Date Issued: March 27, 2019
File: 16408

Indexed as: Oger v. Whatcott (No. 7), 2019 BCHRT 58

IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Morgane Oger

COMPLAINANT

AND:

William Whatcott

RESPONDENT

AND:

Justice Centre for Constitutional Freedoms, Canadian Association for Free Expression, West Coast LEAF and BC Teachers' Federation

INTERVENORS

AND:

Attorney General of British Columbia

PURSUANT TO THE
CONSTITUTIONAL QUESTIONS ACT

REASONS FOR DECISION

Tribunal Panel: Diana Juricevic, Norman Trerise and Devyn Cousineau

Counsel for the Complainant:	Susanna Allevato Quail
Counsel for the Respondent:	Dr. Charles Lugosi
Counsel for the Attorney General of British Columbia:	E.W. (Heidi) Hughes and Freya Zaltz
Counsel for the Justice Centre for Constitutional Freedoms:	Jay Cameron and Marty Moore
Agent for the Canadian Association for Free Expression:	Paul Fromm
Counsel for West Coast LEAF:	Lindsay A. Waddell and Rajwant Mangat
Counsel for the BC Teachers' Federation:	Stefanie Quelch
Counsel for the four Witnesses:	Andrea L. Zwack
Date of Hearing:	December 11-17, 2018
Location of Hearing:	Vancouver, B.C.

Written Reasons by:
Devyn Cousineau

Concurred in by:
Diana Juricevic
Norman Trerise

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I INTRODUCTION

[1] In 2017, Morgane Oger ran as the NDP candidate for the False Creek riding in Vancouver. She ran on a platform that focused on corruption, funding for education, the housing crisis, and $10 per day daycare. If elected, she would have been the first transgender MLA in Canada.

[2] William Whatcott identifies himself as a Christian activist. When he learned of Ms. Oger's candidacy, he resolved to stop her being elected. He was not a member of her riding, nor did he research her platform or the policies which she sought to advance. The sole basis for his campaign against her was that she is a transgender woman and therefore, in his view, unsuitable to hold public office.

[3] Mr. Whatcott created a flyer entitled "Transgenderism vs. Truth in Vancouver-False Creek" [**Flyer**]. In it, he called Ms. Oger a "biological male who has renamed himself… after he embraced a transvestite lifestyle". He expressed a concern "about the promotion and growth of homosexuality and transvestitism in British Columbia and how it is obscuring the immutable truth about our God given gender". He described being transgender as an "impossibility", which exposes people to harm and constitutes a sin. Mr. Whatcott ended the Flyer with a call to action: do not vote for Ms. Oger or the NDP.

[4] Mr. Whatcott handed the Flyer out on street corners, taped it to doors, and put it in mailboxes. In this way, he distributed 1500 copies of the Flyer in and around Ms. Oger's riding.

The Flyer was then further disseminated through the internet. Mr. Whatcott estimates that 10,000 people saw the Flyer.

[5] When Ms. Oger and her team learned of the Flyer, they had to formulate a response during their election campaign. Ms. Oger went to the police, who advised her of safety protocols. She warned her children to be wary of strangers. She describes the effect of the Flyer as destabilizing, terrifying, and searing. Ultimately, Ms. Oger was not elected in her riding.

[6] After the election was over, Ms. Oger filed a complaint with the Human Rights Tribunal [**Tribunal**], alleging that the Flyer violated ss. 7(1)(a) and (b) of the *Human Rights Code* [***Code***]. Those sections prohibit publication of any statement that "indicates discrimination or an intention to discriminate" (s. 7(1)(a)), or "is likely to expose a person or group or class of persons to hatred or contempt" (s. 7(1)(b)). In response, Mr. Whatcott denies that the Flyer violates s. 7 and says that in any event his rights to freedom of speech and religion guarantee his right to distribute it. He says those freedoms are especially important during an election campaign.

[7] The Tribunal granted intervenor status to four groups: the Justice Centre for Constitutional Freedoms [**JCCF**], the Canadian Association for Free Expression [**CAFE**], West Coast Women's Legal Education and Action Fund [**West Coast LEAF**] and the BC Teachers' Federation [**BCTF**]: *Oger v. Whatcott,* 2017 BCHRT 195; letter decision dated November 24, 2017; and *Oger v. Whatcott (No. 4),* 2018 BCHRT 184 [***Oger (No. 4)***]. The Attorney General of BC [**AG**] exercised his right to participate in the proceedings in response to Mr. Whatcott's *Notice of Constitutional Question,* which challenged the province's jurisdiction to enact s. 7 of the *Code* and argued that s. 7 as well as elements of this Tribunal's process violated the *Charter.*

[8] The Tribunal, sitting as a panel of three members, heard this matter over five days. For the reasons that follow, the panel has concluded that Mr. Whatcott's Flyer indicated an intention to discriminate against Ms. Oger and is likely to expose her and other transgender people to hatred or contempt. As such, Mr. Whatcott has violated s. 7 of the *Code.*

[9] My analysis is organized as follows: first, I address four rulings that the panel made during the course of the hearing. Second, I address the substance of Ms. Oger's complaint under ss. 7(1)(a) and (b) of the *Code.* This requires the panel to balance Mr. Whatcott's *Charter*-protected rights to freedom of religion and expression, and I do so in that section. I conclude that both subsections of s. 7 have been violated in this case. Third, I address the province's jurisdiction to enact s. 7, and find that the provision is *intra vires* the province. Fourth, I address Mr. Whatcott's argument that the Tribunal has violated the doctrine of state neutrality in this complaint and conclude that it has not. Fifth, I determine the appropriate remedy for the violation of the *Code* in this case. Next, I address Ms. Oger's application for costs. I conclude that Mr. Whatcott has engaged in improper conduct throughout the course of this complaint and make an award of costs against him. Finally, I comment on the role of the intervenor CAFE in this proceeding.

[10] I begin by situating this complaint in its factual context.

II FACTS

[11] The facts in this complaint are not in dispute. Ms. Oger and Mr. Whatcott were the only witnesses. They each testified truthfully.

[12] In 2017, Ms. Oger stood for provincial election as the NDP candidate in Vancouver-False Creek. Ms. Oger describes it as a "battleground riding", which had never been won by the NDP. Despite low expectations that she could succeed, her campaign gained traction and she began to believe that she could win. Ms. Oger was aware that, if elected, she would be the first transgender MLA, but she deliberately spoke as little as possible about issues affecting the trans community. She explains that only a tiny fraction of the constituents in Vancouver-False Creek are transgender and it simply would not have been feasible to seek election based on their specific issues. She focused her campaign more broadly on issues of corruption, education funding, the housing crisis and $10 per day daycare.

[13] Mr. Whatcott was not a resident in Ms. Oger's riding. She came to his attention after he had decided there were no suitable political options within his own riding. He says that he had decided not to vote in the election at all, but then turned to prayer. He asked God how he could help in the election. He started researching the candidates across the province and, in this way, came across Ms. Oger. He learned that she had been active in lobbying for amendments to the *Code* to add the grounds of "gender identity and expression", and in promoting education about sexual orientation and gender identity in schools. Most importantly, however, he was upset that the media and public at large were "pretending" that Ms. Oger was a woman. He fundamentally believes that gender is static and derived from the genitalia that a person has at birth. He believes that Ms. Oger is a man. He sees himself as the small boy in the fairy tale about the Emperor with no clothes – the only one brave enough to speak the truth about Ms. Oger's gender. He decided to focus his energies on her campaign. In doing so, he describes Ms. Oger herself as "incidental" and "small" within his larger fight for social order and freedom.

[14] Mr. Whatcott wrote the Flyer and raised $60 to print 1500 copies of it. He described his purpose in doing so as follows: "I definitely didn't want [her] to get elected and I do want to see [her] disinvested of all political power and would rather [she] do something else with [her] time."[1]

[15] The Flyer is entitled "Transgenderism vs. Truth in Vancouver-False Creek". It is reproduced in its entirety at Appendix A to this decision.

