Amended Additional Response of Bill Whatcott

Re: Human Rights Complaint Filed by Morgane Oger

Case number: 16408

Please Add the Response Below on Form 3, to Supplement Form 2, Step 4, Part B, Justification for Respondent's Conduct and Other Defences

Submitted by Dr. Charles I. M. Lugosi, SJD
Counsel for William (Bill) Whatcott
Crease Harman LLP, 800-1070 Douglas Street, Victoria, BC V8W 2C4
250-388 5421 (Telephone); 250-388 4294 (Fax)
clugosi@crease.com

Part One: Material Facts

1. The complainant, Morgane Oger was born as a male but identifies as a female. The complainant identifies as a transgender individual.

2. The complainant was an unsuccessful candidate for the New Democratic Party in the May 2017 provincial general election in the electoral district of Vancouver-False Creek.

3. During the election campaign, the respondent, a devote evangelical Christian, and a voter resident in the same riding, wrote, published, and distributed a one page publication entitled, Transgenderism vs. Truth in Vancouver-False Creek.

4. The contents of that publication are alleged by the complainant to constitute a violation of s. 7(1) (a) and (b) of the BC Human Rights Code.

5. The respondent made the following material statements of fact in this publication:
a. Morgane Oger was born a biological male and was named Ronan Oger.
b. The BC media and the NDP party are falsely asserting that the complainant is a woman born into a man's body.
c. It is a lie to live in a gender that is the opposite of the natural biological sex an individual is born with.
d. The promotion of transgender identity and behaviour obscures the immutable truth about an individual's God given gender.
e. The truth is there are only two genders, male and female, and that they are God given and unchangeable.
f. The complainant pretends to be a woman, but government issued identification cannot change the truth that the complainant's DNA will always be male, that he will never have female anatomy, that hormone therapy and cosmetic surgery and media propaganda will never change the truth.
g. The Bible states at Genesis 1:27 that God created male and female in God's own image.
h. Gender is God given and immutable.
i. Transgenderism is a fantasy and impossible to attain.

j. An individual born with male sex cannot become a woman, and an individual born with the female sex, cannot become a man.
k. Transgenderism is harmful and displeasing to God.
l. There are real and serious health risks for anyone who adopts a transgender lifestyle.
m. There are serious spiritual consequences to promoting lies.
n. God is a God of truth.
o. Liars and the sexually immoral will not inherit the Kingdom of Heaven.
p. Those who fail to speak the truth are cowardly and morally corrupt.
q. The Bible states in Revelations 2:8 that the sexually immoral and liars will suffer a second death when they will be thrown into a lake of fire and sulphur.
r. When the NDP canvasser comes to your door, tell them you will not vote for their party because you believe in God's definition of gender.
s. Truth matters.
t. God wants you to stand for truth.
u. It is never too late to repent and to seek God's forgiveness, as illustrated by the story of Walt Heyer, who abandoned his transsexual life and became a born again Christian.

6. On May 8, 2017 the complainant, with the assistance of counsel, filed an individual complaint with the BC Human Rights Tribunal. A copy of the Whatcott publication was attached. The complainant alleged that 300-400 copies of the publication were distributed, out of the 1500 that were published. The complainant argues that the content of the literature distributed by the respondent offends s. 7 (1) (a) and ((b) of the *BC Human Rights Code (Code)* in two ways: first by discriminating or expressing an intention to discriminate against the complainant individually or against transgender people generally contrary to a specific ground, gender identity or expression; and secondly by publishing and distributing literature that is likely to expose the complainant individually or transgender people generally to hatred or contempt.

7. The complainant objects to the publication for claiming that the complainant's gender identity is false, that transgender people are at an elevated health risk, prone to violence, and will suffer in the afterlife. The contents allegedly is likely to expose transgender people to hate and contempt on the basis of gender identity.

8. The complainant asserts that the express intent of the publication is to influence people to adopt a hateful and contemptuous view of transgender people. The complainant assumes that the complainant is hateful to and contemptuous of transgender people.

9. On June 2, 2017 the respondent, without the assistance of counsel, filed a response to the complaint. He admitted delivering 1500 copies of his publication in the riding.

10. Whatcott asserted that his main defence "is the truth." He added, "The right to speak the truth during an election so voters can make an informed vote is essential for a functioning democracy."

11. Whatcott further cited Biblical authority from John 1:17, "For the law was given through Moses, but grace and truth came through Jesus Christ." The implied defence is that his religious beliefs on the supremacy of truth concerning sex and gender, which in turn informs his civic responsibility to participate in the electoral process to declare his religious beliefs in a free and democratic society.

12. Whatcott's thinking is revealed by informing the Tribunal of the following information it needed to know: Penis = Male; Vagina = Female.

13. Whatcott submitted in his response various passages from the Bible, including Deuteronomy 22:5, which states, "A woman shall not wear anything that pertains to a man, nor shall a man put on a woman's garments, for all who do so are an abomination to the Lord your God."

14. Whatcott's justification is based upon his religious beliefs and his election publication was an extension of acting out his faith to declare the truth against lies and immorality.

