Oger v. Whatcott

Reply to AG Submissions

1 At stake is the future of political free speech. The question is whether the Province has jurisdiction to regulate the content of political free speech uttered or stated in a publication in the course of an election campaign.

Is the Subject Matter Within the Scope of Section 92 (13) read together with 92(16) of the *Constitution Act, 1867* and Within Provincial Jurisdiction?

General Response to Paragraphs 30, 36-49 of AG Factum

2 In *Scowby*, Estey J. at p. 233i, determined that the test for deciding whether a section of a provincial human rights code falls within the jurisdiction of the province, boils down to the **activities** legislated. Housing, employment and education were all **activities** that are in relation to property and civil rights or were matters of a local and private nature.

3 The **activity** of political free speech is at issue here. Is there absolute freedom to discuss the moral fitness of a political candidate running for public office?

4 The Respondent says that his liberty, personal autonomy, psychological integrity rooted in security of the person, all guaranteed by s. 7 of the *Charter,* is impaired by the coercive reach of s. 7 of the *BC Human Rights Code* ("Code"). Moreover, his deprivation of these constitutional freedoms is done by a governmental adjudicative process that violates fundamental principles of justice. Rulings made by the Tribunal, both before and during the hearing, resulted in the abandonment of the search for truth, a prohibition upon cross-examination of the complainant to test credibility, the application of a legal test for liability that eliminates *mens rea*, a legal test that eliminates good faith, a legal test that deems truth to be irrelevant, the deprivation of a finder of fact composed of a representative jury, and the imposition of an order compelling speech to conform to gender specific pronouns.

5 The result is the imposition of strict liability based on an objective test of a hypothetical reasonable person. Although the norm in judicial review of administrative action is reasonableness, the Respondent says that the appropriate legal standard can only be one of correctness. This is because what is reasonable to the average person who forms part of the majority, does not take into consideration what is reasonable to discrete and insular minorities, who are powerless and marginalized because of unpopular views. To counter this imbalance, a finder of fact assessing this case, that is essentially about democracy, must give weight to unpopular dissenting views that are perceived as unreasonable or even hateful, by adopting a correctness standard, instead of a reasonableness standard that will only be certain to impose liability upon the Respondent.

6 The Respondent says that there is no authority, express or implied, within the scope of s. 92 of the *Constitution Act, 1867* that grants jurisdiction to the province to regulate the content of political speech in the course of an election campaign. Section 7 of the Code strikes at the heart of democracy. Here is why.

7 The prohibition of alleged hate speech during an election campaign will exacerbate social problems and not relieve them. Banning free speech will bottle up steam that needs a way to

peacefully vent. Restricting free speech disrespects individual autonomy and self-determination. The concept of democracy is self-government by the people. For the system to work, an informed electorate is necessary. In order to be knowledgeable, there must be no constraints on the free flow of information and ideas. Democracy will not be true to its essential ideal if there is law that can manipulate the electorate by withholding information to stifle criticism of the moral fitness of a political candidate.

8 Democracy thrives when there is no regulation of the content of free speech during an election. Good intentions to prevent hurt feelings to targeted candidates harms the political and democratic process. Free speech, not human rights law, is the antidote to the social diseases of prejudice and hate. In this war on free speech, the ultimate casualties are truth and democracy.

9 Whatcott's flyer created a golden political opportunity and platform for Oger to expose Whatcott as a prejudiced bigot and to attack the Bible as a fount of hate literature. The activities of Whatcott identified him as a political opponent and revealed the precise nature of his thinking. This allowed Oger to counter with a strategic political response, by using religious clergy to oppose the biblical authorities cited by Whatcott.

10 The effect of legally supressing unwelcome political speech will outrage and alienate those who share Whatcott's beliefs and views. This consequence marginalizes minorities who may then view the legal order as illegitimate and regard the electoral and democratic process as a one-sided sham. History teaches us that suppressing peaceful political speech in the short term can eventually lead to violence and illegal means to accomplish political goals. Conflicts are inevitable in any society, but what sets democracy apart from other political systems is that it offers the means to resolve conflicts peacefully without violence.

11 Regulating political speech means that the majority and "reasonable" viewpoint in society will attain power that can lead to abuse. Classifying dissenting minority speech as unprotected "hate" speech, will be an easy means to attack moralists who quote the Bible, and to expose people like Whatcott to detestation and vilification by the general public. People like Oger will use s. 7 as a shield to defend dominant groups that have protected status in law, and used like a sword to punish Whatcott, by stifling his political speech and to financially and socially destroy him, labeling him a hater and relegating him to marginal existence, all because Whatcott decided to meaningfully participate in the democratic electoral process and to manifest his religious faith.

