doing in *Brooker* when you applied the rules and principles that you developed in *Brooker* to the particular situation and as the eminent scholar, Claudia Geiringer, says in her article that you’ve already been taken to, that’s what she thinks that you were doing as well. We can go back and dwell on that if you like.

ELIAS CJ:

I noticed in that other academic paper that we were taken to, the recent one, I’m sorry, above the passage that we were shown is the same sort of comment made. Who was that by? Someone beginning with W?

MR PRICE:

Oh Weinstein.

ELIAS CJ:

Oh yes.

MR PRICE:

Yes. I can also give you a very, I’ve got a box of authorities from the United Kingdom which I wouldn’t want to bother you with but they are generally in the administrative law area, but my argument would be that if it’s, if proportionality is regarded as a question of law, as it increasingly is, in fact

almost certainly is in the United Kingdom at the moment, then more so must it be regarded as a question of law in a criminal context which is much more, or doesn't involve any notions –

TIPPING J:

Whether or not –

ELIAS CJ:

Nationality must be a question of law because otherwise it's, to use the old terminology, unreasonable and that is something an Appellate Court can always supervise for.

MR PRICE:

Well, quite –

TIPPING J:

Well whether something is justified in a free and democratic society or limit is justified surely must be a question of law, at least involve a question of law.

MR PRICE:

That would be our position Your Honour. If everyone's comfortable –

TIPPING J:

It's hardly a matter of fact.

MR PRICE:

– with that I'm happy to move on. Perhaps I should simply mention that the UK case is discussed at length in *Clayton and Tomlinson*. I have an excerpt for you if that would be helpful and I could even take you through it but –

ELIAS CJ:

Just give us the reference?

MR PRICE:

Paragraph 6.9 – just a minute Your Honour. Paragraph 6.91 t the end of the chapter, 6.139. You have one – you have one of the Judges saying it's simply not a question of fact and others talking about the situations in which –

TIPPING J:

Is this your reference to *Clayton and Tomlinson*?

MR PRICE:

Yes. There are a range of quotes which would be the ones, the same ones I would have drawn your attention to if you wanted to get into it further – I don't really understand the Crown to be disputing as much –

ELIAS CJ:

Well I don't require it but I'll just check whether anyone else needs to have this expanded it.

TIPPING J:

He'll be able to address it in reply if there's any –

BLANCHARD J:

We're being asked to interpret offensive. That's got to be a question of law.

MR PRICE:

Well my colleague Mr Geiringer has talked about particularly the interpretation. As my other colleague Ms Geiringer says that that's sort of the flip side of the same question. That interpretation and application can't in some ways be separated. It's not right anyway to say that once you've got the interpretation right that's the end of the story but you can actually go wrong and that that is also something that might not be demonstrably justified and my submission would be that that then turns back also into a question, it involves a question of law.

ELIAS CJ:

Well if it's unreasonable or if it's disproportionate it's a question of law so, you know, that's not a problem.

MR PRICE:

Well in that case I'll move on with my submissions. I propose to follow my own, the way it's written in our submissions fairly closely except that I'll be dealing – I won't be reading them all, I'll just be touching on particular points. I also propose, I think, mostly to deal with some of the issues that are coming up in the Crown submissions, as they touch upon some of the points that I may hear. I start at paragraph 134 so my part is basically part 4. Mr Geiringer's is part 3. You'll see it starts off talking about that matter of the question of law and the matter of application being a question of law. We then say that, and this is under the heading "The Correct Approach" beginning at paragraph 139, we talk about the structured, the sort of structured reasoning that is required to reach a result that's proportional but the methodology, if you like, for deciding whether or particular outcome can be proportionate. I then go on to the Judge's errors, I won't say much about that. I talk about the importance of speech in the particular circumstances of this case. I don't think I need to say very much about that either. Then we get into the balancing, the proportion of the balancing that goes on which involves identifying the state interests and comparing them against the importance of the speech here. There I want to actually say quite a lot because I'll be addressing what the Crown has to say about those State interests and I will suggest that they are, they're nebulous interests in the first place. That one of the interests identified, that's the one about emotional distress or significant emotional distress, is really about the message, the content of the message, and therefore to be regarded with suspicion. The other statement that's been identified which is about disturbance, or about interference with the public's right to use and enjoy the land. My submission there is that's really about the horn.

TIPPING J:

It's about sorry?

MR PRICE:

That's about the horn.

TIPPING J:

Oh the horn.

ELIAS CJ:

The what?

MR PRICE:

A horn was blown and perhaps I should –

ELIAS CJ:

Oh, the horn, sorry.

MR PRICE:

Because somebody simply standing up and burning a flag at the back of the crowd where everybody, anyone who didn't like it could simply turn around again, isn't really interfering with rights of use and enjoyment of land. And then I want to suggest that the way that the Crown submissions drawn upon United States and Canadian jurisprudence is not really justified when you look at the body of Canadian and United States jurisprudence that they've drawn it from. Take my suggestion as this. The uses that they've made of the strands that they've taken are really anathema to the traditions of jurisprudence that they've taken them from. And finally I suggest that there are lesser restrictions that really could have been applied in this particular case including simple use of police powers or different offences that could have covered off anything that could have gone seriously wrong, most notably the offence of disturbing a public meeting. And finally I make some comments about the way the balance should be struck between the two interests.

ELIAS CJ:

Well I wonder really whether this is a distinct argument because surely you accept, and I think you make this point, that it's the same, it's an interpretative argument. I wonder whether we've really heard it because the State surely, you would accept, has an interest in preserving public order so it's a question about what the test required by the section is. Whether it's a justifiable limitation in a free and democratic society.

MR PRICE:

Yes although the Crown seems to be hitching its wagon to interests that aren't necessarily directly about public order. They identify three separate interests that they say are at stake in this balancing process and neither or those is actually public order although you might argue that the interference of the public's rights to use and enjoy the land is a public order thing. Secondly, they seem to regard this balancing process as being essentially what has to happen. I mean once you've decided that the original old test applies, which applies in circumstances that aren't rights engaging, the only thing you need to do then is just do a little bit of a check at the end to make sure that you do this balancing thing to make sure it's fine. What I'm trying to inject into that is a much greater degree of rigor to suggest that a simple balance, contextual balancing test such as the Judges did, is not what's called for and doesn't lead to a proportionate response and hasn't led to a proportionate response here and that it's either your job to say, look this is a question of law. This was not a proportionate application or to say, the methodology that needs to be applied here is a rigorous one and you didn't follow that rigorous methodology.

TIPPING J:

Once you've got the right approach to "interpretation" side of the coin are you not necessarily going to apply it and therefore –

MR PRICE:

I can take you to Ms Geiringer's – I mean it would be nice if once you get the interpretation test –

TIPPING J:
I've read that.

MR PRICE:
– exactly right –

TIPPING J:
I've read that –

MR PRICE:
– it's all going to fall out –

TIPPING J:
Yes.

MR PRICE:
But I, she says it's unrealistic to expect that but actually an interpretative test, whatever level you set it at, is going to retain some degree of nebulousness.

TIPPING J:
So you're saying that whatever the interpretation, however right that is, it may yet be wrongly applied?

MR PRICE:
Yes Sir.

TIPPING J:
Yes.

MR PRICE:
Yes. it maybe wrongly applied or in fact it may lead to – it maybe when you apply it lead to a range of results, some of which, unfortunately because we couldn't have foreseen how the test would apply all the time, might actually be

disproportionate in which case you still need this balancing exercise as a catchall just to check that you haven't, you haven't come up with a test that hasn't considered this situation and the test – our submission is, try and front load, section 6 requires you to try and front load that test to try and set it at a level that protects speech but it also requires that at the end of the day you don't come up with a conviction that's disproportionate and much as you'd want to try and calibrate and gear that test as well as you can, as Justice Wilde says, it could be misapplied or, as Ms Geiringer says, it's still probably going to leave a bit of work to do about proportionality.

TIPPING J:

Part of my problem at the moment, I have to say, and I don't know how we're going to solve this, is that I'm not quite sure what the test is that you're now seeking to –

MR PRICE:

Well I'm not talking about any test and I guess that is a problem because I'm premised on the submission that –

TIPPING J:

Well that's what I meant, that's what I meant.

MR PRICE:

– any test that you use –

TIPPING J:

Are you really saying whatever the test is it can't catch this behaviour?

MR PRICE:

No, I'm saying –

TIPPING J:

– as a matter of proportionality?

ELIAS CJ:

Yes you are.

MR PRICE:

As a matter of proportionality I'm saying that whatever test you set, if it's properly applied, in the application, it's, it will be a – it's a disproportionate application here on the facts. When you look at the facts it is simply, on any sort of a rigorous proportionality balancing, the freedom of expression at stake is too important and the competing state interests are too unimportant for you to reach any other result but you have to ask that question properly, and anyone who does, will make that conclusion and I would submit that Justice Glazebrook was the only one who actually when through that exercise in a structured way and she was the only one who reached the conclusion of... I even, my hunch is that she may not have wanted to reach that conclusion, but she was driven to it by actually conducting a disciplined, structured exercise and came out saying, well I – conviction's disproportionate here.

TIPPING J:

Well a lot of, with no disrespect to your oral presentation, but a lot of this is very cojently set out in the written submissions which I've benefited from enormously. But what is it on top of that that you're wanting to –

MR PRICE:

Right Your Honour. Well the first thing perhaps I can address is that the Crown are suggesting that perhaps our expectations are over, overly rigorous that we require too much in the way of structured balancing so I wanted draw a comparison between our expectations of what structured balancing requires and what the Crown requires. They're saying that perhaps we're suggesting that the formulaic Oakes test is the way to go. I simply point out too, that the Crown has conceded that the application's got to be demonstrably justified. It's conceded that this is not to be an impressionistic process. It's conceded that legitimate objectives have to be identified and these will be the touchstones for the justification, it's conceded that – those exercises, that those objectives need to be evaluated and weighed against the importance of

the speech, so I guess my point is I'm not sure there's that much difference between the Crown and what we're trying to say.

And it's not, I mean, with respect I would regard the archetype of what we're trying to say is what Justice McGrath did in *Brooker*, it was a – perhaps a lengthier treatment than you might expect from a District Court Judge, but that's the sort of – in fact I would say that perhaps not just Justice Thomas, but all of the Judges in *Brooker* did this sort of structured reasoning process that we have in mind, so what we're talking about here is really an application of *Brooker.* I might, I mean I do, I set out areas of the trial judgment, you have read that, I mean I think, obviously I think they're simply aspects in which the trial Judge falls short of a rigorous structuring process by not taking rights as a starting point, by not seeming to recognise that the right to offend, shock and disturb is in there. By not recognising that serious annoyance isn't going to be enough following *Brooker*, by putting too much weight on this feeling of awe and dignity and respect and on the fact that, of the occasion, on the fact that she could exercise her rights in some other way. There are a range of, there are a range of problems that I've identified there but I won't go through those in any more detail. I think perhaps it's best if I cut straight to the, well I'd like to at least perhaps – conscious of the time – we'll cut straight to the Crown's, the Crown's identification of the competing interests.

For a start, they tend to characterise the speech of the appellant as sheer insult. Our response to that is, as my learned friend has been discussing, that burning the flag is part of her message, it's not sheer insult, it's part of what she had to say. It was the only way she could say it that would say it in that particular way with that degree of intensity and get across, get it across what she wanted to say to that audience and the media beyond.