15. Whatcott also relies upon expert evidence, and most heavily upon the views of the distinguished psychiatrist, Dr. Paul McHugh. He vigorously disputes that sex is a feeling, as opposed to a biological facts. He compares this meme to the Hans Christian Anderson fairy tale, The Emperor's New Clothes, which tells the story of a naked head of state, publicly prancing in a street in front of crowds, with the false belief that he is clothed in the finest of garments, when his fantasy bubble is burst by the honesty of a simple child, who is not afraid of the truth, and asks why the man is naked.

16. Whatcott portrays himself as that honest child, who is not afraid of speaking the truth, because his faith in God and the teachings of the Bible, are what matter the most to him.

17. On August 1, 2017, the complaint was amended to add the contents of a letter written by Whatcott to the presiding Tribunal official, Walter Rilkoff, protesting an adverse ruling that the respondent morally objected to. No response was filed to that additional complaint.

Part Two: The Legal Basis of the Respondent's Justification

Introduction: Freedom of Conscience and Religion

18. The Respondent submits that he has a constitutional right to freedom of conscience and religion under s. 2(a) of the *Charter of Rights and Freedoms*.

19. Accordingly, the Respondent has the right to entertain such religious beliefs as he chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief teaching and dissemination. See: *R. v. Big M Drug Mart*, [1985] 1 SCR 295 (SCC) at 336.

20. The respondent's freedom of conscience and religion protects both belief and conduct. See *R. v. Videoflicks Ltd.* [1986] 2 SCR 713 (SCC); *Ktunaxa Nation v. BC*, 2017 SCC 54 (SCC) at para. 63.

21. Freedom of conscience and religion protects the right of the respondent to hold religious beliefs, to declare them openly and to manifest them. See: *Saguenay (City)* [2015] 2 SCR 3 (SCC).

Background

22. The respondent is a devout Christian and apostolic confrontational evangelist. He sincerely believes that Biblical values are the basis of Western culture and civilization. He believes that Canadian values are rooted in Biblical principles. He believes that it is his moral obligation and religious duty to

boldly speak Biblical truth to a hostile secular and immoral society, to proclaim the truth, condemn sin, and to urge repentance.

23. The Respondent believes that the Bible teaches believers that it is wrong to lie. This includes the lie promoted by the complainant that a man can become a woman and that a woman can become a man.

24. The respondent contends that the complainant was born a biological male. The complainant's body therefore has unchangeable characteristics proving male sex: XY chromosomes, male hormones, and internal and external male anatomy.

25. The respondent further contends that the complainant pretends to be a woman. The complainant's current social and cultural self-image and self-identity is feminine. This self-deception meets the diagnosis of a psychiatric condition described in DSM-V as gender dysphoria.

26. The feminine gender assumed by the complainant is the opposite of the complainant's male biological sex.

27. The respondent's opinion based upon his sincere religious belief is that people who identify as transgender deny reality, and falsely claim a new sexual identity. He asserts that God made people male or female, and that biological reality can never be factually changed.

28. The respondent's opinion based upon his sincere religious belief is that the complainant's assertion of being a woman is untruthful, immoral, and sinful.

29. The respondent's opinion based upon his sincere religious belief is that gender dysphoria is abnormal, immoral, and a sexual deviation from sexual and gender norms.

30. The respondent's opinion, based upon his sincere religious belief, is that an individual whose conduct is untruthful, immoral, sexually deviant from the general population, and denies reality, is unfit for public office.

31. The respondent contends that in an election campaign, a candidate's morality and capacity for telling the truth is a matter for legitimate social and political debate. Public debate and scrutiny is required to determine a candidate's fitness for public office.

32. The respondent believes that an individual who makes immoral decisions in life or lives a lie may make immoral decisions in the discharge of public duties, or may lie when questioned.

33. Adultery, infidelity, fornication outside of marriage, prostitution, transgender identification and homosexually are conceded to be legal in Canada. However, these kinds of human behaviour, while requiring lawful observance, are personally viewed by the respondent as immoral, contrary to the Bible, and are legitimate reasons to disqualify any immoral candidate from being elected to public office.

34. The respondent recognizes that other people may hold an opposing viewpoint to his own and may consider immorality in a candidate's personal life to be irrelevant when choosing who to vote for.

35. The content of the publication distributed by the respondent questioned the moral fitness of the complainant to hold public office. This action is consistent with the respondent's constitutional right to declare religious beliefs openly and without fear of hindrance or reprisal, and is outside the scope of s. 7(1) (a) and (b) of the *Code*. In particular, s. 7(1) (b) does not restrict expressions that are likely to expose politicians to hatred or contempt. See: *Canadian Jewish Congress (CJC) v. North Shore Free Press*, 1997 CarswellBC 3175.

36. While the complainant is upset with the respondent's religious perspective and conduct, the reality is that most people from diverse religions agree with the respondent's position that making certain human behaviour legal does not make that behaviour moral, and that in general, immoral people should not be elected to public office.