12 The irony is that outliers and dissenters who are most in need of speech protection, will be denied that protection by any finding that s. 7 of the Code is constitutional and may regulate the content of political free speech. If the Tribunal disempowers those who advance biblical authority to justly criticize the moral fitness of a political candidate for public office, the enemies of Whatcott and what he stands for, will have cleverly set the stage for a direct attack on the Bible itself, as cesspool filled with hate literature, that condemns the immoral to eternal suffering and punishment for sin. All this will flow from an innocuous complaint regarding the content of a political and religious flyer that has not a shred or hint of posing any clear or present danger of criminal activity or hatred to the person of Oger or to anyone else associated with Oger's gender identity.

13 All these aforementioned activities cannot be said to have any rational connection to the powers granted to a provincial government under s. 92. The inevitable conclusion is that s. 7 of the Code poses a grave threat to the very foundations of democracy itself.

14 Regulating the content of political free speech and thus restricting Whatcott's public participation in the democratic electoral political process is incompatible with a free and democratic society.

15 If s. 7 of the Code is constitutional, then the provincial government will have the authority to regulate the content of political expression during an election. Such a finding is opposite to the conclusion of the Tribunal in *CJC v. North Shore News*, para. 190, "Thus s. 7(1)(b) does not in any way restrict hateful expressions that are likely to expose … politicians … to hatred or contempt, because of their political affiliations …" Close scrutiny of Whatcott's flyer reveals that his goal was to persuade other voters not to vote for the NDP, a political party advocating the political, legal, and social agenda of Oger, who is the current Vice-President of that same party.

16 The content of political free speech cannot be limited by provincial law, as this activity is outside the scope of s. 92 and arguably also s. 91. The written and unwritten constitution of Canada is a legal instrument that is superior to any positive law passed by any provincial government or by the federal government. Unregulated political free speech is in its own right, is a political institution of the highest order, enshrined by both the implied bill of rights found in the unwritten constitution and in the *Constitution Act, 1982*. Support for this is found in the *Keegstra* decision, where freedom of expression is regarded as the most powerful of all the s. 2 *Charter* rights. See: Brunner, p. 302.

17 In *Switzman v. Elbing*, at p. 328 [SCR], Abbott J. stated, "… neither a provincial legislature nor Parliament itself can 'abrogate this right of discussion and debate.'" Political free speech is the lifeblood of democracy. Political free speech, like the air itself, is not confined to the physical limits of a building housing the elected members of parliament or the legislature, but extends everywhere as a treasured political institution that is at its highest level of importance, during an election campaign, when the freedom to choose a candidate is at stake.

18 In this case, the Whatcott flyer injects truth and Christian morality into the political debate, to dissuade voters from electing a party that nominated an individual perceived by Whatcott to be morally unfit. To mischaracterize a flyer intended to be the sunlight of truth as the darkness of hate, disregards the rule of law, which permits citizens to "explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications … and social principles …" of a political candidate. See pp. 327-8, per Abbott J. in *Switzman*.

19 Do moral virtues and social principles derived from Judeo-Christian authority that informed the genesis and development of the common law and the rule of law still matter today? If the answer is yes, the message that Whatcott preached through his flyer cannot be properly interpreted as hateful at all.

20 While gender identity and expression is be legal as a protected class under human rights legislation, there is a hot political opposition from some feminists who argue that this kind of activity is unwelcome gender misappropriation, offensive to biological women. Does this mean that all political opposition to the legal *status quo* is uniformly hateful, whether based in feminist theory or

in Christian doctrine? If only Christian doctrine is viewed as hateful, is this not bigotry and hate toward Christianity itself, manifested as Christphobia?

21 The human rights legislation includes religion as a protected class too. Is not the depiction of Whatcott's flyer as hate, also an indirect attack on the Bible itself as hate literature? Where is the jurisdiction in the province to make a determination that the holy book of a major established religion is hate speech and cannot be quoted in an election to oppose the morality, political platform, and social principles of a political candidate? Assuming there is a hate finding against Whatcott, is this not State discrimination against Christian evangelists and activists, contrary to the statutory policies of the Code? Where is the jurisdiction in the division of powers that allocates such a sweeping mandate to a province? There is none.