I do want to emphasise that the Crown and the Judges in the Courts below emphasised that she could have, you know I think she could have approached it in some other way. She could – she had alternatives open to her. She could have in fact just stuck with the banners and not burnt the flag. She had protested differently it the past. Well I won't – that seems to be

exactly the error that was, that the first instance Judge fell into in the *Percy v DPP* [2001] EWHC Admin 1125 (HC) case in the United Kingdom. *Percy* was another demonstrator accused of desecrating a flag. She went to, I think, an American army base of some sort in Britain and stood on a flag in the presence of other officers and she was convicted of a public order offence and the Judge said, well look she could that any number of other ways that wouldn't have contravened the law and *Percy* on appeal, perhaps we should quickly go there, it's in the Crown's volume, first volume at tab 19 paragraph 33. "The learned District Judge appears to have placed sole or too much reliance on just the one factor, namely that the appellant's insulting behaviour could have been avoided." Meaning by doing it another way. "This seems to me to give insufficient weight to the presumption in the appellant's favour to which I've already referred. This approach fails to address adequately the question of proportionality which should have been and may well have been upper most in the District Judge's mind. Merely stating that inference is proportionate isn't sufficient." The main, and she said of a series of questions that the Judge should have been asking addressed to proportionality but the main one that the Judge had really, he had asked himself, but then spent too much time answering at the expense of all the other questions was, what could she have done this, in other way. Our submission is that's the, it's one of the errors that the Judges in the Courts below have fallen into in this case.

McGRATH J:

Is your, one of your points that her right to freedom of expression extended to being able to express her views to that audience?

MR PRICE:

Yes.

McGRATH J:

That is the 5000 people who gathered at the commemorative service?

MR PRICE:

Not just freedom of expression, but freedom of peaceful assembly. Professor Eric Barendt in Britain says that's the thing or one of the things, that peaceful assembly adds to freedom of expression. The emphasis on place and the emphasis on group rights. And that strengthens your right to choose where it is that you conduct your protest and that that's inherent in that right to peaceful assembly but we'd also say in the right to freedom of expression.

McGRATH J:

Yes?

MR PRICE:

I think at about paragraph 67 in our submissions we refer to some of the European Court of Human Rights jurisprudence to the same effect that time and place is inherently part of your right to choose the way you present your message.

McGRATH J:

Thank you.

MR PRICE:

Actually, while we're there. Professor Barendt also emphasises, this is in the same article that we've given you, the one that I had wrongly photocopied and got –

McGRATH J:

Yes I've read that. It came in separately, yes.

MR PRICE:

He emphasises that actually a lot of people don't really have access to the media, they don't have access to a political pulpit, they don't have access to a religious pulpit, those people really rely on the rights of peaceful assembly and expression to get their points across.

At paragraph 163 I do a comparison between *Brooker* and *Morse* and the facts there and conclude that this seems to be a more significant protest to a wider group of people with a less obvious justification for suppressing it.

Now picking up at paragraph 164, I start talking about assessing the State's legitimate interests. The Crown has identified two interests, one of them is severe or significant emotional effect on people and the other one is the rights of public use and enjoyment and place. I've already said that these seem to be very wide and vague. The emotional disturbance one seems to be a – very much directed to the quality for the message that the appellant was trying to get across and the one about the rights to use and enjoy public space, seems to be very largely about the horn. I want to spend just a little bit of time now talking about the horn.

ELIAS CJ:

Well why? It's not relevant to the offence with which she was charged is it?

MR PRICE:

That's the thing I want to say Your Honour. That's what the District Court Judge found –

ELIAS CJ:

Well maybe if the Crown answers my query then you can respond to it in reply.

MR PRICE:

Perhaps I make my points in 20 seconds now, so you can keep them in mind.

ELIAS CJ:

Yes.

MR PRICE:

It won't be more than that. Our answer to the question of horn which does seem to feature centrally in the Crown's argument, particularly on this point, is

that it really wasn't very long, it wasn't much more of a disturbance than a baby crying or a plane passing overhead, it wasn't her, she wasn't charged with it, the guy who did it wasn't charged with it and in fact she was specifically – her charge was specifically amended to only be about burning the New Zealand flag. So if you have a look at the information sheet in the case on appeal which is at page 7 I think.

ELIAS CJ:

Yes we do have it.

MR PRICE:

It's – I mean when you see it there you realise actually she would have had no idea going into that trial that she would be facing any allegation that she was connected with the blowing of a horn and that would be held against her and be held as an – as it wasn't in fact in the District Court but in the High Court suddenly she gets notice that that's going to be a crucial part of the case against her.

TIPPING J:

So are you saying that for present purposes the blowing of the horn should be ignored?

MR PRICE:

Yes.

ANDERSON J:

She could have been charged in relation to it.

MR PRICE:

Possibly, as a party to someone else's maybe disturbing public – disorderly behaviour or something.

TIPPING J:

It had the appearance of a co-ordinated exercise because –

BLANCHARD J:

It more than had the appearance, she actually admitted in evidence that it was co-ordinated.

MR PRICE:

That's right, she said in evidence that there was an agreement made for the horn to be blown to draw attention to the flag burning. Although there was no evidence about how long, whether it was meant to be a quick blast or a longer one but she suddenly is being held responsible for that quite late in the day.

TIPPING J:

Well your best point is that there was a specific amendment to limit it to the burning. Now that's your best point.

MR PRICE:

Yes I think it is.

ANDERSON J:

And they could've charged her with particulars that encompassed the horn and the – or the whole protest actually and they didn't.

MR PRICE:

Yes sir.

TIPPING J:

She could easily have been seen as a party to the horn blowing.

MR PRICE:

I mean it's – it's written in there in handwriting, "Namely by burning a New Zealand flag, amended on such and such a date", that's your charge sheet. But as I say I think you'll find when you read through the Crown's – when it talks about this legitimate interest and public use and enjoyment of the

land, it's all about loudness and disturbance and listening. They were forced – interference with their ability to listen to the speakers. It's all about the horn.

Dealing with the significant mental distress point and I pick this up at paragraph 168 and I say that it really seems to be antithetical to the whole point of political protest which is to kind of grab people and present them with a message that they wouldn't otherwise take any notice of and given examples such as, you know, a naked woman who covers herself in paint beneath a sign protesting sex abuse or even an MP waving a Tibetan flag on the – in the precincts of Parliament. They're doing things that are likely to cause emotional distress to people but that's why they do it, that's how they can get their message across. It seems to me that this is – it seems to be simply trying to suggest that protesters should be polite during a protest and in the heart of this there's an inconsistency, I submit, in the Crown's case, a kind of a deep inconsistency, because if you have a look through the Crown's submissions, the Crown says that it – this is paragraph 93, it accepts unhesitatingly that free speech protects offensive ideas. In paragraph 101 it says that political speech is at the heart of freedom of expression and also that Ms Morse intended to convey a political message and then at paragraph 96 that the banners that were beside Ms Morse were explaining her message so that people could understand what she was getting on about, they make a point of linking those together and at paragraph 89 that – and that this was – they imply at paragraph 89 that this restriction on her speech was in fact aimed at the content of her message.

So having said all of that, it then wants to punish this speech for its quality of, what they call, denigration, what they call insult, what they call slight, which are plainly all about the content of the message, the political message, the offensive message that she wanted to convey. So they seemed to be accepting that a political speech can convey offensive ideas and yet at the same time trying to say well she should be punished for the fact she's behaved in a way that's denigrating or insulting or slighting, which by the way, seems very clearly aimed at the viewpoint of the message. I think it's

inescapable that the reason that this is slighting or insulting or denigrating is that people disagree with the content of the message.

TIPPING J:

And disagree strongly.

MR PRICE:

Disagree strongly with it.

TIPPING J:

But that can often be the case.

MR PRICE:

Well it will often be the case in a political protest because that's how people who don't otherwise have access to the political processes can get their message across. In fact, and part of our case is, that society is increasingly tolerating that. We kind of quite like these – maybe not like but we expect people to be in our face with their protests. We – to some degree kind of –

TIPPING J:

Is it a question, Mr Price, of society tolerating it or whether – is it a question of whether in order to be Bill of Rights consistent, society should tolerate this?

MR PRICE:

I think it's a little bit of both. Part – part of our argument is that society is coming to a point where they – people will generally tolerate more offensive messages in the context of a political protest than before. A classic example is probably *Derbyshire*, where it was – it was flag burning or is it *Melser v Police* [1967] NZLR 437? The laying of a wreath for the – the people who died on the other side.

ELIAS CJ:

Wainwright.

MR PRICE:

Wainwright, sorry, it was Wainwright. The laying of a wreath for the people who died on the other side. But we would tolerate that without batting an eyelid today but I also say that the Courts should be requiring that degree of tolerance. In fact, I wasn't going to get into this, I'm going to since you've raised it. You might like to look at the Lee Bollinger's work called the *Tolerant Society*, he's a law professor who says that actually all the other justifications for speech don't really work but the one that matters is tolerance because as a society we have this impulse toward intolerance, both in speech and in tolerating other people's, not just their beliefs and their speech but also, you know, their sexual practices and things and the whole point of freedom of speech is to instil an ethic of tolerance.

TIPPING J:

That's why I used the concept of tolerance in *Brooker*, actually.

MR PRICE:

Yes Sir. It's – it's – you have to – you then have to talk about reasonable tolerance. As soon as you get into reasonableness then it's, as you've said, it's problematic, it's almost – it's almost like the right thinking person with – with another coat on, I think which is why my learned friend was trying to push you towards coming – with a test that focuses to the extent you can on the conduct rather than reaction. I accept it's problematic Your Honour.

I want to spend, I think perhaps only five or 10 minutes going over the treatment of the Canadian and United States jurisprudence and I have a handout, which I am not going to go through in detail, but it will then allow you to follow up if you want to.

ELIAS CJ:

Will that then conclude your submissions Mr Price?

MR PRICE:

I have a little bit more to say on the final balance after that. I've probably got 15, 20 minutes to go.

ELIAS CJ:

Well we'll take the lunch adjournment now, but should we resume at 2.00? Okay we'll resume at 2.15 as usual but we'll hold you to that 20 minutes Mr Price, thank you.

COURT ADJOURNS: 12.57 PM
COURT RESUMES: 2.15 PM

ELIAS CJ:

Yes Mr Price.

MR PRICE:

Thank you Ma'am. I'm not sure if those, the supplementary memorandum has been handed out. Do you have a copy on your desks Your Honours?

ELIAS CJ:

No.

MR PRICE:

This is to address the Crown's arguments about captive audience and public forum, which I understand they are using to support their case that restrictions are demonstrably justified here. In part because the audience is, to some extent, captive, and therefore it's easier to justify restricting speech that is directed at them when they can be understood to be unwilling and in part because as I understand it the argument is that the sort of speech that the appellant was engaging in undermines the basic functions of, of when the sort of speech a person is engaging in undermines the basic functions of that place and that could be more readily restricted as well. My contention is that those propositions which are taken from the American and Canadian free

speech jurisprudence are taken out of context and they overlook the many qualifications and layers of, that are in the American and Canadian jurisprudence and in particular that both are, but in particular the United States are extremely hostile to regulation of offensive behavior. It's simply not accepted in the United States that offensiveness can be a ground for restricting speech. In fact I can take you to one of the Crown's authorities, if I might, I don't think I'm going to do much, I'm not going to spend very long with this memo but, probably because I don't have it, but I would like to take you to the Crown's second volume, the first tab there, that's tab 23, the case is *Hill v Colorado* 530 US 703 (2000). That's a case about a buffer zone that was placed around health clinics to protect people going to seek advice about abortions and I want to pick up a couple of things from that case. The first one is on page 716 and at the first whole paragraph there, about four lines down, the Court says something that's really common place in American jurisprudence, for anyone that's familiar with it, "The right to free speech of course includes the right to attempt to persuade others to change their views and may not be curtailed simply because the speaker's message maybe offensive to its audience." I could give you another hundred quotations of similar ilk. There are a lot of them in *Texas v Johnson* for example.