[16] Under the title, there are two photographs: one of Ms. Oger, and the other of Walt Heyer. Mr. Heyer is described as a man who "lived as a transvestite for eight years, cut off his penis, and injected himself with female hormones, in an effort to delude himself and everyone around him into thinking he was a female". Ms. Oger is identified using her former name and described as "biological male". The Flyer says that the "truth" is that Ms. Oger is male, and

[1] Throughout his testimony, Mr. Whatcott refused to recognize Ms. Oger as a woman, or to abide by the Tribunal's frequent orders not to call her a man. I will return to this in respect of Ms. Oger's application for costs, but in the meantime, I have replaced his male pronouns with the correct, female, ones.

suggests that anyone who says otherwise, including Ms. Oger, the media, and the NDP, are promoting "falsehoods". It says:

> Because gender is God given and immutable, "transgenderism" is an impossibility. A male cannot "transition" into a female, nor can a female "transition" into a male. One can only cross dress and disfigure themselves with surgery and hormones to look like the gender they are not. This practice is harmful and displeasing to God. Those who embrace the transvestite and homosexual lifestyles put themselves at greatly increased risk of diseases such as HIV, syphilis, HPV of the rectum, anal gonorrhea, Hepatitis A, B & C, etc …. Homosexuals and transgenders are also at increased use of drug and alcohol abuse, suicide, and domestic violence.
>
> In addition to the physical and social consequences of adopting a false sexual and gender identity, there are spiritual consequences too. Our God is a God of truth. Those who promote falsehoods like the NDP and BC's major media and say it is ok to indulge in homosexuality or embrace a transvestite lifestyle do so to their eternal peril. Liars and the sexually immoral will not inherit the Kingdom of Heaven, nor will cowards. The truth is many BC residents know that promoting homosexuality and transvestitism is wrong, but are too cowardly or morally corrupt to speak up and defend what is true:
>
> "***As for the cowardly, the faithless, the detestable, as for murders, the sexually immoral, sorcerers, idolaters, and all liars, their portion will be in the lake that burns with fire and sulfur, which is the second death***". Revelation 2:8 [Emphasis in original]

[17] The Flyer ends with a specific call to action:

> Thankfully Jesus Christ paid the price for your sin. You can turn to the merciful Christ and ask for forgiveness and **when the NDP come knocking at your door you can tell them you won't vote for them because you believe in God's definition of gender and marriage**. Truth matters and God wants you standing for what is true! [Emphasis added]

[18] Mr. Whatcott took the Flyer to False Creek and distributed it however he could: he handed it out on the street corner, taped it to doors, and put it in mailboxes. The Flyer was subsequently distributed on the internet, including by Ms. Oger's supporters, such that Mr. Whatcott estimates that over 10,000 people saw it.

[19] Ultimately, Ms. Oger lost the election by about 400 votes. It is impossible to know whether the Flyer had any effect on the outcome of her campaign – positive or negative.

III PRELIMINARY ISSUES

[20] During the hearing of this complaint, the panel made rulings about the evidence that Mr. Whatcott would be permitted to lead, the length of his counsel's cross-examination, and a last-minute application to intervene. I address these issues before proceeding to the substance of Ms. Oger's complaint.

A. Application to set aside orders to attend the hearing

[21] Before the hearing, Mr. Whatcott identified four senior members of the clergy who he intended to call as witnesses: Dean Peter Elliot, Very Rev. Dr. Gary Paterson, Rev. Jim Hatherly and Rev. Dr. Carmen Landsdowne [**Witnesses**]. At his request, the Tribunal issued Orders to Attend the Hearing for each of the Witnesses.

[22] Mr. Whatcott identified the purpose of the Witnesses' testimony in a will-say statement. He said that the Witnesses would testify about an open letter that they signed in response to Mr. Whatcott's flyers [**Open Letter**]. The Open Letter was supportive of Ms. Oger and, according to Mr. Whatcott, engendered a positive response from the community. Mr. Whatcott said that the Witnesses' testimony would show that his flyer "had the opposite effect of creating contempt or hatred towards [Ms. Oger], rather it strengthened their support of [her]".

[23] The Witnesses retained counsel and applied to have the Tribunal set aside the Orders to Attend the Hearing, pursuant to the Tribunal's *Rules of Practice and Procedure,* Rule 31(3). The panel heard oral argument with respect to this application at the beginning of the hearing. We ruled, based on that argument, that the Witnesses' proposed evidence was not relevant. We granted the application to set aside the Orders and indicated that we would give more fulsome reasons in our final decision.

[24] Like a court, this Tribunal must make decisions about the admissibility of evidence. Section 27.2 of the *Code* gives the Tribunal the power to receive and accept evidence that it considers "necessary and appropriate". In exercising that discretion, the Tribunal is mindful to further the purposes of the *Code* by delivering just and timely dispute resolution services to those parties that come before it.

[25] This mandate, and the purposes of the *Code,* are not furthered when the Tribunal takes up time and resources to hear irrelevant evidence. In our view, that is the nature of the evidence which Mr. Whatcott proposed to introduce through the Witnesses. Their views of, and response to, the Flyer are no more relevant to our analysis than the views of any individual on the street. Their evidence could have no bearing on whether the Flyer violated s. 7. That analysis is an objective one, undertaken from the perspective of a reasonable person and not Ms. Oger, Mr. Whatcott, or - most significantly - the Witnesses: *Saskatchewan (Human Rights Commission) v. Whatcott,* 2013 SCC 11 [***Whatcott***] at para. 35; see discussion of s. 7(1)(a) below.

[26] To the extent the Open Letter may have been relevant, and at this point I can say conclusively that it is not, it was admitted as evidence by consent of the parties: Exhibit 2, tabs C and D. It speaks for itself in terms of its support for Ms. Oger following Mr. Whatcott's actions. It was not necessary to hear from the Witnesses further about its origins.

[27] Mr. Whatcott's arguments focused primarily on his position that the "reasonable person" test under s. 7(1)(b) is unworkable and the Tribunal would need to hear from members of the public about their reaction to the Flyer and, in particular, whether it had the effect of inciting hatred. He intended to show, through the Witnesses, that in fact the effect was the opposite: to incite support for Ms. Oger. I address Mr. Whatcott's arguments about the reasonable person test in more detail below, but for now suffice to say that this is a test well known to the law and which this Tribunal is bound to apply.

[28] In light of the objective standard under s. 7 of the *Code,* the evidence of the Witnesses was irrelevant to the issues this Tribunal has to decide. To permit them to testify would not

only waste party and Tribunal resources, but also impose an unnecessary hardship on the Witnesses themselves, who were busy with their Church and community duties during the Christmas season. Accordingly, the Witnesses' application to set aside the Orders to Attend Hearing were granted.

B. Proposed expert testimony of Dr. Gutowski

[29] Mr. Whatcott sought to lead expert evidence from Dr. Willi Gutowski about a number of topics. In a letter decision dated December 6, 2018, the panel determined that most of the evidence that Mr. Whatcott proposed to adduce through Dr. Gutowski was irrelevant and would not be admissible. We determined that one topic **may** be relevant to the complaint, namely "that people choose to love or hate depending upon their own biases". We ruled that Mr. Whatcott would be permitted to lead that evidence if he could qualify Dr. Gutowski as an expert in the subject. We granted Mr. Whatcott's application to have Dr. Gutowski testify by videoconference.

[30] Mr. Whatcott tendered Dr. Gutowski as an expert witness at the hearing, and the panel began by hearing oral evidence about his qualifications. That evidence established that Dr. Gutowski had practiced as a psychiatrist for 28 years. He had a private practice where he treated patients with a variety of issues, including schizophrenia, depression, substance use, bipolar disorder, dissociative disorders, and chronic pain. He also did family and marriage counselling. Much of his therapy was grounded in cognitive behavioural therapy, which rests on the premise that a person can change their emotional reactions by changing their thinking. He practiced for six years as the head of psychiatry at a health centre in the Northern Mariana Islands. There, he was frequently qualified as an expert to give his opinion about whether a person should be involuntarily detained on the basis of mental illness. Dr. Gutowski testified that he had treated one transgender patient "with serious problems". He retired in 2010.

[31] In cross examination, Dr. Gutowski conceded that he had no special training or expertise in the origins of love and hate. He had published one e-book entitled "Living Life, Discovering Truth", which included a chapter about the origins of feelings. However, that book was not peer

reviewed or based on any qualitative or quantitative research. Dr. Gutowski has not spoken publicly or published any peer-reviewed research or material related to the origins of love and hate.

[32] After hearing this testimony, and argument from counsel, the panel concluded that Dr. Gutowski was not qualified to give the Tribunal an expert opinion about what causes people to feel love or hate.

