*Oger v. Whatcott*

**Supplementary Submissions of the Respondent Whatcott**

December 16, 2018

1 Although Whatcott described himself as a Christian activist, there are no doubt a handful of people who view him as a prophet of God, urging repentance from sexual immorality, and preaching that salvation is within reach of everyone.

2 Canadian history records significant litigation brought by Jehovah Witnesses whose civil rights were upheld by the Supreme Court of Canada. This pioneering jurisprudence left a legacy that ensures that personal freedom of Witnesses to go door to door to distribute literature today remains a beacon of religious liberty and personal freedom.

3 Christians like Whatcott take seriously the biblical command to go forth and evangelize the world. His flyers preach the gospel of the Christian Holy Bible. His flyer is anchored in biblical verses that provide the foundation of his political message.

4 What Oger seeks is the branding of Christian preaching in a flyer as hate propaganda. Section 7 of the BC Human Rights Code is to be utilized as a tool to silence and punish political enemies, who if powerful enough, would repeal s. 7 and the addition of gender identity and expression as a protected ground.

5 If this Tribunal adopts Oger's contention that faith is a private matter, and must be kept in the closet and out of the public square, this will set the stage for the creation of a new kind of crime, rooted in human rights legislation. The new crime is publicly manifesting religious belief.

6 Oger contends that even if the flyer does not promote violence or the threat of violence, it ought to be interpreted as hate literature, which inspires violence by others, harming not just Oger but anyone who is transgender or a family member. What Oger describes is a human rights crime that has no victim.

7 The movie Minority Report described a society wherein an individual could be tried and convicted of the crime of murder, when no murder has been committed. I suggest that Oger views Whatcott as a continuously barking dog that is a nuisance, an irritation that spoils Oger's political and legal agenda by refusing to let go of his bone. The bark is the flyer, the dog is less than human, and the bone is the Bible.

8 Oger, who did not personally receive the flyer, is on a mission to stamp out all opposition in a crusade that amounts to Christphobia. Nothing less that the erasure of Whatcott will satisfy Oger.

9 Oger invites the panel to speculate that the flyer will incite evil. Oger implores the panel to harshly punish Whatcott as a preventative measure, to destroy him financially and to permanently muzzle this troublesome meddling dog that will not let go. No evidence of causation is offered. Subjective belief of Oger that amounts to conclusory statements is urged to be sufficient.

10 Even accepting genuine fear in Oger was generated, the evidence does not disclose any reasonable basis for that fear. See *Bracken v. Fort Erie (Town)* 2017 ONCA 668, para. 46. "A person's

subjective feelings of disquiet, unease, and even fear, are not in themselves capable of ousting expression categorically from the protection of s. 2(b).[Charter]" para. 49. "… courts must be vigilant in determining whether the evidence supports the characterization, and in not inadvertently expanding the category of what constitutes violence or threats of violence." Para. 50. "Courts should not be quick to conclude that a person's actions are violent without clear evidence. Here, there is no evidence that Mr. Bracken's protest was violent or a threat of violence, and the finding that it was constitutes a palpable and overriding error." Para. 52.

11 Was the flyer tantamount to a "dog whistle" directed to transgender people, as alleged by Oger? The Ontario Divisional Court in *Christian Heritage Party of Canada v. Hamilton (City)*, [2018] O. J. No. 5105 stated at para 60 that, "…the removal of political speech as a result of alleged subtle, hidden messages in visual imagery demands that robust explanations be given and demands that the CHP have an opportunity to participate in that inquiry. Absent such explanations, any individual could stifle otherwise valid political speech by citing subliminal messages without having to justify that position… no two witnesses saw the same hidden message or even agreed as to what the image was showing."

12 These two illustrations from the evidence of Oger amply demonstrate that Oger's evidence amounts to conclusions derived from Oger's personal biased intolerant perspective. Stating conclusions about a subtle "dog whistle" message and an incitement to hate and violence and without any rational evidentiary basis, and are of no value to the Tribunal. Accepting this evidence would amount to an error in law. See: *Canadian Center for Bio-Ethical Reform v. South Coast BC Transportation Authority*, 2018 BCCA 440 at para. 50, 54, 60.

13 The "likely to expose" may be patently unworkable. There is no definition of the "reasonable person." A hypothetical panel of three qualified lawyers, all with Asian origins from countries where Christianity is respected and gender identity is not legally protected or recognized, might find that Whatcott's flyer to be eminently reasonable, easily finding that the test of "likely to expose" is not even remotely met.

14 Unfortunately, the legislation does not provide for a representative jury of Canada's diverse population to decide the issue of "likely to expose." As well the legislation does not provide a threshold subjective test added to the objective test, to filter out weak claims where there is no actual proof of causation or harm. Instead the panel is left to make a finding derived from three different versions of an objective test known only in the minds of the individual panel members.

15 Oger relies upon an analogy to bolster the argument that it is unlawful to campaign against the election of a black candidate on the basis that no black individual merits election on racial grounds. With respect, that is not the proper analogy. Recently in Spokane Washington a black activist woman and professor was outed by her own mother, who disclosed that her daughter was 100% white and lying about her racial identity. Black people were universally outraged, as this "poser" misappropriated racial identity to benefit from affirmative action, and deceived many supporters. Her lies left a bitter trail of hurt, degrading the progress the black community strived mightily to achieve.