If you flick over the page to page – perhaps I'll pause there and say this I mean there's a similar quotation from the Canadian jurisprudence there as well and, I mean to – I think an American visitor would be surprised to see these cases being cited in support of a proposition that a broadly textured offence like offensive behavior could be used to prosecute someone for flag burning. On page 725 the Court in *Hill* go on to talk about the restrictions that must be in place, the sort of requirements of this captive audience thing, this captive audience doctrine, that really must be in place before you can even go on to think about captive audience and right at the bottom of page 725, under the numeration, roman number IV, they point out that for a captive audience to come into play there has to be, what they've found to be, a valid time, place and manner restriction which is narrowly tailored but serves a significant and legitimate Government interest and then over the page it's content neutral. So what I'm saying is you can't even get to a captive

audience jurisprudence doctrine over in the United States until you've got past, it has to be a narrow time and place restriction and in that case we have, I think, a prevention of picketing or – no, actually, approaching people within 100 metres of a healthcare facility. Now that's a time, manner and place restriction. It's specified as to time, very closely, as to place, very closely, as opposed to this case here where we have the complete opposite of the time, manner and place restriction which is the offence of offensive behavior. It doesn't even, it's not even in the ballpark of being able to be justified under this jurisprudence.

McGRATH J:

If you were appearing before the United States Supreme Court, Mr Price, you no doubt would be arguing that the section should be struck down –

MR PRICE:

Certainly Sir.

McGRATH J:

Not something that's available to us.

MR PRICE:

I understand that Sir.

McGRATH J:

We have to work within the limits of the section itself.

MR PRICE:

I understand that too Sir. I am simply saying that I think it's, it's a little bit mischievous of the Crown to pluck pieces of this jurisprudence out that would be anathema to the American free speech jurisprudence and without reference to actually the requirements that allow the Courts to even contemplate starting to justify restrictions on the basis of captive audience.

The other thing that I want to emphasise is that captive audience jurisprudence and particularly in the United States is point number 3 is directed at intolerably invasions of privacy and that comes from the *Cohen v California* case which is I think the only other one I'm going to bother to take you to because we all have our favourite quotations from *Cohen v California*. This is in the, in our bundle, the appellant's bundle at volume 2, tab 11, page 21. Remember the *Cohen* case of the guy in the courtroom corridor wearing, carrying a jacket that said "Fuck the draft." They point out about halfway down the page that they, consistently stress that we're often captives when we go outside, to some degree. We're often captives outside the sanctuary of the home and subject to objectionable speech. About halfway down they say, "To shut off discourse solely to protect others from hearing it is, in other words, dependent on a showing that a substantial privacy interest – sorry that substantial privacy interests are being invaded in an essentially intolerable manner." It's a very high standard and it revolves around invasion of privacy. And then later on towards the bottom of the page they say that – this is right, about the second sentence in the last paragraph, "Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."

So as far as captive audience jurisprudence is concerned my point simply is that there is no narrowly tailored limitation here. The government interest in this case I would submit is not nearly as pressing and substantial as the sorts of things that have justified the restrictions in the United States such as the trauma to vulnerable abortion patients and aggressive picketers outside people's houses. The restriction here is not content neutral the way it has to be in the United States. So for example in the abortion case the rule was especially designed so it applied to all protest, education and counseling. Well our rule applies to offensive behaviour which, you know, the Crown captures burning a flag but on our argument wouldn't have caught, for example, burning a tea towel or a swastika or an American flag. So it's clearly related to content. There are similar citations which I won't go to in the Canadian cases, that captive audience is only relevant in limited circumstances.

ELIAS CJ:

I'm not quite sure that I understand this submission because the, I thought it was because the offence here is to, too vague but the cases, the US cases are similarly broad. The offences themselves.

MR PRICE:

Such as?

ELIAS CJ:

Well offensive conduct.

MR PRICE:

Is that in the Cohen case –

ELIAS CJ:

Yes.

MR PRICE:

– where they actually didn't. I mean they either struck it down or struck it down as a client –

ELIAS CJ:

Yes, yes I'm not disputing how they dealt with it but I thought you had said that you don't even get to captive audience doctrine until you have a very narrow, tailored provision?

MR PRICE:

Well it's going to fail on a number of grounds and one of them will be captive audience –

ELIAS CJ:

Yes.

MR PRICE:

– and one of them will be narrowly tailored, if you have a wider one, but the archetypal cases that have been cited in support of this proposition all involve very narrowly tailored restrictions that are upheld and my point is really that it's just not what we have here.

ELIAS CJ:

Right.

MR PRICE:

To some extent the flavor of the Crown's submissions is all about, well its' not really very much infringing on her rights. It's only in the time and the manner and the circumstances that, in these particular circumstances that her rights are being even a little bit hurt and you might get a feeling that, well that sounds like a time, manner and place restriction. My point here is to emphasise it's not a time, manner and place restriction because it's not, it's such a broad offence it's not clear when the finger of God is going to come down and point to you and say, your behavior was offensive compared with these cases here it's all about, well if you're within a hundred feet of the entrance to a medical facility you know you've crossed the line, it's narrowly and specially defined, specifically defined.

I emphasise further on down at point 7 there that it has to be very, you have to be very captive such as being in a, you know, the abortion harassment cases or residential picketing and you'll be familiar with what from *Frisby v Schultz* 487 US 474 (1988) (SCUS) in the *Brooker* case and that, you know, being in a courthouse you're not a captive audience. Being a neighbor of a drive in theater that's showing adult pictures, you're not a captive audience. And here you're a long way from being a captive audience, I submit, for the reasons over the page there. The burning of the flag was very brief. She was at the back of the crowd. The crowd could avert their gaze. It was a very public place. It's difficult to see a privacy interest at all there. There was no element

of targeting or harassment or vulnerability or confrontation or importuning or dogging and you'll see those are the characteristics of invading someone's privacy in the cases that the Crown has pointed us towards. There's no destruction of the inter-play of ideas, particularly if you put aside the horn but even factoring the horn in it was vey brief.

I would submit the only case that comes even close to our current one is the funeral picketing cases so there have been buffer zones created around funerals to protect them from people who've picketed the funerals in the United States but my submission, quite different to what we have here, I mean on a surface level that seems a little bit different to a – a little bit similar to a commemorative occasion in the Anzac Day ceremony but my submission is that they're actually quite different in that the level of offensiveness, for one thing in the United States in these cases that's justified these restrictions, is a whole lot worse. It was people protesting with God hates fags signs –

BLANCHARD J:

That's the one that's going to the Supreme Court this term isn't it?

MR PRICE:

Yes, yes. In fact I think it's tomorrow.

BLANCHARD J:

Is it?

MR PRICE:

Yes. There are two parallel proceedings. One of them is about whether this buffer zone is acceptable and the other one is about a lawsuit that's being brought on the basis of intentional infliction of emotional distress. These people from this church would turn up and say, thank God for dead soldiers at the funerals of people who were coming back from –

TIPPING J:

Mr Price, in the interest of time, is your client's case here essentially captured by your points 19 and 20 in combination? 19 and 20 on this sheet?

MR PRICE:

Yes although the public forum arguments are slightly different but that's essentially it.

TIPPING J:

Well they seek reading –

MR PRICE:

Yes.

TIPPING J:

Those two points in combination –

MR PRICE:

Yes.

TIPPING J:

– however one might dress it up or articulate it –

MR PRICE:

Yes well as I say the public forum arguments, I mean they seem to be even more fraught from the Crown's point of view. I mean they seem to be trying to argue that the speech is inconsistent with the basis –

TIPPING J:

You say this is not a compelling State interest and the response to it is disproportionate?

MR PRICE:

Well their argument is slightly more subtle I think. They're saying that when speech undermines the function of the place then you can restrict it and my

response is slightly more subtle which is to say, if you look at the jurisprudence actually the question they're asking in Canada for example is, is it completely incompatible for the actual function of a public space and the answer would be, given in Canada, would be if this is a public street, this is one of those situations where it's not about the occasion, it's about the place. How has it been used traditionally? This is a public street, out in front of Parliament, my submission is that there's really no doubt that they would simply say well, you know, this qualifies as speech because it cant be knocked out as qualifying as speech because it's inconsistent with the values of freedom of expression, the way they will sometimes knock out some speech. So it's misleading, I think, to use – to suggest that the Canadian jurisprudence somehow has relevance here. Similarly with the public forum jurisprudence in the United States where they talk about, the case they're citing talks about designated public forums and says that, there are three sorts of public forums in the United States. Ones that are traditionally public where, you know, everybody from since time immemorial or because government has declared it can go there to exchange ideas. Then there are extra ones that the government has specifically designated as public forums and then there are limited public forums as well, potentially. So this is a case about a designated public forum and they're saying if the nature or function of the property is inconsistent with expressive activity then it won't be designated or then it's all right to regulate it. My – I don't want to get into the complexities of it because the simple answer is we're not dealing with a designated public forum, we're back I the public forum, the traditional public forum, so it's clearer than the United States, they would say it's a street, it's a university, it's Parliament, that's a traditional public forum, it's very, very hard to uphold any restriction of speech in a traditional public forum and again you have go into specified time, manner and place restrictions that are content neutral and narrowly drawn, serving a significant government interest. None of which I think are available here. I know I'm sort of rushing through this, I don't know if –

ELIAS CJ:

Well it is, you are anticipating the Crown's points and you're asking us to bear in mind that the context is quite different, if it's necessary to return to it in reply, you've made your point.

MR PRICE:

Yes Ma'am. I think, my general point is if you wish to rely on the principles that they're saying come from those cases, I would submit that it – you have to look at the context from which they came and I would submit that that shows that the points that they're making have much less force than might be apparent.

I have only another four or five points to make and some of them can be made very briefly. One of them, I think I'd like to take you to this as well, it's a brief point that I want to make from the *R v Spratt* 2008 BCCA 340, (2008) 235 CCC (3d) 521 case which is in the Crown's volume 1 at tab 20. *R v Spratt* is the Crown's version of the *Hill v Colorado* case, it's another abortion restriction one, but I want to use it for a more general purpose which is on page 532. Toward the bottom of the page there's a quotation there from Nova Scotia Pharmaceutical noting that vagueness of an offence can be relevant to its proportionality. So the quote says, "Vagueness can be raised under section 7 of the Charter since it's a principle of fundamental justice that laws may not be too vague. It can also be raised under section 1 of the Charter on the basis that an enactment is so vague it does not satisfy the requirement of limitation that be prescribed by law. Furthermore, vagueness is also relevant to the minimal impairment stage of the Oakes test. So I'm simply using that to support the point that I make in paragraph 170 of our submissions that when an offence as nebulous and elastic and open textured as offensive behaviour, then the proportionality of any particular application of that vague, nebulous test can relate back to how nebulous it is in the first place. I mean it can be found to be less proportionate because it's nebulous or it's more difficult to justify an application of it when you have a nebulous test and if the behaviour falls toward the edge of offensive behaviour, it's hard

to call a conviction on the basis of that nebulous test, a proportionate outcome.