Freedom of Thought, Belief, Opinion, Expression, and the Press

37. Freedom of expression protects all expressive activity. Section 2(b) of the *Charter* is to be given a large and liberal interpretation. See: *Societe Radio-Canada v. Quebec*, 2011 SCC 1 (SCC) at para. 38.

38. The respondent has the constitutional right to express the opinions he holds. See: *National Bank of Canada v. RCIU* [1984] 1 SCR 269 (SCC).

39. The values protected by s. 2(b) of the *Charter* are the respondent's rights to self-fulfilment, democratic discourse, and truth finding. See: *Montreal (Ville) v. 2952-1366 Quebec Inc*. 2005 CarswellQue 9633 (SCC) at para. 72, 37. These are precisely the values advanced by the respondent in his publication.

40. The publication disseminated by the respondent is an activity that supports the principles and values upon which freedom of expression is based. See: *R. v. Keegstra*, [1990] 3 SCR 697 (SCC).

41. The principles and values underlying the freedom of expression include: seeking and attaining the truth (an inherently good activity); participation in social and political decision-making is to the fostered and encouraged (social and political debate is a desired activity in an democratic election campaign); diversity in forms of individual self-fulfilment and human flourishing (advocacy of Christian culture and Biblical law and values in a multicultural society), which is to be tolerated and welcomed by recipients of the message and information conveyed. See: *Irwin Toy*, [1989] 1 SCR 927 (SCC) at 976.

Context and Circumstances

42. The complainant is a politician, public figure, social activist, community leader, and a former candidate in a general provincial election.

43. Prior to being nominated, the complainant published a commentary in the *Globe and Mail* on December 23, 2015, advocating legal and political rights for transgender people, to attain equal protection under the law.

44. On July 28, 2016 the *Globe and Mail* published another commentary by the complainant, ecstatically bragging about attaining equal protection under the B.C. *Human Rights Code*. In that

commentary, the complainant urged Premier Clark to "clean house," by purging certain members of her caucus, who opposed the complainant's social and political agenda.

45. The complainant is described by the *Globe and Mail* as an advocate for policy changes to normalize and protect trans-identities in Canada. The complainant in 2015 was the chair of the Trans Alliance Society, secretary (in 2015), chair (in 2016) of School District 39 District Parent Advisory Council, a member of the City of Vancouver LGBTQ2+ Advisory Committee and a member of the B.C. NDP provincial executive.

46. The personal and public life of a public figure who ventures into politics is subject to legitimate criticism and scrutiny by opponents, the press, and the electorate. There is no expectation of privacy.

47. The complainant is a politician publicly advocating the NDP's social, legal and political transgender agendas. Disclosure of the complainant's own transgender status heightened the personal stake the complainant has in advancing those agendas. The complainant knew or ought to have known that these agendas represent counter-cultural extremist views repugnant to people of religious belief and are hotly contested and politically debated in the community at large.

48. When the complainant ran as the NDP candidate in the 2017 election, the complaint promoted transgenderism as an election issue. The complainant's aggressive unorthodox views baited the respondent to oppose the election of this candidate on moral and religious grounds.

49. The complainant is no stranger to controversy. The complaint against the respondent is consistent with a tactical choice to eliminate, crush and silence political opposition to the NDP's political agenda. This tactic is subversive of democracy and an attack on the institution of democracy.

50. The complainant's claim to injured feelings and loss of dignity is suspect, given the history of the complainant's leadership and strategy to deliberately engage in confrontation to attain a political, legal and social objectives.

51. The respondent exercised his constitutional rights to express his opinion based upon his religious beliefs that the candidate is morally unfit to hold public office. The respondent asserts that the morality of a candidate is a legitimate ground to publicly debate the fitness of any candidate to hold public office, including the complainant.

52. Notice may be taken of recent notorious events when public debate about alleged immoral conduct of prominent politicians, leading to their downfall. Former Chief Judge Roy Moore was publicly criticized in Alabama for his history of allegedly immoral sexual behaviour, and was defeated in his bid to be elected to the United States Senate. Patrick Brown was pressured to resign as leader of the Ontario Conservative Party because of alleged immoral conduct with women. President Trump will face the same scrutiny should he be a candidate in the next presidential election, for his alleged adultery with a porn star, who was apparently paid hush money to keep her silent just before the last presidential election.

53. The right to individual freedom of expression is at its highest in a public election to choose a politician to hold public office. The free exercise of democracy requires public scrutiny of the moral fitness of every candidate for public office.

54. The respondent contends that the electorate has the right to choose a politician that is not only able to perform the responsibilities of public office, but also to make morally sound decisions and to be truthful.

55. Individual members of the electorate, including the respondent, have a legal right and civic duty or responsibility to participate in the democratic process to influence the election outcome by exercising s. 2 *Charter* rights and freedoms.

56. The respondent states that this complaint is a tactic intended to chill legitimate social and political debate and to deter public expression of his religious beliefs.

57. If the complainant succeeds in this case, the effect of the ruling will be to silence the respondent and to immunize the complainant from political opposition to the transgender agenda in the next election, thereby increasing the complainant's chances of being elected in a close contest.