[33] In a previous decision, I outlined the principles which guide this Tribunal's decisions to accept expert evidence:

> I agree with the JCCF that the Tribunal may accept evidence that may not be admissible in court: *Code*, s. 27.2. However, it should not do so in a manner that undermines the fairness of the proceeding. The risks of expert evidence are the same in a Tribunal proceeding as they are in court. Expert evidence can "distort the fact finding process", create a risk that a decision maker relies on "junk science" or "unproven material not subject to cross-examination", and "lead to an inordinate expenditure of time and money": *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at para. 18; *R. v. Mohan*, [1994] 2 SCR 9 [***Mohan***] at p. 21. To address these dangers, the Supreme Court of Canada has established threshold requirements for the admission of expert evidence, namely: relevance, necessity in assisting the trier of fact, the absence of an exclusionary rule, and a properly qualified expert: *White Burgess* at para. 19. As always, a judge retains residual discretion to exclude evidence where its probative value is outweighed by its prejudicial effect. The Tribunal applies these criteria to expert evidence before it, though it may modify the application of any of the criteria where it is satisfied that the evidence is "necessary and appropriate" in the circumstances of the particular case: *Code*, s. 27.2; see eg. *Dunkley v. UBC and another*, 2015 BCHRT 100 at Appendix A, paras. 6-20, upheld in 2016 BCSC 1383.
>
> *Oger v. Whatcott (No. 5),* 2018 BCHRT 229 at para. 22

[34] The burden is on Mr. Whatcott to establish that Dr. Gutowski has "acquired special or peculiar knowledge through study or experience" that would qualify him to give the proposed evidence: *Mohan.* He did not meet this burden. When he was practicing, Dr. Gutowski was a general practitioner and not a specialist. While he may have had a personal interest in the topic, there was no evidence that he had any particular expertise with respect to the origins of

love and hate. He has not conducted research, published in a peer-reviewed publication, or spoken about the subject. He has never been qualified as an expert to give this type of evidence.

[35] Mr. Whatcott relied on *R. v. Thomas,* [2006] OJ No. 153 (QL) to argue that this Tribunal should qualify Dr. Gutowski as an expert based on his "life experience" practicing psychiatry. In that case, the Ontario Superior Court of Justice held that "one can acquire the necessary knowledge through formal education, private study, work experience or other personal involvement with the subject matter": para. 7. However, the very next sentence in that decision reads: "In some cases, the expertise will require formal study as is the case with the evidence of medical experts". In our view, the proposed evidence in this case is such that it requires some degree of formal study or demonstrated expertise. In the following paragraph, the court explained:

> When assessing the qualifications of a proposed expert, trial judges regularly consider factors such as the proposed witness' professional qualifications, her actual experience, her participation or membership in professional associations, the nature and extent of her publications, her involvement in teaching, her involvement in courses or conferences in the field and her efforts to keep current with the literature in the field and whether or not the witness has previously been qualified to testify as an expert in the area. (para. 8)

[36] Mr. Whatcott did not establish that Dr. Gutowski had expertise arising from any of these factors. In the absence of such, Dr. Gutowski's evidence could not have assisted the Tribunal.

[37] Dr. Gutowski was not qualified to give expert testimony to this Tribunal and, as a result, the panel did not permit him to testify.

C. Scope of cross-examination

[38] Ms. Oger testified in direct examination for approximately one hour. The focus of her testimony was the impact that the Flyer had on her. As I will explain, the test for a violation of s. 7 is an objective one, and so Ms. Oger's views about the Flyer were not relevant to liability

but rather only to the appropriate remedy. The scope of her evidence given in direct reflected its relatively limited scope of relevance.

[39] Mr. Whatcott's lawyer, Dr. Lugosi, then cross-examined Ms. Oger for over four hours. At about the four-hour mark, the panel warned Dr. Lugosi that he would have 15 more minutes to complete his cross-examination. Fifteen minutes later, the panel ended the cross-examination. Dr. Lugosi objected to the curtailment of his time.

[40] Given the objective test for a violation of s. 7, the bulk of Dr. Lugosi's cross examination was not relevant to any issue that this Tribunal had to decide. In keeping with the flexible standards of evidence that apply to Tribunal proceedings, the panel granted him a large amount of leeway in his questioning. Many of the questions were intended to show that Ms. Oger was either overly sensitive or vindictive towards Mr. Whatcott. Dr. Lugosi questioned Ms. Oger about her views of whether the Flyer violated s. 7, and the scope of freedom of expression under the *Charter,* which were the ultimate questions before the Tribunal and not appropriate evidence from the witness. He questioned her about backlash that Mr. Whatcott had experienced since publishing the Flyer, which was not relevant to any issue in the complaint. He challenged Ms. Oger on the basis that the heart of her complaint was an attack against the Bible. He asked her to agree that the Flyer was a proper political attack based on her moral fitness to govern. None of this was helpful evidence.

[41] The Tribunal is the master in its own house. It must control its process to ensure the just and timely resolution of complaints: *Prassad v. Canada (Minister of Employment and Immigration),* [1989] 1 SCR 560 at 568. And, like courts, the Tribunal operates with scarce resources which it is bound to deploy in a manner that best furthers its mandate. As the Alberta Court of Appeal has explained:

> The duty to be polite and courteous does not in any way fetter a judge's related obligation to insist that those who make submissions to the court, whether counsel or a person on his own behalf, focus on relevant considerations and conduct themselves in an appropriate manner. … judicial business must be conducted efficiently. Litigants, counsel and others who need the attention of the court expect nothing less. Judicial

> resources are valuable and must not be wasted. So are those of the participants.
>
> *Bizon v. Bizon*, 2014 ABCA 174 at para. 61

[42] In our view, to allow Dr. Lugosi to continue his cross-examination any longer would have been an unjustifiable waste of Tribunal and participant resources, and would have jeopardized the Tribunal's ability to complete the hearing in the time allotted. As a result, he was limited to approximately four hours and fifteen minutes of cross-examination.

D. Application to intervene

[43] December 17, 2018 was the fifth and final day of this hearing. The parties' evidence had concluded the previous week, on December 12. By 12:30 on the final day, the intervenors' arguments had also concluded and all that remained was to hear argument from the Attorney General and reply argument from the parties. It was at that point that Kari Simpson stood up from her seat in the gallery and handed the panel an application to intervene in the complaint.

[44] By way of background, Ms. Simpson had spent the first three days of the hearing at the counsel table, as one of Mr. Whatcott's representatives. On the morning of December 14, Dr. Lugosi advised that she had been replaced by Herb Dunton. From that point on, Ms. Simpson sat in the public gallery.

[45] In her application, Ms. Simpson said that the basis for her intervention was to give the Tribunal "a more accurate portrayal of the Complainant and the tactics used to silence voices, like Bill Whatcott, the Applicants and others that are of threat to the Complainant's political agendas and monetary gain schemes". She sought leave to cross-examine Ms. Oger and to lead evidence through a witness.

[46] The panel gave oral reasons denying Ms. Simpson's application. We found, first, that to grant Ms. Simpson's application at that stage would be prejudicial to all the participants and the Tribunal's process. Six months earlier, the Tribunal had posted a public notice on its website inviting intervenor applications by June 15, 2018. That deadline had long since passed. Ms. Simpson had the same right as anyone else to apply by that deadline but did not. It would not

be fair to any of the participants to allow her to participate on the final afternoon of a five-day hearing.

[47] Second, Ms. Simpson's application fundamentally misunderstood the purpose and nature of an intervenor in this process. The intervenors were there to assist the Tribunal with the legal issues raised by the parties to this dispute. The Tribunal will not grant intervenor status to a party whose participation risks taking the litigation away from the parties: *Hall v. BC (Ministry of Environment) (No. 4),* 2008 BCHRT 437; *Hughson v. Town of Oliver,* 2000 BCHRT 11; *Oger (No. 4)* at paras. 9-11.

[48] That is precisely what Ms. Simpson proposed to do. Her proposed intervention was aimed at introducing argument and evidence about her own interactions with Ms. Oger. This had nothing to do with any issues raised by the parties to the complaint and – as such – was not the subject of an appropriate intervention. The application was denied.

[49] I turn now to the substantive issues in this case.

IV SECTION 7 ANALYSIS

[50] Ms. Oger argues that Mr. Whatcott's publication of the Flyer violated both subsections of s. 7(1) of the *Code,* which provides:

> **Discriminatory publication**
>
> 7 (1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that
>
> (a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or
>
> (b) is likely to expose a person or a group or class of persons to hatred or contempt
>
> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation,

> gender identity or expression, or age of that person or that group or class of persons.
>
> (2) Subsection (1) does not apply to a private communication, a communication intended to be private or a communication related to an activity otherwise permitted by this Code.

[51] Like the other anti-discrimination provisions in the *Code,* s. 7 regulates discriminatory behaviour in a specific context of vulnerability. It targets publications whose effects are to further perpetrate discrimination and hatred against protected groups: *British Columbia Human Rights Tribunal v. Schrenk,* 2017 SCC 62 [***Schrenk***] at para. 48. Its two subsections address different ways in which publications can operate to exclude, marginalize, and harm people and groups based on their connection with a historically disadvantaged group: *Whatcott* at para. 71.