I want to make, I'm actually going to cut right to the end of my submissions at paragraph, around 180, well it's around the last page of my submissions and underscore the point that this offence does not need to be interpreted widely because there are a range of other offences and police powers that are capable of dealing with situations where action is required because disturbance might be about to take place. And in particular emphasise section 37 which is disturbance of a public, disturbing a public meeting which has a fine of $200 which seems like, without conceding anything, that might be a more proportionate way of dealing with this circumstance. If not, a simple exercise of police powers if things were getting underhand to simply ask her to stop and either move her along or arrest her and not convict her. We also mentioned of course in our submissions, that the specific, offensive flag burning would have been the obvious one to charge her with here and it seems to be what Parliament had in mind and this seems to be doing an end-run around that, that particular offence and we would say subverting, really, the whole Parliament's structure that its put in place for dealing with somebody who burns a flag, and including the requirement of consent from the Attorney-General. The requirement of intent that's specified in that section.

I'd also like to emphasise because section 185 which is a bit of a grab bag of other factors that we think are relevant in the balancing. One of them is the need to check the mushrooming use of section 4. I think you'll see if you flick back to paragraphs 43 and 44, and this is another thing I want to underscore, is that something that I found surprising when looking at, doing research for this case, the use of section 4 has mushroomed in the last 18 years. In 1990, it's – in 1990 I think there were about 2000 convictions for disorderly behaviour and other offences of that ilk. Disorderly offence of I think, fighting in a public place might be included in there as well. But by the year 2008, it's up to 10,000. It's probably still going up. So in 18 years we've had a five-fold increase of the use of these vaguely drawn powers, few of

which ever make it on appeal. And which, in my submission, really need to be reigned in because it's suggesting, it's certainly giving an awful lot of power to police to use – and they're clearly using it, in ways that I'm not sure we fully understand, and I'm not sure – and we seldom get to regulate via an appeal.

The point being, the submission being that it – the Court really needs to crack down and tighten up these offences so that they can only be used where it's appropriate and proportionate because at the moment it's hard to have confidence that that's the way they are being used.

Just one other smaller point I want to make and then I think I'll finish. The Crown in their last page, the last page of their submissions rely on the case of *Chorherr v Austria* (1993) 17 EHRR 358 (ECtHR) which is another process case, a European Court of Human Rights case from I think, 1993, in the 1990s anyway which set a low threshold for the States to be able to respond to protest activity. I won't go into the details but what I do want to draw your attention to, though I won't actually take you there, I'll just mention, is that the Mead text that the Crown refer to at volume 2, tab 28, at page 110, they – David Mead the author there discusses the *Chorherr* case, points out he thinks they've got it wrong or at least criticises it in some degree and he says it's also old and contrasts it with the case that we place more reliance on which is the more recent case of *Öllinger* which takes a much stricter response, a much stricter attitude towards state regulation of protestors. And in both our submissions and the Crown submissions discuss that, but my point really is that David Mead is saying that, that is not only better but it's also more recent and more indicative of the current approach of the European Court of Human Rights and I might refer you especially to paragraphs 69, 71 and – this is of *Öllinger* 69, 71, 72, yes those paragraphs of the case. Volume 3, tab 6. That's *Öllinger* volume 3, tab 6, paragraphs 69, 71 and 72. I think the last point, unless you have anything further is to suggest that this case is part of a tide that's coming in really in favour of protestors' rights and that's in the Courts in cases we've seen like *Beggs* and *Hopkinson* and *Brooker* and also it's matched in the legislature where they've, in recent – well in recent years and decades got rid of criminal liable, sedition,

electoral liable, they've passed the Bill of Rights Act, the security legislation that's been passed recently, the SIS Act, I think Marine Security Act contains specific protections for protesters – it actually refers to rights of protesters so that they're not going to be deal with, they're not going to be caught up interview he mechanisms and also, for example, the Broadcasting Standards Authority sets a very high threshold for complaints about offensiveness. That's all I have.

ELIAS CJ:

Any questions? Thank you Mr Price.

MR PRICE:

Thank you Your Honours.

ELIAS CJ:

Yes Mr Mander?

MR MANDER:

Yes may it please the Court, as will be very clear by now, in my submission, the issue for this Court is whether or not the Lower Courts correctly interpreted the offensive behaviour limb of section 4 and further whether or not the Lower Courts correctly applied in the circumstances of this case, that offence provision.

It is the respondent's submission that the Lower Courts went about the task correctly and applied the correct law as distilled from the case of *Brooker* to the facts of this case.

The Lower Courts applied an established test at common law for offensive behaviour. The test that was set out – or is set out in Justice Blanchard's judgment in *Brooker*, that being behaviour that is liable to cause substantial offence to persons potentially exposed to it, capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the reasonable audience subjected to it.

That is a test which necessarily must be applied across a wide spectrum of potential offending, which may or may not give rise to Bill of Rights Act considerations.

ELIAS CJ:

Mr Mander, when you say this is the established common law test and then in your submissions you don't give any reference to that, apart from *Brooker*, is there any other authority that you're relying on there?

MR MANDER:

In my submission the test comes as, as I believe my learned friend alluded to, initially from the case of *Ceramalus v Police* in the High Court.

ELIAS CJ:

Yes.

MR MANDER:

I'm trying to find the reference in the written submissions where – paragraph 23, my learned junior advises, at footnote 24, I'm obliged, where the cases of *Rowe, O'Brien, Ceramalus* and since *Brooker*, *Hunter* and *Lowe*.

TIPPING J:

I'm not quite sure how my observations in *Brooker* are consistent with this observation because I thought I was studiously careful not to go into questions of offensiveness, other than to remark on Justice Hansen having used offensiveness as the test erroneously. This is – I am only raising it because you raised footnote 24.

MR MANDER:

Yes indeed. Well perhaps if we can go to - go to those cases.

TIPPING J:

But it's only a side point and won't, no doubt, affect much at all but I was just a little curious where you got that from. But perhaps you can come back to it in maybe in a moment.

ELIAS CJ:

So when you say that it's the orthodox or the established test, these are the authorities that you're relying on?

MR MANDER:

Indeed.

ELIAS CJ:

You're not relying on pre-existing common law or English authorities or anything like that? It's this line of authority which is all self-referring too.

MR MANDER:

Indeed Ma'am.

ELIAS CJ:

Yes, that's fine.

TIPPING J:

But of course there was no such thing as common – the common law is really irrelevant, isn't it? It's only the interpretations that have been placed on this expression in the present Act and prior cognate legislation.

MR MANDER:

Yes I rely upon the way in which the Court of Appeal in *Rowe* for instance picked up on Justice Tompkin's decision in *Ceramalus* and was accepted and has been accepted, in New Zealand anyway, certainly was not –

TIPPING J:

But one of the problems I've got with it is that the level of offence is couched across the board. In other words it applies, seemingly, to cases which involve and do not involve the Bill of Rights as a test.

MR MANDER:

I agree with that observation, indeed it does. In my submission, the offence provision will necessarily have to apply to cases that won't give rise to BORA considerations.

TIPPING J:

Of course but the question is what adjustment, if any, do you make when it does involve, because I thought both my brother Blanchard and I, in *Brooker,* tended to look at it in two steps. When it does not involve and then when it does there's an additional dimension to factor in.

MR MANDER:

Absolutely Sir and -

TIPPING J:

So is that an application question rather than an interpretation question?

MR MANDER:

Well the test having been made out, where a case gives rise to BORA considerations, the behaviour in question gives rise to questions as to freedom of expression, freedom of assembly, as Your Honour will be well aware, there is need then to determine whether or not a finding of offensive behaviour, a finding of a breach of section 4 can be reasonably justified in the circumstances of that case.

TIPPING J:

So it is really application rather than interpretation, where you make the adjustment?

MR MANDER:

Indeed.

TIPPING J:

All right, I just wanted to clarify that conceptual point.

MR MANDER:

And the submission that I make today is that that approach is a sound approach, with respect and it is one that will preserve and guarantee rights and it is one that will give effect to the criminal law as it should be applied, appropriately recognising the rights of the citizen.

The appellant has put forward two alternative approaches. One that would limit the application of the offence provision only to activities involving public decency. In my submission and I don't intend to go into it in to any great detail, but in my submission, the statutory context, history and language of the provision is such that that simply cannot be discerned as Parliament's intent and it would not, in my submission, be a reasonable limitation of the offence provision.

The other way in which the appellant has submitted the offence provision could potentially be limited, is by limiting the application or the finding of offensive behaviour to only those cases where there has been a serious disruption of public order. In my submission, that is really just a repetition of a finding of the offence of disorderly behaviour, the other limb set out in section 4 which this Court considered in *Brooker*. It would make the two offences of offensive behaviour and disorderly behaviour indistinguishable and in my submission that, again, was not Parliament's intention.

TIPPING J:

Can you not threaten public order both by being disorderly and by being offensive?

MR MANDER:

Absolutely Sir. Without question.

TIPPING J:

Well I'm sorry I don't quite follow the point of your submission then by saying that to do what the appellants are doing, merges the two so as to leave no room for differentiation.

MR MANDER:

Well a serious disruption of public order requires a certain level of interference with public order. In my submission feats of behaviour will undoubtedly infringe upon public order but in my submission it need not be a serious disruption and that's the submission that I'm making, that by ratcheting up the level of interference in public order, such that it must be a serious disruption, goes too far.

TIPPING J:

What is the vice, is the vice that the Crown says that this section 4, in its offensive manifestation is aimed at, is preservation of public order or that's not the vice but that's the purpose of it. It's to avoid disruption to public order, is it, do you accept that or is there some other vice that the section is aimed at. Because violence is three, what is it in four?

MR MANDER:

In four in my submission, it is an interference in the public's freedom to enjoy a particular public space and to be free from a level of interference in the activity in which they're engaged in in that public space, which they ought not have to tolerate.

McGRATH J:

Do you draw that from, by implication do you. Is it – I mean it's – you don't have the consequence spelt out specifically as you do in section 3, so do you draw that by implication from the word, "offensive," or from the context or how do you draw it?

MR MANDER:

It's drawn in my submission from the meaning of the term, "offensive," –

McGRATH J:

Yes.

MR MANDER:

– and it's drawn from the acknowledgement that there has to be acknowledged, that sections 3 and 4 do go to public order. But in my submission one needs to identify having regard to section 3, the level of public orders being sought to regulate.

McGRATH J:

What's the meaning, how do you – what's the meaning you give to public order in this context. I mean public order really is just coming in, in the heading, isn't it, to this group of sections?

MR MANDER:

The meaning that's attached to public order on the respondent's submission is set out at paragraph 48 of the respondent's written submissions and my learned friend placed great emphasis on the Crown's reference to tranquillity. And that needs to be set in the context of the other descriptions of being secure from disruptive behaviour. Being able to use and enjoy the amenities of the environment available in the public space. That in my submission is what is sought to be or the value of the public order which is sought to be protected and in my submission, the present case provides a very good example of the type of use of a public place that was sought to be enjoyed.

TIPPING J:

Would it be better to say ability to use a public space rather than enjoy a public space, because enjoy has somewhat strange connotations in this field

when you're talking about conflicting – you've got to put up with a bit of hassle. The question is how much?