58. The respondent specifically denies any illegal discrimination or intent to illegally discriminate against the complainant or to arouse any hatred or contempt against the complainant individually or against transgender people generally.

59. Persuading voters to rejecting a candidate on the basis of moral unfitness for public political office falls outside the scope of s. 7(1) (a) and (b) of the *Code*.

60. The publication distributed by the respondent does not constitute the likelihood to incite hatred or contempt toward an individual or a class of persons on a prohibited ground. If this were so, then the publishing, distribution, of Christian, Jewish, and Islamic literature, all of which disapproves of lying, sexual immorality, sinful behaviour, gender self-identification and gender dysphoria, is also illegal and contrary to s. 7 (1)(a) and (b) of the *Code*.

61. Upholding this complaint will invite human rights complaints by politicians who face opposition from individuals who are alleged to be unfit because of immoral positions on controversial issues or who personally choose to live what others consider immoral lives. The guise of race, sex, gender or other prohibited grounds will then be used as a tool to silence opposition from individuals who are not prejudiced but who simply desire to elect a politician who is honest and moral.

Notice of Constitutional Question

62. The Respondent serves *Notice of Constitutional Question* herein, challenging both the constitutionality of the s. 7(1) (a) and 7(1) (b) of the *BC Human Rights Code*, RSBC 1996 c. 210, and the manner in which it is interpreted.

63. The first argument is that s. 7(1) (a) and (b) of the *Code* infringes upon s. 2 (a) and (b) of the *Charter* and cannot be saved by s. 1 of the *Charter* as a reasonable limit in a free and democratic society.

64. The second argument is that s. 7(1) (a) and (b) of the *Code* are *ultra vires* of the Province of British Columbia, by regulating the expression of opinions based upon religious beliefs concerning the moral fitness of political candidates for public office. It is beyond the jurisdiction and competence of a province to limit political and social debate in an election campaign, with the effect of immunizing

a politician from castigation and scrutiny for immoral conduct and for propagating falsehoods, particularly in the context of a hotly disputed political campaign in an election.

65. The third argument is that the legal test to determine "likely to expose" in s. 7(1) (b) is at best speculative, and is unconstitutionally vague and overbroad, and cannot be objectively determined, thereby resulting in the exercise of an arbitrary discretion exercised by the adjudicator, who is not necessarily independent or impartial.

66. The fourth argument is that effect of the BC Human Rights Commission's decision to proceed to the hearing stage in this case amounts to oppressive government action that violates the respondent's s. 2, 15(1) and s. 27 *Charter* rights, by not respecting the doctrine of state neutrality.

Violation of State Neutrality

67. The guarantee of freedom of religion gives rise to a duty of state neutrality. Neutrality requires that the state and any administrative body must not favour or hinder any religious belief. See *Saguenay supra*, at para. 71-72.

68. By remaining neutral, the government preserves a neutral public space free of discrimination and in which true freedom to believe and to express that belief is enjoyed by everyone equally. Neutrality is required of the government, but not from individual persons. See *Saguenay supra*, at para. 74-75.

69. A neutral public space is one that is free from coercion, pressure and judgment on the part of government actors, including a Human Rights Tribunal that suppresses by threat of punishment, s. 2 *Charter* rights. See *Saguenay supra*, at para. 74-75.

70. Section 27 of the *Charter* requires affirmative promotion by the state to enhance diversity, including opposing viewpoints, in a multicultural society, particularly in an election campaign. This is a democratic imperative. See *Saguenay supra*, at para. 74-75.

71. This pursuit of neutrality in a free and democratic society requires the state to encourage everyone, including the respondent, to participate freely in public life, regardless of their individual beliefs.

72. By accepting the complainant's complaint and by allowing it to proceed to the hearing stage, the state has violated s. 2(a) of the *Charter*, abandoned any pretence of neutrality, and created a preferential public space that favours the secular promotion of transgender practices, and is hostile to religious beliefs that opposes lies, seeks the truth, promotes morality and opposes immorality.

73. A secular state may not interfere with the religious beliefs of an individual exercising his democratic rights and constitutional freedoms. There is no harm to public interests, when the publication in question in this case seeks to expose the truth, oppose immorality and to promote moral conduct in society, all of which is consistent with the greater good of society at large.

74. A secular state seeks to respect religious beliefs in truth and morality. It does not seek to extinguish truth and morality. *Loyola High School v. Quebec*, 2015 SCC 12 at para 43.

Merits: The Respondent is the Victim

75. The respondent asserts that he is the one who is suffering discrimination, for the filing of this human rights complaint was intentionally designed to silence him. The complainant is transgender, and seeks to interfere with the manifestation and dissemination of the respondent's religious beliefs. The complainant hates the respondent and is hostile to Christianity generally and in particular despises the opinions and the genuine sincere religious beliefs held by the respondent in good faith.

76. The candidate is using these proceedings to intimidate and to chill opposing viewpoints rooted in principled moral and religious objections to transgender behaviour and the inherent falsehood that that someone who is born a male can become female.