[52] Much has been made in this case about the impact of s. 7 on freedom of expression. However, I observe at the outset that speech which adversely impacts a person in connection with a characteristic protected by the *Code* is prohibited in all the social areas which the *Code* regulates: see e.g. *Ismail v. British Columbia (Human Rights Tribunal),* 2013 BCSC 1079 at para. 194; *Brito v. Affordable Housing Societies and another,* 2017 BCHRT 270 at paras. 40-45. Sexual and racial harassment are the most obvious examples of this. Whenever people use words in a way that substantively attacks and undermines a person's dignity in connection with their work, housing, or access to public services, because of personal characteristics protected by the *Code,* they run afoul of human rights law: *Schrenk.*

[53] To the extent that s. 7 is unique, it is because it expressly and exclusively targets speech. Mr. Whatcott argues that, in doing so, it violates his *Charter*-guaranteed rights to freedom of religion and expression*:* ss. 2(a) and (b). In his final reply, he added an argument that it violates his right to life, liberty and security of the person, guaranteed by s. 7 of the *Charter.*

[54] This Tribunal does not have jurisdiction to apply the *Charter: Administrative Tribunals Act,* s. 45; *Code,* s. 32(i). I cannot find s. 7 of the *Code* unconstitutional, or that any of Mr. Whatcott's *Charter* rights have been violated in the course of Ms. Oger's human rights complaint against him.

[55] There is no question, however, that this complaint engages *Charter* protections. In these circumstances, I must interpret and apply the *Code* in a manner that proportionately balances its purposes with those protections. The framework for this analysis has been set out by the Supreme Court of Canada in three cases: *Doré v. Québec (Tribunal des Professions),* 2012 SCC 12 [***Doré***]; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [***Loyola***]; and *Trinity Western University v. Law Society of BC,* 2018 SCC 32 [***TWU***].

[56] The first question for the Tribunal is whether this decision "engages the *Charter* by limiting *Charter* protections – both rights and values": *TWU* at para. 58. If so, then the Tribunal must assess the relevant *Charter* protections, the nature of its decision, and the statutory and factual context to render a decision that "gives effect, as fully as possible, to the *Charter* protections at stake given the particular statutory mandate": *Loyola* at para. 39; *Doré* at para. 56; *TWU* at para. 31. This is called the "proportionality analysis". It is highly contextual and allows for more than one possible outcome: *Loyola* at para. 41.

[57] In my view, a full proportionality analysis is not necessary with respect to s. 7(1)(b) of the *Code,* which prohibits hate speech. In *Whatcott,* the Supreme Court of Canada considered a direct constitutional attack on a nearly identical provision in Saskatchewan's human rights legislation. It found that the provision infringed Mr. Whatcott's freedoms of expression and religion, but that the infringement was "demonstrably justified in a free and democratic society". It undertook a full *Oakes* analysis under s. 1 of the *Charter* and articulated a constitutionally-compliant test for hate speech. As I will explain, the Court directly considered – and rejected - many of the same arguments that Mr. Whatcott now makes before this Tribunal. Because the s. 1 *Oakes* test "works the same justificatory muscles" as the *Doré/Loyola* analysis - balance and proportionality – the Court's test for hate speech embodies a proper balancing of the *Charter* interests and the objectives of human rights legislation: *Doré* at para. 5. So long as it properly applies the test, the Tribunal's decision could not run afoul of *Charter* rights or values.

[58] Section 7(1)(a), however, targets a different kind of speech than was at issue in *Whatcott*. For reasons I will explain, its application could limit Mr. Whatcott's *Charter* rights to religious and expressive freedom. Those rights must be balanced with the objective of the

provision and the factual context to render a decision that is proportionate to the interests at stake.

[59] Before I address the two subsections of s. 7, I situate this complaint in two important contexts. The first is pervasive discrimination and hatred against transgender and gender diverse people in Canada. The second is the consequent under-representation of transgender people in the political life of this province.

A. Factual context

1. Discrimination against transgender people

[60] This is a significant time for trans and gender diverse people. Their long fight for equality is bearing some fruit, as society begins to adjust its traditionally static and binary understanding of gender, and its tolerance for people to identify and express their gender authentically. One indicator of this progress is the 2016 amendment to the *Code* that added the grounds of gender identity and expression.

[61] However, as this hearing made clear, the journey is far from over. Unlike other groups protected by the *Code,* transgender people often find their very existence the subject of public debate and condemnation. What flows from this existential denial is, naturally, a view that transpeople are less worthy of dignity, respect, and rights. In the hearing room for this complaint, we were witness to repeated, deliberate, and flagrant attacks on Ms. Oger based on nothing more than a belief that her very existence is an affront.

[62] And so, despite some gains, transgender people remain among the most marginalized in our society. Their lives are marked by "disadvantage, prejudice, stereotyping, and vulnerability": *F(C) v. Albert (Vital Statistics),* 2014 ABQB 237 at para. 58; see also *Rainbow Committee of Terrace v. City of Terrace,* 2002 BCHRT 26 at paras. 47-51. They are stereotyped as "diseased, confused, monsters and freaks*": Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1 at paras. 136-137, overturned 2005 BCCA 601 (not on this point). Transpeople face barriers to employment and housing, inequitable access to health care and other vital public

services, and heightened risks of targeted harassment and violence. The results include social isolation, as well as higher rates of substance use, poor mental health, suicide, and poverty: *XY v. Ontario (Government and Consumer Services),* 2012 HRTO 726 at paras. 164-166. For transgender children, anti-trans bullying leads to higher rates of absenteeism and poorer educational outcomes, which then has ripple effects for their health and future prospects: Christophe Cornu (2016), "Preventing and addressing homophobic and transphobic bullying in education; A human-rights based approach using the United Nations Convention on the Rights of the Child", *Journal of LGBT Youth*, 13:1-2, 6-17 at pp 7-8.

[63] It was within this context that, in 2016, the Legislature amended the *Code* to add the ground of "gender identity and expression" as a protected characteristic. While human rights law has protected transpeople for many years, this legislative amendment was intended to raise the profile for that protection. In doing so, then-Attorney General Suzanne Anton acknowledged the specific and unique challenges faced by transgender people in BC, and expressed the Legislature's clear intention to foster a society in which they are equal in dignity and rights:

> There is no question that transgender persons can face challenges. They face violence. They face discrimination. They may be refused tenancies. They may be refused employment for no other reason than that they are transgender. They may be fired. It is important for transgender persons to know that they are protected, to know that government is with them.
>
> It is important for all of us in society to know that we may not discriminate against a person based on their gender identity or expression. It is important for all of us to treat each other with respect, but in particular, when one group of people suffers discrimination which is unusual in society and particular to them, it is very important that their rights be recognized.
>
> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 40th Parl, 5th Sess (25 July 2016) at 1425

[64] Mr. Whatcott and the JCCF sought to rely on statistics about the poor health and social outcomes for transgender people as proof that – at best – the merits of being transgender was a matter for ongoing study and debate and – at worst – it was a bad lifestyle choice, which

ought to be publicly discouraged. I agree with Ms. Oger that this is an ill-conceived attempt to "take the data about the consequences of being a victim of oppression, or the consequences of being marginalized, and turn that into the root cause of the issue".

[65] The poor health, economic, and social outcomes for many transgender people are not a signal of their inherent worth but rather of the significant degree to which they continue to face marginalization, stigma, and discrimination. They illustrate how much work remains to be done to make the *Code's* objective of an equal society into a reality.

2. Transgender participation in political life

[66] The second important context in this case is that of the underrepresentation of transgender people in the political life of this province.

[67] This complaint arises from events during a political campaign. The electoral process is, of course, the heart of Canada's democracy. The right to meaningfully participate in that process is enshrined in s. 3 of the *Charter,* which guarantees all citizens the right to vote and to be qualified for membership in a legislative assembly. Canada's democracy is enhanced by the "enriched political debate" which occurs when a diverse populace participates in political discourse: *Harper v. Canada (Attorney General),* 2004 SCC 33 at para. 70.

[68] However, not all groups in Canada have equal access to the levers of political power. Just as economic power, unchecked, can overwhelm the political discourse, so too can power derived from social status: *Harper; Schrenk* at para. 43. It is no coincidence that the realm of politics in Canada was, for a long time, the exclusive purview of upper-class white men. Nor, in my view, is it mere happenstance that Ms. Oger, if elected, would have been the first transgender MLA in Canada. The same social forces that operate to oppress, marginalize, and impoverish transpeople in employment, education, housing, and services also act as barriers to meaningful participation in political life.