MR MANDER:

Indeed Sir. Indeed I certainly accept that and that formula is taken from the Court of Appeal in *Rowe*.

TIPPING J:

Well I don't like the word enjoy in this context.

ELIAS CJ:

I should indicate that I have doubts about *Rowe* and so if you're really relying on *Rowe*, you may need to address it.

MR MANDER:

Well the emphasis I wish to place upon is the value in members of the public being able to use a public space for a particular purpose.

McGRATH J:

But you're not talking so much about enjoyment of the place as such, as I understand it, you're talking about the enjoyment of being secure from disruptive behaviour?

MR MANDER:

Indeed. Indeed Sir. The emphasis that I seek to place is on the public interest, the state interest in securing for its citizens the right, and indeed it was a right in this case in my submission, to utilise a public space which for that particular time was clearly designated for a purpose, namely a service of remembrance and was there, was a facility which was there to be used by attendees of the Dawn Service in the exercise of their right to freedom of expression, that is to collectively come together and pay their respects and acknowledge, at a commemorative service, the sacrifice of the fallen. And in my submission that is the value in this case which is the prime value which is sought to be protected by the offensive provision.

TIPPING J:

And then you went on to – sorry.

ELIAS CJ:

Sorry, I was going to say, it has to apply in all circumstances however. If you were, if you were putting this on an interpretative rather than an application basis, you have to have a test that's capable of applying whatever the reason people are associating together.

MR MANDER:

Well in my submission it will have to be, it will have to be calibrated by time, place and circumstances.

ELIAS CJ:

Yes I understand that, yes.

MR MANDER:

But it might –

TIPPING J:

Is it effectively ability to use public space without interference which the public should not have to tolerate?

MR MANDER:

In a nutshell Sir, yes.

TIPPING J:

Yes. And you use the words, "should not have to tolerate advisably"?

MR MANDER:

Indeed, indeed.

TIPPING J:

In a sense that is a little circular and I say that as perhaps as much against myself as anyone else. In, on reflection because doesn't that sort of almost beg the question how much should someone have to tolerate. That is a value judgment which according to my tentative thinking, only a Judge can make when applying, if you like, the Bill of Rights to the perhaps, more the application – it's – I find this difference between interpretation and application quite puzzling and any assistance you can give along the way on that point Mr Mander I would welcome.

MR MANDER:

Well I would have to acknowledge that ultimately it is going to be a value judgment, section 5, in my submission, doesn't really admit of any approach in my submission.

TIPPING J:

But you've got to construe it in a way that's consistent and then you've got to apply it in a way that's consistent. I don't think there's any dispute about those two propositions?

MR MANDER:

No Sir.

TIPPING J:

But if you've already construed it in a way that's consistent, this is the point I was raising with one of the appellant's counsel, it is said that it doesn't automatically apply that that will give a Bill of Rights friendly application, so you've got to sort of double, a double bite of the cherry if you like, according to the appellant. But the, what do you say about that?

MR MANDER:

Well candidly, in my submission, the formula that the ordinary, a natural and ordinary meaning to give – to be given to the term "offensive behaviour," is

going to capture behaviour that's wider than cases that were necessarily give rise to BORA issues and it ought to.

TIPPING J:

It has to.

MR MANDER:

Indeed. So one is not going to get the –

ELIAS CJ:

Well I don't know because what about the – some other provisions of the Bill of Rights Act, the ones concerned with certainty in the application of the criminal law? If you have something that is only to be assessed after the event on a time, place and circumstances approach, do you have sufficient certainty to be Bill of Rights Act compliant? And why would one not use the structure of the Act and the context of the Act and by that I don't just mean section 4(1)(a), I mean – and I don't just mean the offences under the Public Order Provision but the whole of this statute and so if you have an offence which is about disorder, isn't that in context clearly about disturbance of the public order which is sufficient to justify the involvement of criminal law?

MR MANDER:

Well in my submission the offence provision on an interpretation of its natural and ordinary meaning is also aimed at gratuitous pieces of behaviour which shouldn't require the type of threshold necessary to safeguard Bill of Rights values. So one is – one is, taking Your Honour's approach, one would ratchet up the threshold before the offence could be breached.

ELIAS CJ:

You're simply applying a purposes approach to this provision which – which does narrow its application. It has to disrupt public order.

MR MANDER:

Indeed it does.

ELIAS CJ:

So gratuitous behaviour which doesn't reach that standard isn't something which should be the subject of criminal responsibility under section 4(1)(a) either.

MR MANDER:

Well, in my submission, gratuitous behaviour may – it may be desirous that that sort of behaviour is captured and that is what Parliament intended.

ELIAS CJ:

Why do you say that?

MR MANDER:

Because, in my submission, while – because public order, the need to protect the individual in the public place may require – does require, in my submission, the ability of the State, a police officer to interfere with that particular action. Where –

ELIAS CJ:

So this is about –

MR MANDER:

Whereas – sorry Ma'am.

ELIAS CJ:

– empowering the police?

MR MANDER:

It's about allowing State or allowing State intervention in people's lives that's lawful and that's laid down by Parliament in terms of the offence provision. If there is no power, there's no – if a police officer cannot lawful stop an activity in a public place he cannot stop the activity.

ELIAS CJ:

Yes. Yes, sorry I was misunderstanding your meaning.

So it's all about what is unlawful under section 4(1)(a) and I don't really think you are disagreeing that it has to be a disruption of public order.

MR MANDER:

No, I suspect where the difficulty arises is defining the public order.

ELIAS CJ:

Yes, yes. So what's wrong with the – with the Gleeson sort of approach?

MR MANDER:

Well –

ELIAS CJ:

That it has to be something that causes people to feel uncertain, unwelcome, to cause them to at least want to withdraw?

MR MANDER:

Well that is one – certainly that is – that is one approach but in my submission, it has a tendency to – it has a tendency to focus on the disorderly aspect of the behaviour, as opposed to the impact on the individual.

ELIAS CJ:

Well then perhaps you can tell me why both aren't directed at the disorderly aspect and offensive is not properly to be regarded as the impact on the individual, but simply the propensity to create disorder. You have disorderly behaviour and you have behaviour that could provoke disorder and that is – so that that's why they're coupled together in section 4(1)(a). As indeed Lord Justice Sedley was really, I think, partly suggesting. I mean he didn't put – he wasn't dealing with that point but that was the test that he was using.

MR MANDER:

Well, in my submission, the difficulty with that is they all come under the – under the rubric of disorderly behaviour. It doesn't add anything, in my submission. One could take offensive behaviour out of –

ELIAS CJ:

But it may not be disorderly itself. The behaviour may simply be behaviour which may provoke disorder.

MR MANDER:

But my submission is that in of itself may be disorderly behaviour. If you're acting in a public place in such a way that you are – you potentially are invoking disorder in others, you're acting yourself disorderly.

ELIAS CJ:

Well why are you not acting offensively?

MR MANDER:

Well you might be in that situation but equally you might be on – in another situation, acting in a way that isn't causing – indeed the Anzac Service may be an example of it. People just put up with it. Ought they have to put up with it? Even though they are not going to act in a disorderly or react in a disorderly manner. But should –

ELIAS CJ:

Well again it depends what you mean by disorder. Because if disorder is simply that sort of anxiety that causes people to shrink and withdraw, maybe a line has been crossed but if it is simply that you feel offended, that this is not appropriate behaviour but your use of the public space is not inhibited then perhaps it's not.

MR MANDER:

I'm certainly not contending for that Ma'am.

ELIAS CJ:

No. Right, thank you that's helpful.

MR MANDER:

So, in my submission, the approach, the second approach of the appellant in an effort to limit or give a BORA consistent meaning to the offence provision, short of engaging in a section 5 analysis, in my submission, simply doesn't work.

ELIAS CJ:

The section 5 analysis is inevitable in a case like this where you're concerned with a limitation on a right. I mean we're not into the sort of *Hansen* debate.

MR MANDER:

No Ma'am.

ELIAS CJ:

Where the issue was identifying what the right is. Here there is no dispute about the right to freedom of expression but it is in the ICCPR a qualified right and so if one's looking at the antecedence of the Bill of Rights Act you're immediately looking at whether the limitation is justifiable in a free and democratic society.

MR MANDER:

Indeed Ma'am. Indeed, I accept that entirely. And the issue that must be considered is whether the public interests engaged and indeed, in my submission, on the facts of this case, the rights of the attendees engaged and protected by the offence provision are of sufficient strength to justify the limit on the appellant's right to freedom of expression.

ELIAS CJ:

But why do you jump – we are construing a statutory limitation, why do you jump to the balancing of the interests of those present beyond the limitation that Parliament has provided for, which is sheeted home to public order?

MR MANDER:

Well because in my submission what is sought to be being protected is that value of public order.

ELIAS CJ:

All right, that's fine, yes. I understand that.

MR MANDER:

And maybe that's, that's the place to turn to, that the public interest or the public values which the Crown says section 4 is given effect to. At least in the circumstances of this case, is as I have submitted the public's right or the value to be placed upon the public's use of the facility, of the public facility of the public space as it was intended to be used at that particular time. And indeed in the context of this case at that particular hour, on this particular day. The second value, in my submission, which I accept is to a large degree related to the first, is to be free from significant mental distress of the type with which it is faced on the facts of this case, which in my submission largely flow from the initial test of offensive behaviour, that is that the person is outraged and is angered by the conduct that they are required to witness in the public space.

ELIAS CJ:

If offensive in section 4(1)(a) is not the provocation of disorder in the way that I have suggested, what's the difference, what's the explanation for the difference between section 4(1)(a) and section 4(1)(b) because it is only an offence to address words which offend that person if the words are addressed to that person with intent to offend?

MR MANDER:

In my submission in this case, there's no evidence that anything was addressed to a given –

ELIAS CJ:

No, no.

MR MANDER:

– individual.

ELIAS CJ:

But I'm talking about the structure of this legislation and what I have been suggesting is that it's not how the words are received in section 4(1)a), that's a 4(1)(b) concern. A 4(1)(a) is whether if you're not acting in a disorderly manner yourself, but you behave in a way that may provoke disorder, so it's an objective assessment. Otherwise I just don't see the difference. Why there is the need for a separate offence of offending someone, in other words I don't see offensive behaviour as offending, except within the meaning of 4(1)(b)?

MR MANDER:

Well my submission 4(1)(b) that the offence that or the evil that is sought to be addressed is where a person is personally –

ELIAS CJ:

Yes.

MR MANDER:

– assailed or the words are directed to an individual in the public space to offend that particular person. So it's something different from where a person is just behaving in a general fashion which is offensive to the general audience without any direct connection with an individual who's been targeted by the offensive words.

TIPPING J:

So one is focused, the other is unfocused?

MR MANDER:

Indeed, yes. One is behaviour –

TIPPING J:

Yes.

MR MANDER:

– in a general sense, the other is where, yes a person has been targeted, it's specific.

ANDERSON J:

Why should a communication offending someone be an offence only if it's intended to intend but a communication to the same effect, other than in words, doesn't have to be intentional?

MR MANDER:

Because in my submission there will be situations where people have no intention to target an individual or direct abuse or to offend that particular individual but a by product, a consequence of their action is offensive.

ANDERSON J:

Well that's really just paraphrasing the difference between the sections. What logical reason could there be for requiring intent in one form of expression and not requiring intent for another form of expression to the same effect. For example if they'd held up placards saying, "burn the flag," and people were offended, it wouldn't be an offence unless it were intended to offend them. But if they burn a flag without intending to offend, which is what the evidence is here, that per se is an offence, it's just not logical.