77. The respondent says that the effect of these proceedings, if successful against him, will silence moral and religious opposition to transgender behaviour, encourage public deception by denying the truth about gender dysphoria, and silence meaningful social and political debate, all of which is contrary to core constitutional value of truth and robust open debate in a free and democratic society, that requires scrutiny of the character of candidates for political office during an election campaign.

78. Section 7(1) of the *Code* is improperly used when it is used as a tool to silence moral opposition to immoral behaviour.

79. Any reasonable person, aware of the context and circumstances surrounding the expression, would not view an appeal to truth and morality as exposing the complainant to hatred. See: ***Whatcott v. Saskatchewan Human Rights Tribunal***, 2013 SCC 11 at para 56.

80. The content of the publication authored and distributed by the respondent, cannot be interpreted as an extreme manifestation of the emotion described by the words, "detestation" and "vilification." While the content of the publication may have been regarded by the complainant as repugnant and offensive, the information and opinion in the publication does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects. See: *Whatcott*, para 57.

81. The prohibition of hate speech is not designed to censor ideas or to compel anyone to think "correctly." Exhortation of Biblical values, sexual morality, and truth to persuade others not to vote for a particular political candidate, fall outside the scope of the legislative objectives to reduce or eliminate discrimination. Politicians per se do not fall into a protected class. See: *Whatcott*, para 58.

82. An objective analysis of the content and context of the publication authored and distributed by the complainant would not be regarded as an expression of religious belief, in the context of a social or political debate during a general election, as likely to expose a person to or persons to detestation or vilification based upon a prohibited ground. See: *Whatcott*, para 59.

83. The pith and substance of the expression in dispute is political discourse. The respondent engaged in social, political and moral debate, informed by his religious beliefs and values. As a citizen who has a stake in the outcome of the general election, his political opinion that the

complainant was not a fit candidate for public office, is political expression that lies close to the core of the guarantee. See: *R. v. Sharpe*, 2001, SCC 2, at para 23 per McLachlin, CJ.

The Rule of Law

84. The respondent relies upon the preamble to the *Charter*, which acknowledges the Supremacy of God and the Rule of Law.

85. The moral foundation of the rule of law is natural law based upon Judaeo-Christian principles, religious laws, religious morals, community precepts and God's commandments. Any law passed by an elected body is a rule that may be enforced by coercion, but an immoral law will never have moral authority in a society governed by the rule of law.

86. In Canada's free and democratic society, built upon the rule of law and the supremacy of God, an immoral law will not quell social and political unrest, for people exercising their conscience and acting upon their moral and religious beliefs, will persist in challenging immorality in their pursuit of truth and justice. It is unconstitutional to enact any law or to interpret any law to silence opinions founded upon religious belief in social and political debate that questions the moral fitness of politicians and their political, legal and social agendas.

87. An attempt to stop that debate in this case is not consistent with the rule of law, the supremacy of God, which are the twin pillars upon which Canada's constitution rests.

88. Immunizing electoral candidates from public discussions and debate pertaining to honesty and moral fitness for public office offends the rule of law.

89. In *R. v. Boucher*, 1950 CarswellQue 11, Locke, J. stated:

"The right of free public discussion upon all matters affecting the State and its government, subject only to the restraint imposed by the laws both civil and criminal as to defamation, and in the case of the administration of justice to the law as to contempt of court, has long since become firmly established…. The existence of this right of public discussion is wholly inconsistent with a rule of law that judges or others administering justice or Ministers of the Crown are immune from criticism on the ground that to impugn their honesty or capacity is a reflection upon the government. It is very much too late in the day to say that "if a publication be calculated to alienate the affections of the people by bringing the government into disesteem, whether the expedient be by ridicule or obloquy" it is a crime."

90. Rand J. adopted his earlier reasoning in the first Boucher decision, reported at 1949 CarswellQue 18 (SCC). He noted how the unwritten constitution is capable of evolving to meet the changing times, entrenching a liberal view of the right to criticism public officials, including judges:

"80 But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry

out their duties accountably to the public. The basic nature of the common law lies in its flexible process of traditional reasoning upon significant social and political matter; and just as in the 17th century the crime of seditious libel was a deduction from fundamental conceptions of government, the substitution of new conceptions, under the same principle of reasoning, called for new jural conclusions: *Bourne v. Keane*, [1919] A.C. 815, 89 L.J. Ch. 17.

91. At para 85, Rand J. stated:

"…Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency. What is the degree necessary to criminality? Can it ever, as mere subjective condition, be so**? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability.** Similarly in discontent, disaffection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which **ultimately serve us in stimulation, in the clarification of thought** and, as we believe**, in the search for the constitution and truth of things generally.**" [My emphasis].

92. The respondent's quest to socially and politically debate the truth about transgender matters is foundational to a properly working democracy. While controversial fury may be aroused, Canada's free society, in order to flourish, welcomes the expression of political opinions informed by religious beliefs, to stimulate clarification of thought is matters of great public importance. To suppress the respondent's views is inimical to the rule of law.