[69] The gendered barriers that impede the participation of women in politics, and consequently undermine the integrity and effectiveness of democratic institutions, are widely

recognized. In its submission, West Coast LEAF drew the Tribunal's attention to the experience of politically active women across the world, which can include being targeted for gender-based harassment, as well as threats and acts of violence. The aim of such attacks is to "discourage women from being politically active and exercising their human rights and to influence, restrict or prevent the political participation of individual women and women as a group": *Report of the Special Rapporteur on violence against women, its causes and consequences on violence against women in politics,* UNGAOR, 73d Sess, UN Doct A/73/201 (2018) [***Report of the Special Rapporteur***] at p. 5. In Canada, the prevalence of sexual harassment within government led an all-party Parliamentary committee to develop a formal complaints process, and call on MPs to undergo training and to take a pledge condemning sexual harassment: Mona Lena Krook, "Violence Against Women in Politics", (2017) Vol. 28 No. 1, *Journal of Democracy* p. 75 [**Krook**] at p. 86.

[70] Transwomen in politics are at an even greater risk for attacks which seek to discourage their political participation based on their gender identity: *Report of the Special Rapporteur* at p. 5. This complaint thus arises in a context where Ms. Oger was seeking to enter a realm where people like her have long been shut out, to the detriment of Canada's democratic aspirations. Her campaign was watched by transgender people across the province. In large part, the significance of her campaign was not whether or not she won the election, but whether in running she would be treated as a human being equally entitled to dignity and respect. At such a delicate moment, acts like Mr. Whatcott's Flyer not only send a message to Ms. Oger, but to any other transgender people who may be considering a life in politics. They continue to push the doors of government closed against transgender people, at a time when Canada's human rights laws, and its commitment to an enriched and diverse democracy, demand they be flung open.

[71] In sum, this complaint arises in a context of ongoing, pernicious discrimination against transgender people, one manifestation of which is their underrepresentation in the political life of this province. Within that context, I turn to the question of whether Mr. Whatcott's Flyer violated s. 7(1)(a) or (b) of the *Code.*

B. Section 7(1)(a): indicates discrimination or an intention to discriminate

[72] The first question within the *Doré/Loyola* analysis is whether the Tribunal's decision under this provision engages *Charter* protections.

1. Engaging Charter protections

[73] I begin with Mr. Whatcott's *Charter* rights.

[74] Mr. Whatcott says that three of his *Charter* rights are engaged in this decision: freedom of religion (s. 2(a)), freedom of expression (s. 2(b)), and life, liberty and security of the person (s. 7).

[75] There is no dispute that a decision against Mr. Whatcott would limit his *Charter* right to freedom of religion. Ms. Oger concedes that Mr. Whatcott has a sincerely held religious belief that it is his duty to spread his views about transgender people: *Syndicat Northcrest v. Amselem,* 2004 SCC 47 at para. 65. This concession was appropriate. Mr. Whatcott identifies as Christian and describes himself as a "flawed Christian activist". He says that his theology largely lines up with that of the Lutheran Church. The Supreme Court of Canada has recognized that Evangelical Christians, and I believe it is fair to count Mr. Whatcott as one, "carry their religious beliefs and values beyond their private lives and into their work, education, and politics": *TWU* at para. 67. This is certainly true of Mr. Whatcott. For many years, he has manifested his religious beliefs through activism, beginning with anti-abortion activism and then, in more recent years, in activism against the LGBTQ community. His beliefs about transgender people – namely that they do not exist and are engaged in a falsehood – stem from his interpretation of the Christian Bible. He believes it is God's will that he spread the Christian gospel and his views about the "morality" of being transgender.

[76] Mr. Whatcott testified that his decision to create and circulate the Flyer was made after he asked God how he could help in the election. The contents of the Flyer are directly linked to Mr. Whatcott's interpretation of the Bible; he relies on Biblical quotes to support his position. Mr. Whatcott explains that creating and circulating the Flyer was his way of bringing "Jesus

Christ to a secular riding". I am satisfied that a decision by this Tribunal that Mr. Whatcott is prohibited by the *Code* from distributing the Flyer, or its like, would interfere with his ability to act in accordance with his beliefs in a manner that is more than trivial: *Amselem* at para. 65; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54 at para. 68. While Mr. Whatcott would remain free to hold his beliefs about transgender people, he would be limited in the manner in which he could spread those views to the general public. This is sufficient to engage Mr. Whatcott's religious rights in this decision.

[77] There is similarly no dispute that a decision against Mr. Whatcott would limit his freedom to publicly express his views about transgender people generally, and Ms. Oger specifically. This engages his right to free expression. As I will discuss below, the scope of freedom of expression, and the significance of any possible infringement, varies according to the type of speech and the extent to which it furthers or detracts from the core values underlying the freedom. However, at this threshold stage, it is sufficient that the Flyer was a form of expression and that any decision restricting Mr. Whatcott's right to distribute it publicly would limit his expressive rights to some extent.

[78] With respect to Mr. Whatcott's s. 7 *Charter* rights, I agree with the Attorney General that it would not be fair to consider that argument, which was raised for the first time in Mr. Whatcott's final reply, after the hearing of this complaint had concluded. Regardless, the argument has no merit. A decision by this Tribunal would not restrict Mr. Whatcott's life, liberty, or security of the person. The remedial jurisdiction conferred by s. 37 of the *Code* is in no way equivalent to penal consequences. It does not threaten Mr. Whatcott's life or liberty. While I accept that individuals found to violate the *Code* may encounter, as a consequence, a degree of stigma and social disapproval, such consequences do not rise to a level of "serious state-imposed psychological stress" which could trigger s. 7 considerations: *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46 at para. 60; *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at para. 57; and *Taylor-Baptiste v. OPSEU,* 2013 HRTO 18 at para. 45, upheld in 2015 ONCA 495.

[79] Finally, while Mr. Whatcott did not expressly rely on s. 15 of the *Charter,* I acknowledge that he also holds the right, under that provision, to be free from discrimination based on his religion. In my view, however, that interest overlaps largely with his rights under ss. 2(a) and (b), and that is where all the parties and intervenors have focused their arguments. It will add nothing to this analysis to consider his s. 15 rights separately: *TWU* at para. 78.

[80] I next turn to whether Ms. Oger has *Charter* protections that may be engaged by this Tribunal's decision.

[81] Ms. Oger argues that the Tribunal must also consider her *Charter* rights in the analysis, specifically her rights to participate in the democratic process (s. 3), and to be equal under the law (s. 15). She is supported in this position by West Coast LEAF, which argues that the substantive equality rights of transgender and gender diverse persons, guaranteed by s. 15 of the *Charter,* must be "central" to the Tribunal's decision.

[82] The Attorney General takes a different view. He argues that Ms. Oger's *Charter* rights would not be limited by a decision to dismiss her complaint. As such, there is no need to separately weigh her *Charter* rights in the proportionately analysis. Rather, those interests are properly considered within the context of the Tribunal's statutory objective, which aligns in any event with the s. 15 *Charter* right to equality. This is the approach, he says, that the majority of the Supreme Court of Canada took with respect to the interests of the LGBTQ community in *TWU.*

[83] In *TWU*, the Court was reviewing a decision of the Law Society of BC to deny accreditation to TWU, an evangelical Christian university. TWU required students and faculty to follow a religiously based code of conduct [**Covenant**] which prohibited sexual intimacy outside of cisgender, heterosexual marriage. The effect of the Covenant was to effectively remove TWU as an option for most LGBTQ people based on their sexual or gender identity. For those LGBTQ people who may still choose TWU, the choice would entail significant personal cost.

[84] The Supreme Court of Canada engaged in the *Doré/Loyola* analysis to balance the statutory objectives of the Law Society with TWU's religious rights under the *Charter.* In

effecting that balancing, the Court did not weigh the s. 15 equality rights of LGBTQ people separately. Rather, it effectively treated those rights as embedded in the Law Society's mandate to promote the public interest in the administration of justice and the legal profession: see paras. 29-47. The goal of substantive equality for LGBTQ people was, in the majority's analysis, indistinguishable from the Law Society's mandate to promote equality of access to the legal profession. The majority drew directly from s. 15 jurisprudence to find support for the Law Society's decision, without engaging in a separate analysis of whether a decision to accredit the school would infringe s. 15 rights: para. 95.

[85] This is similar to the approach that the Court took in *Loyola.* There, the Court considered the *Charter* values of dignity, diversity and equality to be part of the context of state regulation of religious schools in a "secular, multicultural and democratic society": para. 47. It did not engage in a separate weighing of s. 15 rights.