22 A political proposal to repeal the protection of those people who identify as transgender might be regarded by some as hateful, and the subject of a complaint to the human rights tribunal. But however repulsive Whatcott's political actions might be to Oger, who lobbied to amend the Code to protect gender identity, CJC Duff ruled in *Reference re Alberta Statutes*, at pp. 133-4 that "every point of view" is legitimate in both the advancement and in the attack upon political proposals. This freedom is governed by criminal laws that protect public order from violence and protects by tort law the reputation of individuals from defamation. Duff CJC does not identify the truth as a limitation that may be restricted by law.

Is the Subject Matter Within the Exclusive Jurisdiction of the Criminal Law, s. 91 (27) *Constitution Act, 1867*?

Specific Response to Paragraph 40, AG Factum

23 The imposition of a penal sanction, such as the deprivation of physical liberty for a predetermined period of time, is not the only identifying characteristic of criminal law regarding the classification of legislation to be in pith and substance criminal law. Whatcott faces the possible lifetime deprivation of his liberty to evangelize, to manifest his religion in the public square, and to use the pronouns he chooses. He also risks losing his freedom to express his conscience and to publicly rebuke immorality, as part of his participation in a democratic election to urge voters not to vote for a candidate or a political party, or both, that he believes is morally unfit to hold public office and to exercise power. These infringements of liberty are far more insidious and restrictive of personal liberty and his psychological integrity, which is integral to his security of the person, than incarceration that imposes no control over the mind.

24 Section 7 of the Code resurrects the crime of seditious libel that was once regulated in the *Criminal Code*. Exclusive jurisdiction for the regulation of hate speech as a crime is conferred upon the federal government by s. 91(27). The *Keegstra* decision is an illustration of the exclusive authority of the federal government to regulate hate speech.

25 In this case, Oger asked the police to bring a hate crime prosecution against Whatcott. No charges were laid. That ought to have been the end of the matter. It is a violation of the rule of law and the division of powers to use human rights legislation as criminal law to accomplish the suppression of Whatcott's views.

26 Had Whatcott been charged with a hate crime, he was entitled to be presumed innocent until proven guilty beyond a reasonable doubt, to test the credibility of Oger, to rely upon the defence of truth, to the admission of expert evidence from Dr. Gutowski, allotted more time to cross-examine and to make legal submissions, and if indicted, to be tried by a judge and a jury, just to name a few due process protections available under criminal law. Whatcott would have been far better off to be criminally charged and undoubtedly acquitted.

27 The test for charge approval is that there is no likelihood of conviction and that it is not in the public interest to proceed. That was the right decision.

28 However, s. 7 of the Code is bereft of the due process requirements of criminal law. In effect, Whatcott is unconstitutionally prosecuted for a human rights hate crime that is not only outside the jurisdiction of the province, but also is shamefully lacking legislative safeguards that ensure due process.

29 The penal sanctions test deserved more than just a cursory look by the Attorney General to see if the Tribunal has the power to jail Whatcott or not. A proper analysis begins with the finding of liability. A finding of liability under the applicable statute attaches moral culpability and social stigma to the offender. The sanctions imposed by both a sentencing judge for a criminal offence and for a human rights offence are the same. The sanctions are designed to compel behaviour modification.

30 Behaviour modification is the goal of sanctions that are designed to denounce, deter, rehabilitate and make reparations to the complainant and to society at large. In this case, this Tribunal is asked by Oger to make a finding of liability; to make a declaration that s. 7 of the Code was violated; to impose costs of $35,000 for alleged defiant and disrespectful behaviour, both in and out of the sight of the Tribunal members; to assess a severe monetary penalty of $35,000 to punish for the public expression of alleged hateful thoughts and ideas that allegedly harmed Oger's dignity and reputation, to pay an unspecified large sum of money to a transgender-rights organization to pay for harm done to the larger transgender societal community; for an order that Whatcott be compelled to be re-educated by participating in a school designed to teach him a better understanding of gender identity, with the goal to humble and humiliate Whatcott by indoctrinating him with the Tribunal's view of Whatcott's legal obligations under the Code.

31 Denunciation is accomplished by the declaration that Whatcott violated the Code and amounts to a societal miscreant who is a hateful bigot. The monetary penalty of $35,000 for harming Oger's dignity and reputation serves as a deterrent to both Whatcott and others who might follow his example. The monetary penalty of $35,000 in costs also serves to deter Whatcott and others from criticizing the lack of due process, coercion and bias alleged by Whatcott to have permeated the human rights proceedings. The coerced donation to an organization supporting what Whatcott considers to be immoral political, social and cultural goals is designed to make reparations to a certain segment of society that identifies with the political advocacy of Oger. The order for coerced re-education is designed to rehabilitate Whatcott in the hopes that his thinking and behaviour will conform in the future to transgender values and objectives. The individual and collective sum of all these sanctions amount to behaviour modification through a combination of financial penalties, social stigma, and forced re-education of his mind by social engineering.