Jurisdiction

93. The banning of political opinion based upon religious belief is beyond the competence of the Province. The respondent published his opinion and distributed that publication to expose deception and to urge voters to disassociate from voting for a political party. His dissemination of what the complainant may view as subversive and offensive "Christian propaganda," and the complainant's attempt to silence this opinion, is analogous to the use of provincial legislation in Quebec to silence in 1956 "Communist propaganda." The Supreme Court of Canada ruled that Quebec did not have the jurisdiction to outlaw the publication and distribution of any opinion that might propagate or tend to propagate (read likely to propagate) communism, under threat of penalties. See: *Switzman v. Elbing,* [1957] SCR 285 (SCC).

94. The respondent adopts the comments below stated by Rand, J.:

"52 …. For the past century and a half in both the United Kingdom and Canada, there has been a steady removal of restraints on this freedom, stopping only at perimeters where the foundation of

the freedom itself is threatened. Apart from sedition, obscene writings and criminal libels, the public law leaves the literary, discursive and polemic use of language, in the broadest sense, free.

53 The object of the legislation here, as expressed by the title, is admittedly to prevent the propagation of communism and bolshevism, … and the issue is whether that object is a matter "in relation to which" under s. 92 the Province may exclusively make laws. Two heads of the section are claimed to authorize it: head 13, as a matter of "Civil Rights", and head 16, "Local and Private Matters".

…

55 … The ban is directed against the freedom or civil liberty of the actor; no civil right of anyone is affected nor is any civil remedy created. **The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. There is nothing of civil rights in this**; it is to curtail or proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.

…

57 … Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. **This means ultimately government by the free public opinion of an open society**, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

58 But **public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas**. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of **individual liberation from subjective as well as objective shackles.** Under that government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.

59 This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. **Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence**. As such an inherence in the individual it is embodied in his status of citizenship. Outlawry, for example, divesting civil standing and destroying citizenship, is a matter of Dominion concern. Of the fitness of this order of government to the Canadian organization, the words of Taschereau J. in *Brassard et al. v. Langevin*[32] should be recalled:

The object of the electoral law was to promote, by means of the ballot, and with the absence of all undue influence, the free and sincere expression of public opinion in the choice of members of the Parliament of Canada. This law is the just sequence to the excellent institutions which we have borrowed from England, institutions which, as regards civil and religious liberty, leave to Canadians nothing to envy in other countries.

60 Prohibition of any part of this activity as an evil would be within the scope of criminal law, as ss. 60, 61 and 62 of the *Criminal Code* dealing with sedition exemplify. Bearing in mind that the endowment of parliamentary institutions is one and entire for the Dominion, that Legislatures and Parliament are permanent features of our constitutional structure, and that the body of discussion is indivisible, apart from the incidence of criminal law and civil rights, and incidental effects of legislation in relation to other matters, the degree and nature of its regulation must await future consideration; for the purposes here it is sufficient to say that it is not a matter within the regulation of a Province.

…

62 I would, therefore, allow the appeal, set aside the judgments below, dismiss the action and direct a declaration on the intervention that the statute in its entirety is *ultra vires* of the Province…. [Emphasis added]

95. In *Brassard v. Langevin*, 1877 CarswellQue 6 (SCC), Ritchie J. justified why the respondent has the legal right to express his unfettered opinion on the fitness of the complainant to hold public office:

"72. … It has long ago been said by a standard legal authority as a common law doctrine that "It is essential to the very existence of Parliament that elections should be free, wherefore all undue influences on electors are illegal." **The rights of individual electors are the rights of the public. All, without distinction of class or creed, are alike interested in the good government of the country, and in the enactment of wise and salutary laws, and therefore the public policy of all free constitutional governments in which the electoral principle is a leading element, (at any rate of the British Constitution) is to secure freedom of election**;

78 Clergymen, and I draw no distinction — my observations I wish distinctly to be understood as applying to all churches and denominations alike — **Clergymen, I say, are citizens, and have all the freedom and liberty that can possibly belong to laymen, but no other or greater. The fullest and freest discussion of the fitness of the candidates, of the policy of the Government, of the merits of the Opposition, of any or all of the public questions of the day, can be denied to neither priest nor layman; but while there may be free and full discussion, solicitation, advice, persuasion, the law says, in language not to be mistaken, and not to be disregarded, there shall be no undue influence or intimidation to force an elector to vote or to restrain him from voting in a particular manner. The layman cannot use undue influence or intimidation, neither can the priest;** …" [My emphasis]

96. The respondent is not an official registered clergyman, but is a layperson who published and disseminated a publication engaging in the "fullest and freest discussion about the fitness of the complainant to hold public office. He did not attempt to intimidate nor use undue influence upon the conscience of any voter. He expressed his opinion that the complainant was not being truthful and was immoral. To use human rights legislation to ban political opinion and political debate is an abuse of the intended purpose of such legislation, and if the suppression of political opinion and political debate is held to be within the scope of the *Code*, then those provisions of the *Code* are unconstitutional.

97. The implied bill of rights doctrine rooted in the unwritten Canadian constitution, protects the fundamental importance of public discussion to democracy, at all times, including during election campaigns. In *Reference Re Alberta Statutes,* [1938} SCR 100 (SCC); affirmed [1939] AC 117 (PC), Duff CJC recognized the inherent checks and balances needed to hold elected representatives accountable to the public to ensure that Parliament (and the legislatures) work under the influence of public opinion and public discussions.