[86] I find the same approach to be useful this case. I am not satisfied that a decision dismissing Ms. Oger's complaint would have the effect of infringing her *Charter* rights under ss. 3 or 15. Indeed, she has not argued that it would. This distinguishes these *Charter* protections from those advanced by Mr. Whatcott under ss. 2(a) and (b). Rather, Ms. Oger's argument is simply that those rights and the values underlying them must be weighed as part of the proportionality exercise. I agree, but in my view this exercise is accomplished by giving weight to the context of the complaint as well as the purposes of the *Code* generally, and s. 7(1)(a) specifically.

[87] While there are significant differences in scope and analysis between the equality rights conferred by the *Code* and s. 15 of the *Charter,* there is no question that they share the common purpose of achieving substantive equality. They each promote a "society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *R. v. Kapp*, 2008 SCC 41 at para. 15, quoting *Andrews v. Law Society of British Columbia,* [1989] 1 SCR 143, at p. 171.

[88] Likewise, the values underlying s. 3 of the *Charter* are embedded within the purposes of the *Code*. In particular, s. 3(a) of the *Code* makes it an express purpose of the legislation to "foster a society … in which there are no impediments to full and free participation in the… political … life of British Columbia". In addition, the values of s. 3 of the *Charter* dovetail with a key purpose of freedom of expression in Canada, and I find it useful to consider them in my analysis of Mr. Whatcott's *Charter* rights.

[89] In sum, I am satisfied that the *Charter* protections invoked by Ms. Oger can be appropriately weighed within the statutory and factual context, as well as a robust interpretation of Mr. Whatcott's *Charter* rights. I therefore do not intend to undertake a separate weighing of Ms. Oger's *Charter* interests.

[90] I now turn to consider the statutory objectives and specific *Charter* protections at issue.

2. Statutory objective

[91] Simply put, the aim of human rights legislation is to "identify and eliminate discrimination": *Robichaud v. Canada (Treasury Board),* [1987] 2 SCR 84 at 92. The *Code* is "pre-eminent" legislation, whose protections are "fundamental to our society": *Zurich Insurance Co. v. Ontario (Human Rights Commission),* [1992] 2 SCR 321 [***Zurich***] at para. 18; *Schrenk* at para. 31. It is the "law of the people" and often the "final refuge of the disadvantaged and the disenfranchised": *Tranchemontagne v. Ontario (Director; Disability Support Program),* 2006 SCC 14 at para. 33; *Zurich* at para. 18. Decision makers must interpret its provisions expansively, and not "search for ways and means to minimize [human rights] and to enfeeble their proper impact": *Canadian National Railway Co. v. Canada (Human Rights Commission),* [1987] 1 SCR 1114 at 1136.

[92] The purposes of the *Code* are set out in s. 3:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

All these purposes are directly engaged in this case. In particular, I note that this Tribunal is bound to render a decision in a manner that promotes equitable participation in political life, eliminates persistent patterns of inequality, and promotes a climate of respect.

[93] Section 7(1)(a) prohibits publications which indicate discrimination or an intention to discriminate. The role that this provision plays within the *Code's* scheme of promoting equality can be best understood by placing it in historical context.

[94] The prohibition against discriminatory publications has been in BC's human rights legislation since 1961. In its original form, it was modelled on Ontario's *Racial Discrimination Act* and was intended to "combat the once prevalent 'whites only' signs that were prominently displayed in shop windows, on beaches and in other places of public resort": John D. McAlpine, Report Arising Out of the Activities of the Klu Klux Klan in British Columbia, presented to the Honourable J.H. Heinrich, Minister of Labour for the Province of British Columbia (Vancouver: 1981) at p. 58; Luke McNamara, "Negotiating the Contours of Unlawful Hate Speech: Regulation under Provincial Human Rights Laws in Canada", 38 UBC L. Rev. 1 (2005) [**McNamara**] at p. 8; *Public Accommodations Practices Act,* SBC 1961 c. 20. When the province enacted its first consolidated piece of human rights legislation eight years later, it included a provision which prohibited the publication or display of any representation indicating discrimination or an intention to discriminate based on protected characteristics: *Human Rights Act,* SBC 1969 c. 10, s. 10. The provision expressly stated that it was not intended to interfere with freedom of expression: s. 10(2).

[95] In 1973, the discriminatory publication provision was slightly amended. During the Hansard debates, the legislature considered whether the 'free expression' acknowledgment essentially rendered the provision meaningless. In rejecting such an interpretation, the Honourable Mr. King explained:

> I don't believe that interpretation is correct, Mr. Chairman. I believe the differentiation here is simply to indicate that the intent of restricting any writing or publication to the extent that it may not be discriminatory is, on the other hand, clearly not an attempt to inhibit or restrict the free expression of one's opinion and one's right to free speech…
>
> Certainly anyone who, by their speech, indulged in discrimination that had the effect of injuring a party, would, I suggest, be liable under this Act, as they would be liable if they indulged in their free speech with slanderous comment – which would make them liable under the common law for damages in that situation.
>
> So I don't think it is an inconsistency. I think it is simply an indication that this does not inhibit free speech in any way, but that **free speech is subject to the prohibitions of discrimination, as it is to slander.**
>
> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 30th Parl, 3rd Sess (6 November 1973) at 1349 [Emphasis added]

[96] In 1982, the *Charter* was signed into law and, with it, a constitutional guarantee of the right to free expression in s. 2. The effect of the *Charter* on anti-discrimination laws targeting speech was first considered by the Supreme Court in *Canada (Human Rights Commission) v. Taylor,* [1990] 3 SCR 892 [***Taylor***]. The Court found s. 13 of the *Canadian Human Rights Act,* prohibiting discriminatory hate speech, to be constitutional.

[97] In the wake of *Taylor,* the BC legislature amended the discriminatory publication provision into what is essentially its current from. The legislature added a prohibition on hate speech (now s. 7(1)(b)), removed the free speech acknowledgment, and added an exception for speech which is private or intended to be private (now s. 7(2)): *Human Rights Amendment Act,* 1993 SBC c. 27. In explaining why the free speech acknowledgment was removed, the Honourable Andrew Petter observed:

> … A human rights statute does not require an explicit exemption on free speech for it to be balanced legislation. In fact, as Chief Justice Dickson said [in *Taylor*], such an exemption would be incongruous. It would, if anything, throw the legislation out of balance. It would be incongruous with the intent of such legislation.
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> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 35th Parl, 2nd Sess, Vol 11, No. 8 (17 June 1993) at 7391

[98] The Tribunal has applied s. 7(1)(a) in only a handful of cases. Four examples suffice to show the range of circumstances in which the purposes of s. 7(1)(a) may be engaged.

[99] In *Koehler,* the respondents had engaged in a public campaign opposing a proposed care home for First Nations boys: *Koehler v. Carson,* 2006 BCHRT 50, upheld in 2006 BCSC 1779. The basis of their opposition rested on invidious stereotypes and prejudices about First Nations people. They asserted that the youth in the home "will be suffering the effects of Fetal Alcohol Syndrome" and that "this chemically damaged demographic harbours an inborn fascination with fires". One respondent said that the youth in the home would likely end up being abusers and would place children in the community at risk. Another submitted a letter to the editor, in which she suggested that the youth would "hide in the bushes and wait to pounce on [local] kids, steal their bikes, beat them up, or rig the [bike] trails so someone gets hurt, just so these troubled teens can have a little entertainment". The BC Supreme Court upheld the Tribunal's decision to move the complaint to a hearing. While the Tribunal never issued a final decision in the complaint, the tenor of the publications is, in my view, of the type that s. 7(1)(a) was intended to regulate.

[100] In *Dahlquist-Gray v. Hedley,* 2012 BCHRT 50, the Tribunal found that Ms. Hedley had violated s. 7(1)(a) when she distributed posters in response to Ms. Dahlquist-Gray's bid to erect sculptures in a city park. The posters read:

> IF YOU LOVE GOD DO NOT Support ART IN THE PARK by Kathi Dahlquist-Gray. SHOW UP at City Hall on September 22.09 7:00 p.m. AND SAY NO! to Kathi Dalhlquist Gray AN American Wiccen Lesbian who wants to line her and her wife's pockets with Canadians Money! Stop giving her her 15 minutes of fame. We don't need a monument forever reminding us that

> God has been replaced by Kathi Dahlquist Gray, a goddess-loving American Wiccen Lesbian.

The Tribunal found that, in distributing the posters, Ms. Hedley "clearly intended to injure and, regardless of her intent, did injure the complainants' privacy, dignity, artistic and economic interests by calling attention to their religion, marital status, and sexual orientation, and to [Ms. Dahlquist-Gray's] place of origin, and by urging others to act on what she took to be shared prejudices about those characteristics": para. 59. This was a violation of s. 7(1)(a).