MR MANDER:

Well in my submission I would put emphasis on the use of the term, "words," in paragraph B that where a person uses words, verbally communicates with an individual in a public place but never intended to cause insult or offence, they ought not be liable under the criminal law. But where a person by their

actions, by their behaviour has the effect of causing offence, there needs to be some means by which the state can lawfully regulate that behaviour and they can only lawfully regulate that behaviour if it's an offence.

ELIAS CJ:

And it's not commensurate because in one case, one would have thought that these would be regarded as roughly equivalent, in terms of culpability, these provisions. Which is really why I think that the coupling of offensive or disorderly must be the provocation and the, and both must be directed at disorder.

MR MANDER:

Well I accept that both provisions are obviously concerned with public order and in my submission it may well be that where there is no intention upon a person by, on the person's behalf to address a person with words to offend them, it doesn't really give rise to any public order concern. So it's limited in that regard.

TIPPING J:

Does the word, "behaves" include speaking?

MR MANDER:

Potentially it can.

TIPPING J:

Well you could have a real anomaly there, you could speak in an offensive manner without intending to offend –

MR MANDER:

Well there are some cases on that. There's an old case about – I think it's included in the appellant's bundle as I recall.

ELIAS CJ:

But surely that is why if one available meaning of offensive is the provocation or the aggression meaning, it's a preferable meaning to adopt rather than causing someone to feel offended which seems more logically to be under sect 4(1)(b)?

MR MANDER:

But section 4(1)(b) wouldn't cover a person's actions. It would only cover –

ELIAS CJ:

Well I understand that, but then you have provisions that aren't commensurate because you require intent in one case and not in the other and in the other, as you've said, actions may include words.

MR MANDER:

Well I did submit that, however the case that I was alluding to did make a distinction whereby the prosecution relied upon the words, that was the words addressed to school girls I think by a man who approached them when they were on their bikes as I recall, and didn't include the fact that he stopped his van, stopped them and then spoke to them and if they'd relied upon the – together with the words, with the conduct of stopping the van and approaching them, in terms of behaviour, the prosecution would have succeeded but the prosecution limited itself to the nature of the words, "used". So I have to perhaps just qualify my initial answer.

TIPPING J:

Well that's what, partly why I asked the question because I think it's quite – you see I think the Chief Justice's proposition is that, "behaves in an offensive manner" really means behaves in a hostile manner, if I have picked it up correctly.

ELIAS CJ:

Well those definitions which – are really –

TIPPING J:

In an aggressive attack –

ELIAS CJ:

Yes well it's on this fighting talk continuum –

TIPPING J:

Yes, aggressive sort of –

ANDERSON J:

There's a potential for causing disorder.

ELIAS CJ:

Yes.

TIPPING J:

It's not apt to cause offence, it's apt to or its aggressiveness if you like, threatens public order. No I'm not saying one way or the other which side of this I'm on but I think there is force in the proposition because otherwise you have this anomaly that, when it comes to speech, it clearly has to be an intent under (b) and it would be pretty odd if it didn't have to be intentional of causing of offence or under (a) because you'd have the same conduct capable of being objectively criminalised under one but has to be subjective on the other.

ELIAS CJ:

And has to be targeted, not only in (b) but also in (c), which arguably is worth than a scatter gun statement that may give general offence. It may be –

MR MANDER:

I repeat the submission that I make – in my submission there's a clear, a different public order purpose in prohibiting someone from directing offensive, insulting speech to an individual in a public place, that's one type of activity which is sought to be prescribed.

ELIAS CJ:

Well effectively there's a legislative judgment that that is an offence against public order.

MR MANDER:

Indeed.

TIPPING J:

The oddity is that the word, "offensive" in (a) would have a significantly different connotation from the word, "offend" in (b).

ELIAS CJ:

As it does in the dictionary definition, as is capable – anyway.

TIPPING J:

It is. Yes that would – it means that the legislature is deliberately setting out different considerations under the rather similar concepts of "offensive" and "offend" and that gives one cause for pause and this is in your favour.

MR MANDER:

Yes.

ANDERSON J:

It seems to me that the issue that's being raised is this. When does a communication not intended to offend, amount to behaving in an offensive manner? You know if it is intended to offend it's –

ELIAS CJ:

When its non verbal is the only answer possible. Which is hardly satisfactory is it?

MR MANDER:

Well it may be. I'm trying to think of examples and the obvious example is the person who, to pick up on the line of the approach of the appellant, the person

that behaves in a rude or lewd indecent way in a public place swearing and – in an out of control manner. They're not addressing –

ANDERSON J:

Or expressing distain by doing a down–trou for example?

MR MANDER:

That's a good example Sir, yes. Indeed. Which is just an act not aimed at anyone in particular.

ANDERSON J:

All right, I'm assuming that it is.

TIPPING J:

It might be.

ANDERSON J:

It might be.

TIPPING J:

Because it's a communication if it's directed to a person or person.

ANDERSON J:

But what it might lead one to is the point that the Chief Justice has been raising from time to time that BORA considerations in connection with section 4(1)(a) mean that you have to regard communications as offensive behaviour at a, quite a high level and one that is very closely related to the potential for generating disorder in the circumstances. So for example if there were known to be a number of fascist thugs attending some meeting, someone came along and said something which they calculated to offend them or by any objective standard, the response would be a potential for disorder but – and it's really BORA may require that type of fairly high level meaning in relation to communications that 4(1)(a) has relied on. Not just hurting feelings or raising the spectre of unseemly conduct.

MR MANDER:

Well in my submission that may be, the question that needs to be asked is what level of behaviour below that threshold –

ANDERSON J:

What quality of behaviour?

MR MANDER:

What quality of behaviour can and should be properly prescribed that doesn't meet that threshold and doesn't fall fowl of section 5. And in my submission there will be, all manner of behaviour which still can legitimately be prescribed by a government in the interests of public order and would not offend against section 5.

ELIAS CJ:

Except there hasn't been prescribed, it's left to be determined.

MR MANDER:

It is, but that's what section 5 does.

TIPPING J:

But the problem is you've got to have a definition that's single but it's got to – well it seems to me anyway, subject to your submission, you can't interpret the section depending on the fact. The section surely must have a constant meaning. It's when you get to the application of that meaning to the facts that you may get room to manoeuvre.

MR MANDER:

Indeed.

TIPPING J:

I can't see any logical way round that, you can't say it means this against these facts and something else against another set of facts. I wouldn't have thought.

MR MANDER:

No I acknowledge that Sir.

TIPPING J:

But this is not unhelpful to you –

MR MANDER:

No.

TIPPING J:

– but this is one of the conundrums in the case that in *Brooker* we sort of, with respect, we may have just skirted round that a bit, but it has to have a single meaning I would have thought that's out to do all the work that the section is asked to do across the whole spectrum of activity?

MR MANDER:

Indeed. Perhaps an example of that might be to pick up again on one my appellant's submissions, if the appellant had ignited a tea-towel and perhaps had yelled out –

ELIAS CJ:

Fire or something.

MR MANDER:

Exactly, or some other –

ELIAS CJ:

Yes well I agree that that is well capable of being disorderly behaviour or –

TIPPING J:

It's capable of being disorderly but it wouldn't I think, be capable of being offensive.

MR MANDER:

Well in my submission it is capable of being offensive and I make that submission because the element of disruption, the element of gratuitous interruption of what's supposed to be a solemn ceremony would, that the attendees would reasonably be aghast that someone could behave – they were offended that people would necessarily behave on such an occasion in such a way and that has nothing to do with content, obviously.

ANDERSON J:

Isn't section 37 there to deal with that type of situation, disturbing meetings? The only thing is it requires unreasonableness. Their presence, "Liable to a fine not exceeding $200 within any public place, unreasonably disrupts any meeting, congregation or audience." This doesn't happen to be one of the various offences for which you can arrest someone. It's excluded. It's tailor-made for the very situation that arose.

MR MANDER:

Well it could be used Sir, but in my submission that doesn't prevent the proper application of the offensive limb of section 4.

ANDERSON J:

It avoids the jurisprudential difficulties that occupy the Court.

MR MANDER:

There may be another example. We haven't got a meeting as such.

ANDERSON J:

Meeting in a public place, an Anzac Day meeting?

MR MANDER:

No, but there may be another example where what –

ANDERSON J:

I see what you mean.

ELIAS CJ:

If there has, if this section, which I accept has to be a one size fits all, then surely the touchstone of public order is essential if it's not to be too wide and it's not to be too subjective and that simply something which causes – which may offend some people present is just not enough.

MR MANDER:

Cause an offence in and of itself.

ELIAS CJ:

It may, it may disrupt public order in the sort of situation that Chief Justice Gleeson was talking about or in other situations where people just feel uncomfortable.

MR MANDER:

Well in my submission it's not enough to feel uncomfortable. It's enough that you're –

ELIAS CJ:

Inhibited in your use.

MR MANDER:

In my submission it goes, it can go, it doesn't need to just be inhibited. In my submission the public, assembled audience, is entitled to use a space free of behaviour which may outrage them.

ANDERSON J:

Subject to BORA considerations?

MR MANDER:

Subject to BORA considerations, absolutely. And that is a proper value which the State ought to seek to protect and in my submission that's what section 4, subject to BORA considerations, sets out to do.

McGRATH J:

So really you're saying without having to tolerate an emotional, a negative, emotional impact beyond a certain degree?

MR MANDER:

Beyond a certain degree.

McGRATH J:

And BORA controls the degree, I suppose, well section 5 controls the degree?

MR MANDER:

Indeed. Where BORA issues, BORA considerations arise, and that takes one to a contextual balancing of the respective strengths of the, and in my submission I repeat it, the conflicting rights and values and interests.

TIPPING J:

Is that equivalent to saying that the level of tolerance must, might differ according to whether or not BORA is or is not engaged. I'm picking up your –

MR MANDER:

Yes the –

TIPPING J:

– tolerance.

MR MANDER:

–level of tolerance is not ratcheted up if there are no BORA considerations because there must be, there must be – to use the phrase, the reasonable

person must be imbued with an appreciation of the value that attaches to freedom of expression and ought to be expected to tolerate but not tolerate beyond a reasonable degree.

TIPPING J:

And the Judge, ultimately, has to fix that degree, I would have thought, albeit by, under the coded reference to a reasonable person?

MR MANDER:

In my submission, yes. The reasonable person, in my submission, is the device, the mechanism by which the Judge can make that assessment.

TIPPING J:

But I wonder whether that is sound jurisprudentially as to whether we shouldn't simple abandon the reasonable person and simply say that the Court decides the level of tolerance because it is ultimately a question of what is appropriate in a free and democratic society. Not what a reasonable person thinks is appropriate but what the Court thinks.

BLANCHARD J:

Well a reasonable person presumably thinks in a Bill of Rights consistent way.

TIPPING J:

Well that's true but in the end isn't it calling a spade a spade?

MR MANDER:

I have to acknowledge that ultimately I'm not sure it makes any difference but having made that acknowledgement when one's applying section 5 what can be, what is a reasonable limitation and a reasonable limitation, in my submission, is the equivalent of what a reasonable person ought to have to put up with in a public place, having regard to the –

TIPPING J:

I agree with that but, well perhaps – time is short so I won't press the point.

McGRATH J:

It can't, of course, differ according to individual Judges, that's what I think the objectivity of the reasonable person test does assist in, in the formulation.