98. Duff stated at para 106:

"There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination **from every point of view** of political proposals, …" [Emphasis added]

99. At para 108, he added:

"Even within its legal limits, it [freedom of discussion] is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of **this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life** for parliamentary institutions.**"**

100. Duff explicitly rejected any attempt by any province to regulate political and social debate in the context of an election campaign. At para 110 he stated:

"Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) **would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces**, as repugnant to the provisions of *The British North America Act* , by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province." [Emphasis added].

101. Cannon J concurred with Duff CJ, and added his own view at para 148:

"Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of *The British North America Act*, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. **Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law.** Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but **the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern.** The mandatory and prohibitory provisions of the Press Bill are, in my opinion, *ultra vires* of the provincial legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. **The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion.** These subjects were matters of criminal law before

Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the criminal code. **No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada.** Moreover, citizens outside the province of Alberta have a vital interest in having full information and comment, favourable and unfavourable, regarding the policy of the Alberta government and concerning events in that province which would, in the ordinary course, be the subject of Alberta newspapers' news items and articles." [Emphasis added]

102. The use of s. 7(1) of the *Code* is analogous to Quebec City's bylaw to prohibit the publishing and distribution of Jehovah Witness material, as it was viewed to be offensive to the orthodox view of Roman Catholicism, the prevailing theology at the time. The bylaw gave unfettered discretion to a police officer to decide whether or not to issue a license to permit the distribution of the impugned literature. That discretion is analogous to the discretion of a human rights officer who decides whether or not the respondent's literature is permissible or not.

103. In *Saumur v. Quebec (City)*, 1953 CarswellQue 43, the Supreme Court of Canada set aside the bylaw as outside the jurisdiction of the province to enact. Rand J. found in effect that the bylaw amounted to censorship and that the religious sect of Jehovah Witnesses were victims of religious discrimination.

104. Rand J. stated:

"86 As in all controversies of this nature, **the first enquiry goes to the real nature and character of the by-law**; in what substance and aspect of legislative matter is it enacted? … we must take its objects and purposes to be what its language fairly embraces. **The by-law places no restriction on the discretion of the officer** and none has been suggested. If, under cover of such a blanket authority, action may be taken which directly deals with matters beyond provincial powers, can the fact that the language may, at the same time, encompass action on matters within provincial authority preserve it from the taint of *ultra vires*? May a court enter upon a delineation of the limits and contours of the valid and invalid areas within it? Must the provision stand or fall as one or can it be severed or otherwise dealt with? These are the subsidiary questions to be answered.

87 **What the practice under the by-law demonstrates is that the language comprehends the power of censorship**. From its inception, printing has been recognized as an agency of tremendous possibilities, and virtually upon its introduction into Western Europe it was brought under the control and license of government. At that time, as now in despotisms, authority viewed with fear and wrath the uncensored printed word: it is and has been the bête noire of dogmatists in every field of thought; and the seat of its legislative control in this country becomes a matter of the highest moment.

88 **The Christian religion, its practices and profession, exhibiting in Europe and America an organic continuity, stands in the first rank of social, political and juristic importance.** The Articles of Capitulation in 1760, the Treaty of Paris in 1763, and the *Quebec Act of 1774*, all contain special provisions placing safeguards against restrictions upon its freedom, which were in fact liberations from the law in force at the time in England…."

105. Rand J. recognized that freedom of religion and speech is at the heart of the unwritten constitution, and cannot be banned by positive law, that is, statutes and regulations enacted by provincial legislative bodies.

106. He stated:

"95 The only powers given by sec. 92 of the *Confederation Act* which have been suggested to extend to legislation in relation to religion are nos. 13, Property and Civil Rights, and 16, Matters of a merely local or private nature in the province. The statutory history of the expression "Property and Civil Rights" already given exhibiting its parallel enactment with special provisions relating to religion shows indubitably that such **matters as religious belief, duty and observances were never intended to be included within that collocation of powers**. If it had not been so, the exceptional safeguards to Roman Catholics would have been redundant.

96 Strictly speaking, civil rights arise from positive law; but **freedom of speech, religion and the inviolability of the person, are original freedoms** which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions**, there is no prior or antecedent restraint placed upon them**: the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law; but the sanctions of the latter lie within the exclusive jurisdiction of the Dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms.
97 That **legislation "in relation" to religion and its profession is not a local or private matter would seem to me to be self-evident: the dimensions of this interest are nationwide**; it is even today embodied in the **highest level of the constitutionalism** of Great Britain; it appertains to a boundless field of **ideas, beliefs and faiths** with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other, and **there is nothing to which the "body politic of the Dominion" is more sensitive.**"

Charter of Rights and Freedoms

107. Section 7(1) of the *Code* is unconstitutional when examined in the context of a political election campaign. Context matters, as a particular right may have a different value depending on the context. See: *R. v. Keegstra*, 1990 CarswellAlta 192 at para 50, per Dickson, CJ. The s. 1 analysis required by *R. v. Oakes* [1986] 1 SCR 103 (SCC) demands a contextual approach. See: See *Canada v. Taylor*, 1990 CarswellNat 1030 (SCC) para 48, per Dickson, CJ.