[101] Most recently, in *Li v. Brown,* 2018 BCHRT 228, the Tribunal found a violation of s. 7(1)(a) in the context of an ongoing tenancy dispute between the parties. A landlord went into his tenant's place of employment and showed his boss a picture of the male tenant in a dress, saying that this was "what kind of people you have working for you": para. 124. The Tribunal found that the landlord's conduct clearly revealed an attempt to interfere in the tenant's employment, based on a perception that the photograph would elicit a negative reaction from the employer and therefore carry job-related consequences for the tenant. In that case, there was no suggestion that the photograph itself was hateful or demeaning; rather, it was the way in which the landlord sought to weaponize it, by relying on negative views of men wearing dresses, that invoked the protection of the *Code.*

[102] In contrast, in *Palmer,* the Tribunal concluded that s. 7(1)(a) was not violated. In that case, members of the Mormon community in Bountiful complained that the BCTF had violated s. 7(1)(a) when it published a letter to the Premier, a news release, and a petition, all urging the government to investigate allegations of sexual abuse and human trafficking within the community: *Palmer v. BCTF,* 2008 BCHRT 322. The publications listed several serious allegations against the community, including: trafficking young girls, assigning husbands to girls as young as 14, older men impregnating girls as young as 14, and casting out young men. The complainants argued that the publication targeted them based on their religion and marital status (plural marriage). They said that the allegations were false and that the publications placed its students and teachers at risk of discrimination within the education system. The Tribunal dismissed the complaint, finding that the publications did not indicate an intention to

discriminate. Rather, they reflected the union's opinion about what the government should do in respect of a well-known matter of ongoing public debate: paras. 52-53. The Tribunal considered the purposes of the *Code* and concluded:

> … restating allegations of wrongdoing, which are already in the public domain, about a matter of legitimate public interest, and calling on government to investigate those allegations, cannot be a contravention of s. 7(1)(a) of the *Code*. I also agree with the respondents' submission that it is **not a purpose of the *Code* to stifle public comment, and I would add, democratic political action, on matters of legitimate public interest; nor is it a purpose of the *Code* to prevent persons and groups with an interest in such matters from requesting government to investigate**.
>
> … [The] purposes of the *Code* can only be fostered and promoted in a society where individuals and groups are free to comment on, and take political action, with respect to matters of public interest…. [Emphasis added, at paras. 55-56]

[103] This review of the history and interpretation of s. 7(1)(a) reveals two things about its purpose. First, it deliberately targets speech, and as such contemplates some level of restriction of freedom of expression in order to further the purposes of the *Code*. Second, while there may be overlap, the speech it targets is different than "hate speech", meaning speech that exposes or is likely to expose a protected group to "detestation and vilification": *Whatcott* at para. 163; *Stacey v. Campbell,* 2002 BCHRT 35 at para. 27. A "whites only" sign would not meet the threshold for hate but clearly indicates discrimination and has no place in an equal society. I agree with, and adopt, Ms. Oger's description of s. 7(1)(a):

> Section 7(1)(a) focuses on the connection between an impugned publication and a real-world effect, even if that effect was only intended and not actually achieved. Its scope is limited to communications that disclose an intention to generate some real-world, discriminatory effect, beyond merely being offensive….

[104] In short, s. 7(1)(a) targets "conduct where a respondent intends to make an invidious distinction with adverse consequences": *Stacey* at para. 40. In doing so, it serves the *Code's* purposes of identifying and eradicating discrimination at its source.

3. Freedom of expression

[105] The right to free expression, guaranteed by s. 2(b) of the *Charter,* serves three purposes: fostering Canada's democracy, enabling the search for truth, and nourishing self-fulfillment. The Supreme Court of Canada describes those purposes as follows:

> First and foremost, free expression is essential to the proper functioning of democratic governance. As Rand J. put it, "government by the free public opinion of an open society . . . demands the condition of a virtually unobstructed access to and diffusion of ideas": *Switzman*, at p. 306.
>
> Second, the free exchange of ideas is an "essential precondition of the search for truth": *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 803, per McLachlin J. This rationale, sometimes known as the "marketplace of ideas", extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.
>
> Third, free expression has intrinsic value as an aspect of self-realization for both speakers and listeners. As the majority observed in *Irwin Toy*, at p. 976, "the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed".
>
> *Grant v. Torstar Corp.,* 2009 SCC 61 at paras. 47-50; see also *R v. Keegstra,* [1990] 3 SCR 697 [***Keegstra***], at paras. 87-89;

[106] These three purposes are animated by those values which the Supreme Court of Canada has recognized as "essential to a free and democratic society", namely:

> respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.
>
> *R. v. Oakes,* [1986] 1 SCR 103 at p. 136, cited in *Keegstra* at para. 45.

[107] While the scope of s. 2(b) has been interpreted to capture the broadest range of expression, the freedom has never been "absolute": *Grant* at para. 2. The law has long distinguished between expression which furthers the values underlying s. 2(b) and expression which detracts from them. The latter may more readily be restricted. The Supreme Court of Canada cautions decision makers against uncritically accepting the proposition "that the suppression of expression must always and unremittingly detract from values central to freedom of expression": *Keegstra* at para. 91. Indeed, to treat all expression as equally important to the purposes of s. 2(b) is "destructive of free expression values, as well as the other values which underlie a free and democratic society": *Keegstra* at para. 82.

[108] In short, the significance of infringing an individual's right to free expression varies depending on its proximity to the core values underlying the right. The parties in this case take opposite views about the extent to which the expression in Mr. Whatcott's Flyer furthers, or detracts from, those core values.

[109] Mr. Whatcott, JCCF, and CAFE characterize the Flyer as "political speech" and argue that it is of the highest value. The purposes underlying freedom of expression, they say, is perhaps never more directly engaged than during an election campaign. This is the moment when the average citizen is most engaged in Canada's democratic process: *Figueroa v. Canada (Attorney General),* 2003 SCC 37 at para. 29. Free expression protects both the speaker and the listener in this context, ensuring that citizens are exposed to the broadest scope of beliefs and opinions, thereby enriching Canada's democracy: *Harper* at para. 70; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 2000 SCC 69 at para. 41. They point to the Supreme Court of Canada's recognition that "the connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee": *Keegstra* at para. 94.

[110] This group argues further that, in disseminating the Flyer, Mr. Whatcott was contributing to the "marketplace of ideas" and furthering the search for truth about "transgenderism and the portrayal of these issues in politics and by the media". The JCCF argues that a finding against Mr. Whatcott in this complaint would have dire consequences: "If the electorate is only permitted to hear censored opinions and approved beliefs about

candidates for public office, the right to make informed decisions in voting becomes illusory, and Canada's democracy will become a sham" (emphasis in original). Mr. Whatcott takes a similar view of the stakes, arguing:

> The effect of legally suppressing 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.

[111] Ms. Oger, West Coast LEAF and the BCTF take a different view. They say that Mr. Whatcott's Flyer is far removed from the values of free expression. Ms. Oger argues:

> Rather than contributing to free participation in social and political decision-making, the Respondents' impugned expression conveyed an objective of excluding transgender people, and the Complainant in particular, from political processes. Rather than cultivating diversity in forms of individual self-fulfillment and contributing to a tolerant and welcoming environment, the Respondents' expression communicated rejection of diversity in the individual self-fulfilment of living in accordance with one's own gender identity.

[112] I agree with this statement. The fact that the Flyer was a response to a political campaign, and its message related to how people should vote, does not imbue it with inherent value. In *Whatcott,* the Supreme Court of Canada cautioned that simply framing speech as "arising in a 'moral' context or 'within a public policy debate' does not cleanse it of its harmful effect": para. 116. While the Court in that case was considering a prohibition on hate speech, in my view its reasoning applies equally to the balancing I must do in respect of expression which indicates an intention to discriminate under s. 7(1)(a):

> … Indeed, if one understands an effect of hate speech as curtailing the ability of the affected group to participate in the debate, relaxing the standard in the context of political debate is arguably **more rather than less damaging to freedom of expression**. As argued by some interveners, history demonstrates that some of the most damaging hate rhetoric can be characterized as 'moral', 'political' or 'public policy' discourse. [Emphasis added, at para. 116]

[113] Free expression is a means by which people can meaningfully exercise their right to participate in politics. In that respect, the values underlying s. 2(b) dovetail with those of s. 3 of the *Charter,* and s. 3(a) of the *Code.* Public engagement during an election has an "intrinsic value independent of its impact upon the actual outcome of elections": *Figueroa* at para. 29. The Supreme Court of Canada explains:

> To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, **the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process.**
>
> *Figueroa* at para. 70 (emphasis added)

[114] In an election, the type of speech which enriches, or at least contributes to, democratic governance is the type which empowers voters to "weigh the relative strengths and weaknesses of each candidate and political party" and to "consider opposing aspects of issues associated with certain candidates and political parties where they exist": *Harper* at para. 70. Political expression "contributes to our democracy by encouraging the exchange of opposing views": *Whatcott* at para. 117. Expression furthers the democratic purpose of s. 2(b) when it opens the political process and debate to all persons, and in doing so manifests our shared commitment to a society in which "all persons are equally deserving of respect and dignity": *Keegstra* at para. 89.