TIPPING J:

Well the control comes from the right of appeal.

ELIAS CJ:

There are going to be a lot of appeals.

TIPPING J:

Well there's still going to be a lot of appeals whether you couch it as reasonable or – potential for appeals is exactly the same I would have thought but –

BLANCHARD J:

I didn't have a reasonable Judge so –

TIPPING J:

That's right. But no, I'll back off it Mr Mander. I'm not abandoning the point I'm just not wanting to trouble you any more.

MR MANDER:

I appreciate it Sir. In my submission the two ways in which these interests that I've identified, these values, indeed these rights, were affected by the appellant's conduct. What was indeed offensive was firstly the disruptive effect. The intrusiveness of the behaviour that marked the appellant's conduct and secondly the manner and nature by, of the appellant's message. The way in which it was communicated and the way in which it was reasonably interpreted or understood, having regard to time, place and circumstance.

ANDERSON J:

What was the offensive quality of the flag burning?

MR MANDER:

The offensive quality of the flag burning was one, the way in which it interrupted the proceedings.

BLANCHARD J:

Did the flag burning, per se, interrupt proceedings?

MR MANDER:

The flag burning was, in my submission, an inherent part of the intrusive protest.

TIPPING J:

I thought it was the horn that had the effect of interrupting the speaker or I mean if there'd been no horn what is the evidence as to what people would – would people have known what was going on out the back there?

MR MANDER:

The horn is certainly what drew the attention of the attendees to the flag burning. That was the design of blowing the horn and indeed that was the intent of the appellant.

BLANCHARD J:

But there's no charge in relation to blowing the horn even as a party?

MR MANDER:

No the appellant is not charged with blowing the horn, she is charged with burning the flag. But having regard to the, to the way in which that act was carried out, it was carried out in the knowledge, and indeed it occurred, that people's attention was focused on her. That people's attention, people were compelled by the previous noise to look where the source of the noise was coming from, to look at her to see what she was doing.

BLANCHARD J:

But they could look away pretty quickly.

MR MANDER:

Well, in my submission, that's really just an assessment of whether or not that was realistic in the circumstances because in my submission once you get a ceremony, a service such as the dawn service, interrupted people look for the source of the interruption and then, they have very little chance to exercise any choice as to what they then have to witness, to where their attention is drawn.

ANDERSON J:

Well that's really just saying that the flag burning was – the offensive quality in the flag burning was that it occurred with people seeing it?

MR MANDER:

Well certainly people had to see it to be offensive without question.

ANDERSON J:

But what was offensive about it?

MR MANDER:

About the flag burning itself?

ANDERSON J:

Mmm.

MR MANDER:

What was offensive was the impact of seeing such a highly symbolic thing –

ANDERSON J:

Desecration of a symbol.

MR MANDER:

Indeed, which ordinarily may have been something that people had to put up with. That ordinarily it might be something which people would have looked at with great distaste and frowned upon and thought indeed was disgraceful. But on this occasion, when they were there to acknowledge and pay their respects to people who had died, effectively fighting for the flag –

ANDERSON J:

And freedom of expression.

MR MANDER:

And freedom of expression, without doubt, but the question becomes whether or not, that given that hour on that day, they ought to have to have tolerated the reasonable interpretation which comes from burning such a symbolic items in the midst of a dawn service on Anzac Day.

BLANCHARD J:

But wouldn't they have simply seen it as a protest about ongoing wars, not as a protest about the wars that they were there to commemorate which had been fought years and years before?

MR MANDER:

Well that's an assessment of what's reasonable for those present to have thought and we have evidence from –

ELIAS CJ:

Not very much, really, there's not much evidence.

MR MANDER:

Yes there's a cross-section of at least half a dozen witnesses. I can take Your Honour –

ELIAS CJ:

But there were 5000 people there.

MR MANDER:

The Crown could, I won't say it.

BLANCHARD J:

It would be a long trial.

ANDERSON J:

There might be a situation where doing that would be so provocative that there was a reasonable possibility that people would become disorderly. Start yelling and calling out.

MR MANDER:

And that's indeed what happened on the evidence. I can take Your Honours to those passages.

ANDERSON J:

What, shame on you and that sort of thing?

MR MANDER:

Indeed.

ANDERSON J:

Fist shakings? Advancing across the road in a threatening manner?

MR MANDER:

Well I can take you to the evidence of, the evidence of Mr Shaw, which commences at page 108 of the case.

ELIAS CJ:

Sorry 108?

MR MANDER:

Page 108 and for present purposes at page 111, about halfway down the page.

ELIAS CJ:

Yes, I've read that.

ANDERSON J:

Well he expresses a personal view but it's not substantiated by any evidence is it?

MR MANDER:

Well then there's the evidence –

ANDERSON J:

And it's directed at the whole protest. The banner waving, the content of them, the horn blowing, the flag burning.

MR MANDER:

The interruption, indeed. Sorry Sir, Campion, page 119.

ANDERSON J:

The punch.

MR MANDER:

The punch. "I then saw a member of the public lean over the fence and punch the protestor."

ANDERSON J:

That's the horn blower.

MR MANDER:

I think it may have been at the time that the, Mr Rawnsley was being apprehended. Sergeant Bergh, page 123.

ELIAS CJ:

Not the time and place, really. That's the submission isn't it?

MR MANDER:

That's the expression of those present.

ELIAS CJ:

What bothers me, Mr Mander, is that *Melser* did this sort of balancing and said that MPs are entitled to entertain their guests unembarrassed by unseemly protests.

MR MANDER:

I'm not relying on *Melser*.

ELIAS CJ:

No I know but what I'm saying is how do you stop sliding back into that?

MR MANDER:

Dare I say it, the Court.

ELIAS CJ:

Yes well that was the Court. That was the Court of Appeal. Different times, Didn't have the Bill of Rights Act, of course.

MR MANDER:

The other point I've said to stress is that the, certainly the cross-section of people, the witnesses, a number of them said, we could appreciate what they were communicating –

ELIAS CJ:

Yes.

MR MANDER:

Even agree, we didn't think there was anything wrong –

ELIAS CJ:

Yes, but it was not the occasion.

MR MANDER:

But it was not the occasion.

ANDERSON J:

Bad manners.

MR MANDER:

Well in my submission it was more than just bad manners in my submission. It goes to the reasonableness of the outrage and whether or not public order, or the value we place on public order, manifested itself on this occasion, having regard to time, place and circumstance such that section 4 can reasonably be applied to prevent this type of behaviour on that type of occasion.

TIPPING J:

This public order concept strikes me as a somewhat slippery one for the purpose of reading down people's protest rights. I've always found the concept of public order pretty elusive but it really amounts, in your submission, to this issue of being able to go about your lawful business in public without interference.

MR MANDER:

I acknowledge that the risks, what I place emphasis on in this case is that those witnesses, those people who were outraged, were, they were expressing their section 14 rights on that occasion.

TIPPING J:

They undoubtedly were.

MR MANDER:

And who's protecting their rights?

TIPPING J:

Indeed but don't they each have to tolerate the other?

MR MANDER:

They do and that's –

TIPPING J:

They're expressing a point of view which is entirely valid and to be respected but on the other hand just because the view expressed on the other side of it was unpopular – once you slip back into public order without any connotations of violence, as is in section 3, I find it getting quite elusive as to what actually is being protected. In such a fashion – of such importance societally but it overtakes what is undoubtedly here political speech.

MR MANDER:

Well in my submission that's where the balancing comes in and the particular values that come into relief are going to differ in each different set of circumstances.

TIPPING J:

Should we be trying to reflect responsible public opinion or should we be trying to lead with a Bill of Rights consistent approach to these matters? And I don't necessarily think the two would go together. Be the same I mean.

MR MANDER:

Well my submission is that they ought to and in my submission section 5 ought to be applied, or it has to be applied, in a manner that does ultimately produce, well stating the obvious, that will produce a reasonable, demonstrably reasonable justification.

TIPPING J:

We are here being invited to protect the interests of the vast majority who were present but equally the minority who were present have interests. Now is there not a danger of being overwhelmed by numbers on either side?

MR MANDER:

Not in my submission because the contest is not about content. It's between he respective messages that the minority and the majority were expressing. In my submission the contest, or the issues, the accommodation of what were two expressive types of behaviour on the occasion, and the balancing, and that's why the respondent places great emphasis on the fact there was nothing wrong with the, obviously there was nothing wrong with the banners. There was nothing wrong with the way thy protested it in the past, handing out free food. There wouldn't have been anything wrong, dare I say it, or it would come to issue, as to what would have happened if after, immediately upon the ceremony coming to an end, the appellant had done exactly the same thing. She had her audience but she waited until the service was complete and then she carried out her provocative act. She wouldn't have interrupted anyone. She wouldn't have infringed upon the expressive rights of the audience.

TIPPING J:

I think that's a very interesting submission to make, that it would have been all right if it had been just at the end but it wasn't all right in the middle.

MR MANDER:

Well I'm not saying whether that would or would not be the occasion but I do, the difference is between disrupting the expressive conduct of the majority –

TIPPING J:

Disrupting it, what's the evidence that it caused Mr, what's his name, Fortune to pause for a moment or two because he was being drowned out by a couple of blasts on the horn? But other than that, as far as the evidence runs, was it disrupted anymore?

MR MANDER:

Well it was disrupted on the evidence that the audience who were there participating in a respectful and solemn service, that was disrupted because there were required, and I make the submission, were required to witness Ms Morse, the appellant's, flag burning.

TIPPING J:

Well they heard the horn, they turned round, they saw the flag burning, which was brought to an end pretty promptly by police, and then the thing, on the evidence, as far as I recall, just proceeded ordinarily, didn't it? It didn't break up in disorder or disarray or anything like that?

MR MANDER:

No it didn't but in my submission it didn't because the police did intervene and they didn't – the question then becomes, for this Court, is to whether or not they intervened lawfully.

TIPPING J:

And your concern perhaps is more that if this isn't upheld as a valid conviction then this will be repeated, or maybe repeated, and the police won't be able to do anything about it, and the whole thing will get out of hand. Is that really the sort of silent premise of some of the concern anyway? And I'm not necessarily saying that would be unimportant.

MR MANDER:

No –

ELIAS CJ:

It's quite speculative though, isn't it, because it may be that if we say flag burning in these circumstances is, what is it, disorderly behaviour or offensive behaviour, that it will be engaged in all the more. I mean that's one of the problems about this sort of thing, otherwise it may be a bit of a yawn.

MR MANDER:

Well I don't speculate as to what may or may not –

ELIAS CJ:

No and I'm not, I don't have a clue, but those are the – there are a whole lot of options. People tend to react against –

TIPPING J:

Control.

ELIAS CJ:

Controls, yes.

TIPPING J:

And if it's all right, you know, there's no fun in doing it.

ANDERSON J:

What's the next thing we can do?

TIPPING J:

Yes.

MR MANDER:

Well dare I say it, maybe that's why it isn't, there is some – well there is a great deal of public benefit in drawing a line in the sand. Because there does need to be some certainty.

ELIAS CJ:

Well the line in the sand gets drawn by the policeman effectively, doesn't it?

MR MANDER:

But we must proceed on the basis that the policeman is bona fide –

ELIAS CJ:

Absolutely.

MR MANDER:

– acting lawfully and in good faith.

ELIAS CJ:

Yes but may get it wrong.