108. Section 7(1) clearly violates s. 2 (a) and (b) of the *Charter* and cannot survive a constitutional scrutiny under s. 1 for numerous reasons.

109. The respondent's publication and the message communicated meets the purpose of the guarantees in s. 2(a) and 2(b) of the *Charter*: "The purpose of the guarantee is to permit free expression in order to promote truth, political and social participation, and self-fulfillment…" See *Attis v. New Brunswick School District No. 15*, 1996 CarswellNB 125 (SCC) at para 59, per LaForest, J.

110. The *Code* is fatally deficient with respect to the complaint here, as the reasons of the majority in the *Taylor* decision is justified under s. 1 only when rationally connected to human rights legislation that is targeting systemic discrimination. See *Taylor* at para 82, per Dickson, CJ.

111. Excusing the balancing factors of intent, medium, context, truth, in this case, as was done by Dickson CJ in *Taylor*, to eradicate the evil of systemic discrimination, results in catching political and social speech focused on truth and morality targeted at a single individual who is a political candidate, which is the kind of desired expression that contributes positively to democracy in an election campaign. The *Code* has to be much more narrowly tailored to meet the requirements of minimal impairment and proportionality to pass constitutional scrutiny.

112. Section 7(1) of the *Code* is too broad and too invasive, for it overreaches its objectives and cannot be justified under s. 1. The scope of s. 7(1) includes speech neither intended nor calculated to likely expose an individual or identifiable group to hatred or contempt. It catches speech which may be entirely accurate and truthful; speech which merely seeks to air legitimate group grievances; speech which merely exposes to ridicule; and speech which merely communicates the information by a leaflet that may be discarded by an individual who does not like the message. See *Taylor*, para. 165, per McLachlin, J.

113. Excluding the defence of truth in the context of an election campaign, in the quest to choose a candidate that is morally fit for public office, defeats the purpose of *Charter* freedoms. The exclusion of the defence of truth by s. 7(1) of the *Code* exponentially increases to erosion of guaranteed constitutional rights.

114. The respondent adopts the reasoning of McLachlin J. from *Taylor*, at para 162:

"… the value of seeking truth is one of the strongest justifications for freedom of expression. It is essential to the "marketplace of ideas" which is a condition of a free, vibrant society. It is equally central to the rationales of the working of democracy and self-fulfillment that underlie freedom of expression. **Individuals in a free society assume** that, whatever restriction it may be necessary to place on free speech, **they will always have the right to say what is true**. That right cannot be lightly restricted." [My emphasis].

115. There is no balance struck in s. 7(1) between competing *Charter* and societal values. It is not carefully tailored to its aims and lacks a rational connection with its objectives. Any expression or communication or opinion based on religious belief is might be held to "likely to expose" persons to hatred or contempt, based on an objective test that is essentially the personal view of the decision-maker.

116. The respondent faces a hearing bereft of common sense, legal logic and constitutional protection. Subjective intent is irrelevant. Foreseeability of possible effect is irrelevant. Intent is irrelevant. Context is irrelevant, even though the reach of s. 7(1) intrudes into the electoral, social, religious and political fora. The absence of proper balance and grossly disproportional overreach in the *Code* is a formula to advance the tyranny of extremist views to attack and silence a moral majority seeking truth and desiring morality in a secular culture.

117. This perverse situation is a major departure from the original purpose of human rights legislation designed to promote equality in housing, the workplace and public accommodation. The result is simply absurd, for the respondent equality rights are threatened by effects of this complaint. It is the respondent in these proceedings who is the target of detestation and vilification from the complainant. See: *Whatcott* at para 41.

Part Three: Remedies

118. The respondent seeks to have this complaint dismissed, with costs payable to the respondent on a full indemnity basis.

119. Alternatively, if the Tribunal finds that the respondent is found to have offended s. 7(1) of the *Code*, the respondent argues that the Constitution of Canada, both written and unwritten, which guarantees the respondent's freedom of religion, conscience, thought, belief, opinion, expression, and association, is paramount over section 7(1) of the *Code*, and seeks a *Charter* remedy from the Tribunal to declare that section 7(1) of the *Code* or any portion thereof is unconstitutional, to the extent it is inconsistent with s. 2(a), (b), and (d), s. 15(1) and s. 27 of the *Constitution Act, 1982*, and is of no force and effect, contrary to s. 52 of the *Constitution Act, 1982*, and cannot be saved by s. 1 of the *Charter*.

120. The respondent further seeks findings by the Tribunal that his rights under the *Code* and the *Charter* have been infringed or denied, and seeks appropriate and just remedies under the *Code* and s. 24(1) of the *Charter*, including declarations, damages, exemplary damages, and costs on a solicitor client basis.

All of which is Respectfully Submitted,

This 8th day of May, 2018.

Dr. Charles I. M. Lugosi, SJD

Counsel for Bill Whatcott