32 These sanctions are indeed penal and to anyone with a sound knowledge of criminal law, recognize that these sanctions follow the basic principles of criminal law sentencing. In fact, the sanctions sought are more comprehensive and more draconian than simply a fine and a term of probation with conditions that is normally imposed as sanctions for summary conviction offences that result in a criminal record.

33 A human rights record is no less odious than a criminal law record, and is perhaps even worse, because there is no process for a human rights pardon. Whatcott faces a lifetime of unemployment. No employer is required to hire an individual deemed by law to be a hate monger. He will be discriminated against, in spite of his Christian beliefs. Social isolation, ostracism and expulsion are other consequences. For an indigent individual like Whatcott, bankruptcy looms, and the financial penalties affect not only him, but his wife and two young children. Compulsory re-education imposes the state's will upon Whatcott's security of the person, in a similar manner to a judge unconstitutionally ordering the castration of a convicted sexual offender or the forced ingestion of unwanted prescription drugs upon a convicted person, to modify that individual's behaviour and mental state. Compulsory re-education at a facility amounts in principle to a form of temporary incarceration to brainwash Whatcott so that he will modify his Christian beliefs to accept transgenderism. This sanction is similar to the current situation in China where over a million Muslim Chinese are confined to a detention facility to modify their religious beliefs so that the prevailing orthodox view of the secular state is unchallenged in society.

34 For the Attorney General to conclude without any substantive analysis in paragraph 40 that "there is no penal sanction that could possibly make this [legislation] criminal law," ignores the provisions of the human rights legislation, that permit sanctions that follow the principles of behavior modification and sentencing utilized in criminal and human law.

35 There is no doubt that s. 7 of the Code in pith and substance is criminal law. Rand J. at pp. 12-13 [SCR] ruled in *Switzman* that prohibiting any part of political free speech "as an evil would be within the scope of criminal law," and then referred to sections of the *Criminal Code* that dealt with sedition.

36 Section 7 of the Code, according to the AG in para. 40, does not specifically ban the propagation of a political belief. If that is the case, why was this case not dismissed at an early stage upon the application of Whatcott? The evidence in this case is clear that Whatcott was expressing a political belief that was grounded in Christian morality.

37 Duff, CJC read s. 92(13) and s. 92(16) together in *Reference re: Alberta Legislation*. At p. 26 [SCR] Duff summed up the law that leaves no doubt that s. 7 of the Code falls outside provincial jurisdiction: "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 … is also a citizen … 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**." [My emphasis]

38 This conclusion is supported in para. 47 of the AG factum. In *OPSEU*, Beetz J. held, "… neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure." The structure is the right to abrogate the right of free public discussion and debate referred to in the immediately preceding authorities cited, of *Switzman* and *Alberta Statutes*.

39 The law is clear: the mandatory and prohibitory provisions of s. 7 of the Code are *ultra vires* of the provincial legislature.

Housekeeping Matters

40 Academic Articles cited in Support of Submissions

Tab 1: pp. 228, 231, 232, 235, 236, 242, 243, 244, 246, 247, 245;

Tab 3: pp. 448, 489, 491, 495;

Tab 5: pp. 50, 51, 64, 65

Tab 7: pp. 302, 303, 313, 314.

41 Academic Article submitted in Reply Regarding the Nature of the "Activity" for s. 92 Purposes and Analysis

C. Edwin Baker, *Hate Speech*, March 10, 2008 ssrn.com/abstract+1105043 pp. 9-23.

42 Costs

The Respondent adopts his earlier submission to Tribunal made in writing at the pre-hearing stage. As well, the Respondent adopts the submission of the Justice Center regarding costs.

43 The Submission of the Justice Center

The Respondent adopts the submissions of counsel for the Justice Center.

44 Highlighted Paragraphs from Supplementary Submissions of the Respondent

Paragraphs 20, 21, 22, 23, 24, 25, 26, 27

45 Highlighted Paragraphs from Constitutional Submission that may be useful to the Tribunal in the Application of Charter Values

Paragraphs 27-45.

46 Highlighted Paragraphs from the Section 7(1) Submissions

Paragraphs 25, 26, 27, 28

All of Which is Respectfully Submitted

Dated this 20th day of December, 2018, at Victoria, BC

Charles I. M. Lugosi, Counsel for Bill Whatcott