MR MANDER:

May get it wrong and no doubt the decision of this Court will have a, it must do, have an influence on how the police, in a similar situation, ought to react. That's inevitable in my submission.

There was a great deal of criticism of, by my learned friend Mr Price, as to the emphasis that the Crown placed upon the captive audience. I just want, just seek to place in context the Crown's reliance upon that type of jurisprudence and the Crown is seeking to point to that type of jurisprudence as to the intensity of the interruption and effect on the audience. This wasn't just a case of people walking up and down the street who you could just continue to walk and ignore. This is a case of people who went to a particular place at a particular time for a particular activity and to participate. So when one looks at accommodating the majority and the minority in the public place, in my submission, it's entirely reasonable to consider well, how does one or the other have to modify their behaviour to reasonably accommodate both expressions, freedom of expression and the emphasis the respondent seeks to place on the captive audience cases is that like in those cases this wasn't a situation whereby the audience could simply just walk away or could simply just ignore it and carry on regardless. This was a case where, because of the unique situation in which it unfolded, there was no avoiding and certainly the intent of the appellant was to ensure that it could not be avoided because part of the, the whole purpose of the coordinated blowing of the trumpets was to attract people's attention to what was going on, so that they wouldn't miss it.

ELIAS CJ:

That is true whenever speech is made on the occasion of an event.

MR MANDER:

Indeed and then one has to examine the quality of the event.

ELIAS CJ:

Yes.

MR MANDER:

It wasn't a rugby game that these people were attending.

ELIAS CJ:

Some people regard rugby as very important.

MR MANDER:

The other submission that I would seek to make is whether or not, having regard to the expressive activity taking place in the environs of the Cenotaph, the Dawn Service, whether that was an activity which of itself was simply fundamentally inconsistent with intrusive speech could, ought Dawn Service attendees have to tolerate that type of expression when again some calibration of the appellant's protest activity would allow both sets of activities to take place in the same place. The audience, the appellant still had her audience and the attendees were still able to participate and to experience the ceremony, the unique ceremony. So in my submission there is a real issue arises as to whether or not quite simply the manner, and I stress "manner" of the appellant's protest was fundamentally inconsistent with the form of expression taking place in the public space at the time. Is it really a situation that allows for intrusive competing protest? Her Honour, Justice Glazebrook, gave the example of heckling at a political rally. Now in my submission, that analogy is, with respect, wrong. This was not a political rally where one could expect the exchange of different political viewpoints. It simply wasn't that type of venue and, in my submission, this takes one back to the disruptive element

of a solemn occasion, and whether – which is my submission, such an interruption can be viewed reasonably as offensive in the circumstances.

McGRATH J:

Were you putting this submission in the context of accommodating the rights of those attending the commemoration as well? In other words, is this a submission that goes to trying to accommodate the rights of citizens from the two camps to the greatest extent possible?

MR MANDER:

Indeed Sir, yes.

McGRATH J:

So what are the rights then of those attending the commemoration? What are they – are they...

MR MANDER:

The rights, and I use that word "right" in terms of the Bill of Rights, was that they were participating, they were expressing, by participating in this ceremony, their freedom of expression. They were expressing –

McGRATH J:

Is it freedom of expression or is it freedom of assembly?

MR MANDER:

Well it's both, in my submission.

McGRATH J:

As that *Barendt* article points out, yes.

MR MANDER:

It is both. Certainly –

McGRATH J:

Both.

MR MANDER:

– inherent in the manner of their expression was the collective element of assembling together to experience, as a group, the unique atmosphere, the poignancy, the solemnity of a Dawn Service in which the attendees are commemorating and paying their respects to the fallen.

The respondent says that the public place that was being used at the time was the Cenotaph, or the environs of the Cenotaph. This wasn't a street. This was 6.00 am on Anzac Day, Lambton Quay, or that end of Lambton Quay, was not being used at the time as a road and, in my submission, it is quite wrong to suggest that one attaches to that area the normal character of the public place where there will, traditionally has been, an exchange of views.

ELIAS CJ:

Well that's overdoing it surely because the charge is about within, in or within view of any public place so, of course it's a public place that those seeking to communicate were entitled to be in?

MR MANDER:

I'm not suggesting otherwise ma'am.

ELIAS CJ:

No, I just think perhaps you were a little carried away there.

MR MANDER:

Well my –

ELIAS CJ:

Where you said it's not a road, it's a Cenotaph, but it's a public place. That's why we're here.

MR MANDER:

Well may –

TIPPING J:

I think what you're saying is that they weren't entitled to choose this place in these circumstances.

ELIAS CJ:

Oh yes, I understand that argument.

TIPPING J:

No, no, I'm not, yes – but I think that's effectively all it's amounting to.

ELIAS CJ:

Yes.

MR MANDER:

It is what was the place being used for at the time?

ELIAS CJ:

Yes.

TIPPING J:

And that, of course, is a very key part of the case because the appellants say per contra. You can't sense a choice of place, paraphrasing their submission but, of course, per contra to that, the choice of place may be what tips it over.

MR MANDER:

Because one can't just, well time, place and circumstance, one always comes back to that, in my submission.

The final matter I seek to stress is that the prohibition on the appellant's behaviour is not content based. It's not viewpoint based.

ELIAS CJ:

Does that mean, if it had been a tea-towel it would be exactly the same thing, when you say it's not content based?

MR MANDER:

It's not content based in terms of – well first of all taking the disruption. If people were yelling and screaming as I think we set out in the submissions, given how in Afghanistan or some sort of pro war type – the complete opposite message, that equally would be offensive, having regard to time, place and circumstance. It wasn't the place to be acting in that manner and, in terms of the burning of the flag, it's, in my submission, it's not the message behind the burning of the flag which was offensive, and a number of witnesses, as I've already eluded to, they weren't offended by the nature of the message of the anti war message being communicated on this occasion, it was the manner by which it was being communicated which, quite reasonably, and implicitly, by the burning of a flag at the Dawn Parade, you are slighting the memory of those, even if you don't mean to that's the effect, of those who you're actually paying homage to who have, effectively, died for the flag. And that's a reasonable interpretation, in my submission. That's not far-fetched in my submission, and indeed, it was one that is expressed by the same people who are not unsympathetic to the anti war message.

TIPPING J:

Is it simply – I find this distinction between content and manner quite tricky in a way. Is it – the burning of the flag surely is content as well as manner. I have difficulty divorcing them in my mind. The burning of the flag was sending a message, a vivid message if you like, but are you saying that one can separate out that as a manner of conveying a message in such a way that you can say the message per se is not being censored? It's the way it's being conveyed.

MR MANDER:

That's the objectionable element, that's the offensive element to the behaviour. My learned friends place emphasis on that – what's – the

message is being sent is the intensity with which the view is being held and that's content, that's a message being sent.

The Crown's response to that is that, well, but inevitably, and reasonably, what's being received by those present, isn't the intensity of your viewpoint but the insult that you're sending to the memory of the people that we're here to acknowledge. It wasn't the time and the place to be expressing such a –

TIPPING J:

An intense message.

MR MANDER:

– an intense message because you insult when you do so. You might not have insulted if you did it the next day or at the military parade.

TIPPING J:

But we're told on the one hand that you can't stop protests simply because they offend people. Well here, this protest did offend people but you're trying to draw a distinction between the content of what was being said and the method by which it was being conveyed and saying, "Well the content on its own would have been all right but the method is that takes it over the line." Now, that's what you're seeking to support isn't it?

MR MANDER:

It is and –

ELIAS CJ:

And the occasion because that's a very big part of it.

MR MANDER:

Indeed.

ELIAS CJ:

Yes.

MR MANDER:

Yes and that's what the witnesses themselves attempted to do in their briefs of evidence.

TIPPING J:

But you can't –

MR MANDER:

Draw that distinction.

TIPPING J:

So you're entitled to offend but beware the occasion.

MR MANDER:

Well the occasion gives the context to the message.

TIPPING J:

Well there you are you see.

ELIAS CJ:

Yes, it's round and round.

TIPPING J:

Yes, anyway I'm finding this most helpful, Mr Mander. Please don't think otherwise. It's just that it's some fairly subtle points are being made here, and I'm not saying wrongly being made.

MR MANDER:

Well, if one starts from the proposition that yes you are limiting the appellant's freedom of expression.

TIPPING J:

Yes.

MR MANDER:

The question is whether it's a legitimate limitation and, in my submission, to ratchet up – I've used that word many times today, if you ratchet up the intensity of the message, you are, you go over the threshold into insult.

TIPPING J:

But the intensity, is it the intensity which is liable to be inemicable by public order.

MR MANDER:

Yes.

TIPPING J:

Is that perhaps the clue or the link?

MR MANDER:

Yes.

TIPPING J:

It's the very fact of the intensity that threatens public order. If the message had been less intense, it wouldn't threaten public order.

MR MANDER:

Indeed.

TIPPING J:

Is that helpful?

MR MANDER:

In my submission that's correct. You get to the point where the reasonable person ought not have to tolerate.

TIPPING J:

Yes but I'm just looking to link this with what I, at least provisionally, perceive as being the vice, which the section is aimed at, ie. preservation of

public order. Now if it's the level of intensity threatens public order, whereas a lesser level of intensity of expression of the view would not, then you have the line, and perhaps a principled line. I don't know whether it's principled but at least it can be seen. Thank you, that's most helpful.

MR MANDER:

With respect Sir, that, in my submission, is the point. I pause as to whether or not there is any – I am mindful of the time and whether or not there are any particular points the Court may –

ELIAS CJ:

No, well the submissions were very thorough and it's been very helpful having this exchange, Mr Mander. If there's nothing else that you want to add to them that's fine.

MR MANDER:

Could I just have an opportunity to just consult with my co-counsel?

ELIAS CJ:

Yes.

MR MANDER:

No, thank you Ma'am.

ELIAS CJ:

Thank you Mr Mander. Mr Shaw, I must stop sitting at 4.30 pm, very brief.

MR SHAW:

I will be four minutes, five minutes.

ELIAS CJ:

Thank you.

MR SHAW:

Your Honours, there was just one point that I wanted to pick up in reply, and that is to meet my friend's proposition that somehow the fact that we are dealing with an Anzac Day Dawn Ceremony, which has commemorative aspects to it, somehow makes it immune or off limits to other viewpoints being expressed on that occasion at that time, and if my friend, if I understood him correctly, he was emphasising that this was a commemorative meeting, it was in memory to the fallen, it has aspects of solemnity and poignancy and I accept all of that. But that does not take away the appellant's fundamental rights that are in play here, and that's my response to the proposition.

I wish to draw attention to a decision of the European Court of Human Rights, which I apprehend you might derive some considerable assistance from. It's referred to in the written submissions. It's a case called *Öllinger v Austria*, and if I could just take Your Honours' very briefly to the written submissions for the appellant, at paragraph 72, and just invite Your Honours' to read paragraph 72 and the quotation that is attached. And simply, Your Honours, my proposition is that the Crown's proposition is wrong in principle. The Crown ought to accept, and I invite the Court to adopt, the reasoning of the European Court whereby the rights of both parties must be protected to their fullest extent.

So picking up His Honour, Justice McGrath's point, it's a question of ensuring to the maximum degree possible, the rights of both the attendees and the protestor. Your Honours, I said I would be brief, that's my reply.

ELIAS CJ:

Thank you Mr Shaw. We will reserve out decision in this matter and I wish to express our gratitude to counsel for your assistance.

COURT ADJOURNS: 4.16 PM