16 The correct analogy in the case at bar is that same person who runs for office as a "black" candidate, but is genetically 100% white. If her own mother handed out a flyer claiming that her

daughter was morally unfit for public office, this would not be received as hateful, but welcomed as the truth. People hunger for honest politicians, for deceit in one subject area may lead to deceit in other, much more important matters.

17 Oger admitted that some women feminists oppose transgender women. Oger identified Megan Murphy, who operates the publication, the *Feminist Current*, as one such individual. These women resent the sexual misappropriation claimed by transgender women. This is an ongoing hot political issue.

18 Oger's ambition is to become the first transgender woman to be elected to the BC legislature. It is no different than the calling card of Hilary Clinton, who urged voters to elect her as the first female President of the United States. Prime Minister Justin Trudeau appointed a cabinet that implemented affirmative action for women and diverse representatives of different races and cultures.

19 Canadian politics is rife with playing whatever "card" a politician possesses to gain political success. Oger follows this tradition by putting transgender identity into the NDP toolbox to promote the legal, social, and political agenda of Oger's passion, namely the legislative reform and enforcement of transgender rights. What Oger did not anticipate, was that transgenderism, like abortion is a moral issue that just will not disappear. Making transgenderism legal, does not make it moral.

20 A political debate about morality, rooted in Christian morality that adheres to scripture, is not within the scope of hate. Genocide occurred in Rwanda when the dominant majority urged for the killing of the minority, by labeling them cockroaches that needed to be exterminated. That is hate speech. Today in South Africa, a political party seeking the seizure of land from white farmers, openly promotes the killing the white farmers. That is hate speech too. Whatcott's flyer does not meet the legal test for hate speech.

21 Whatcott's political and moral attack could have been easily handled by revealing the truth. Oger could have said he was born a male, raised as a boy, and made the life changing decision to identify as a transgender woman. Oger then could take the advantage by noting that the law registers Oger's identity as a woman. Oger could then say it is unfair to be put into such a position to reveal personal and private information. The sympathy generated by Oger would have resulted in Oger's election, for Oger could then claim to be completely truthful and a morally fit candidate for public office. Whatott's flyer might then have resulted in fruitful search for the truth, a cherished value.

22 The core value of freedom of expression is a search for the truth, and is at its highest protection in the context of public participation in an election campaign in a free and democratic society. While Whatcott may represent only a tiny minority viewpoint in contemporary Canadian society, the constitutional *Charter* values of liberty (s. 7); conscience and religion (s. 2a); thought, belief, opinion, expression and freedom of the press (s. 2b); right to vote (s. 3); not to be subjected to cruel or unusual treatment or punishment (s. 12); equality and equal protection (s.15); and multicultural heritage (s. 27) all apply to protect Whatcott's rights.

23 The Tribunal is urged to apply Justice Harlan Stone's footnote 4 from *Carolene Products*, 304 US 144 (1938), because s. 7 of the *Human Rights Code* does not protect a discrete and insular

minority, namely Whatcott, nor flyers distributed in the course of political and moral debate in the political process. Human rights legislation that ordinarily is accorded the presumption of constitutionality, in the context of this case, must be subject to the equivalent of strict scrutiny.

24 Footnote 4 states:

> There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth....
>
> It is unnecessary to consider now whether legislation *which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny* under the general prohibitions of the Fourteenth Amendment than are most other types of legislation....
>
> Nor need we inquire whether similar considerations enter into the review of statutes directed at particular *religious*... or nations... or racial minorities...: whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to *curtail the operation of those political processes ordinarily to be relied upon to protect minorities*, and which may call for a correspondingly more searching judicial inquiry.... [Italics added]

25 Finally, Whatcott contends that the abandonment of truth-seeking in the context of this hearing is an affront to the fundamental principles of justice found within s. 7 of the *Charter*. Whatcott's security of the person and liberty is infringed, when truth is held to be irrelevant. No one may be deprived of liberty or security of the person in contravention of the fundamental principles of justice, which includes the search for truth as an integral part of any judicial or quasi-judicial administrative law proceeding.

26 Truth is absent in this case. Even if the entire content of the flyer is the truth, this Tribunal has already ruled those facts are completely irrelevant. Credibility is not allowed to be tested on cross-examination. All this makes the oath to tell the truth administered to witnesses irrelevant, since all that ultimately matters is the document and the Tribunal's application of the "objective" test directed by the Supreme Court of Canada.

27 In *Bracken*, the Town Council was deeply offended to be called liars and communists in an impolite and unrestrained manner. However the Ontario Court of Appeal upheld the conduct of Bracken to be lawful, citing the following passage from *Cusson v. Quan*, 2009 SCC 62, at para. 125 as the final word on this topic:

> "(d)emocracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those … who exercise power and authority in our society … Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy."

Dated at Victoria, BC, this 16th day of December, 2018

Charles I. M. Lugosi, Counsel for William Whatcott