[115] The Flyer aims to the opposite effect. It seeks to exclude a group of already marginalized persons from political life. Like the anti-gay speech at issue in *Kempling,* the Flyer invokes stereotypes and indicates "a willingness to judge individuals" based on those stereotypes: *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 [***Kempling***] at para. 35. In

doing so, it ignores the inherent dignity of the individual and, as such, "is not representative of the core values underlying s. 2(b)": *Kempling* at para. 77. Like the anti-Semitic speech in *Ross,* the Flyer "impedes meaningful participation in social and political decision-making", in this instance by transgender people, an outcome that the Court called "wholly antithetical to the democratic process": *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 at para. 93; see also *Keegstra* at para. 90. In Mr. Whatcott's own words, he sought to **disinvest** Ms. Oger "of all political power" because she is a transgender woman. This speech does not enrich Canada's democracy – it undermines it.

[116] I therefore reject the characterisation of Mr. Whatcott's Flyer as "political speech". It does not engage in debate about matters of social policy. Although, in the hearing, Mr. Whatcott referenced social debate about sexual orientation and gender identity curriculum in the public-school system, that issue was not mentioned in the Flyer. Mr. Whatcott, in the hearing, also alluded to debate about whether gender identity and expression should be protected in human rights legislation. Again, however, this was not the subject of the Flyer, nor a policy issue on which he sought to persuade people not to vote for Ms. Oger. Far from an attempt to engage in an enriching policy debate, the expression contained in the Flyer is intended to denigrate and humiliate Ms. Oger based on her gender identity and encourage voters not to support her party – not because of the quality of its ideas, but because of its support for a transgender candidate.

[117] Mr. Whatcott, the JCCF and CAFE put forward two main reasons for why the Flyer is valuable political speech. First, they say it engages in an ongoing public policy debate. Second, they say that it concerns the legitimate issue of Ms. Oger's character and consequent suitability for public office. Both rationales rest within their view that a minimally regulated marketplace of ideas is the best way for truth to prevail. Mr. Whatcott goes so far as to argue that "Free speech, not human rights law, is the antidote to the social diseases of prejudice and hate". On this point, I invoke and adopt Chief Justice Dickson's caution:

> …neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little

> chance that statements intended to promote hatred [and to this I add discrimination] against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided…
>
> *Keegstra* at para. 87; see also *Whatcott* at para. 104

[118] I turn to the first proposed interpretation of the Flyer: that it contributes to a valuable and ongoing public debate about the morality, and indeed reality, of being transgender. For this proposition, Mr. Whatcott, JCCF and CAFE cited religion, science, and "common sense".

[119] I reject this proposition in the strongest possible terms. The question of whether transgender people exist and are entitled to dignity in this province is as valuable to ongoing public debate as whether one race is superior to another. This does not mean that all expression that criticizes or questions the existence of transgender people violates the *Code.* Here I distinguish between public debate about, for example, the scope of rights that different groups in society may be afforded, and commentary like that which is in the Flyer, which denies the very existence of transpeople. Understood in its proper context, it is simply not accurate to place this type of expression at the core of s. 2(b) values.

[120] Indeed, the proposition that we should continue to debate and deny the existence of transpeople is at the root of the prejudice and stereotypes that continue to oppress them. It rests on the persistent belief, held by people like Mr. Whatcott, that a person's genitals are the essential determinant of their sex and, therefore, gender. The result of this belief is to necessarily cast transgender people as either "deceivers or pretenders": Talia Mae Bettcher, "Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion", *Hypatia,* Vol. 22, No. 3 (Summer 2007) pp. 43-75 [**Bettcher**]. They are placed in what Dr. Bettcher calls the "double bind": "disclose 'who one is' and come out as a pretender or masquerader, or refuse to disclose (be a deceiver) and run the risk of forced disclosure, the effect of which is exposure as a liar": Bettcher at 50. The outcome is to delegitimize transgender people and to cast them as authors of their own misfortune:

> Insofar as transpeople are open to constructions as 'really an x,' (appearances notwithstanding) we will immediately find ourselves represented in ways that are contrary to our own identifications. This construction literally *reinscribes* the position that genitalia are the essential determinants of sex by identifying that essential status as the 'hidden reality or truth of sex.' Through such a construction, we will invariably be represented as deceivers or pretenders. This has the effect of doubly delegitimating our own voices by constructing us as both fictitious and morally suspect. Hence, after identity enforcement, nothing we might say could possibly matter. A framework has been deployed whereby transphobic violence may be excused or justified on the grounds that deception had been involved. The only latitude appears to involve the degree to which our pretense is viewed as harmless make-believe or evil deception.
>
> Bettcher at 51

[121] This framework of deceiver/pretender is at the heart of the ideas that Mr. Whatcott puts forth in the Flyer. By calling Ms. Oger's identity a "falsehood" and an "impossibility", she is cast as deceptive and therefore unworthy of public office. This brings me to the second proposed interpretation of the Flyer: that it engages the legitimate question of Ms. Oger's character.

[122] Mr. Whatcott and CAFE say that a candidate's morality and integrity is always the subject of fair scrutiny in an election. It is political. They point to examples of Bill Clinton, Roy Moore, Donald Trump and even David Duke to illustrate the public's legitimate interest in a candidate's private life and the values they can be expected to bring to public office.

[123] The problem with this argument is that it fails to understand that being transgender is not a 'moral' choice or a measure of integrity. It is not in any way analogous to sexual harassment, extra marital affairs, pedophilia or white supremacy. It says nothing about a candidate's morality or values. It is simply one part of a person's identity, in the same way a candidate might be Jewish, or First Nations, or Deaf, or a woman. A candidate's qualification for public office – rightly the subject of open debate – is not measured by their gender identity, any more than it is measured by their race, religion, or disability. In fact, this is the very essence of substantive equality: the right to be measured on one's true merits and not on qualities

arbitrarily attributed to a person based on stereotype and connections with a protected group: *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4 at para. 48; see also *Kempling* at para. 41.

[124] Mr. Whatcott, the JCCF and CAFE submit that elections are a time when people must be able to discriminate based on a person's protected characteristics. They point to Prime Minister Trudeau's gender-balanced cabinet, and other calls for greater representation by Indigenous people, women, and racialized groups, as evidence that a person's protected characteristics can be a lawful and relevant point of distinction in a political campaign.

[125] This argument confuses distinctions with discrimination. Efforts to increase the participation and representation of groups which have historically been excluded from political life serve the goals of achieving substantive equality and enriching Canada's democracy. But to advocate **against** including those groups in politics is not the same thing as arguing **for** their deliberate inclusion. The law has long understood that identical treatment of groups is often the very source of serious inequality: *Kapp* at para. 27*,* citing *Andrews*. Put another way, "different treatment in the service of equity for disadvantaged groups is an expression of [substantive] equality, not an exception to it": P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol. 2, at p. 55-53; cited with approval in *Kapp* at para. 37. It is simply not reasonable to equate efforts to increase the representation of disadvantaged groups in government with those which would seek to continue to exclude them. While I acknowledge that individual voters may choose to discriminate within the privacy of a ballot box, it does not further Canada's democracy to suggest that a person's connection with a historically disadvantaged group is a legitimate point on which to openly campaign against them.

[126] I accept that a modern political campaign can be a gloves-off, no-holds-barred affair. Ms. Oger put herself forward as a candidate for public office. In doing so, she was exercising her constitutionally protected right to "present certain ideas and opinions to the electorate as a viable policy option": *Figueroa* at para. 29. As a candidate, she opened herself up to the rigours of the campaign process, and to scrutiny for the merits of her ideas and her ability to effectively govern. She opened herself up for opposition and criticism – some of which, no doubt, would

be “harsh and undeserved”: *Grant* at para. 58. Our democracy is enriched when political candidates are rigorously and fearlessly challenged on their political ideas and their ability to effectively govern. However, just as “participation in public life [does not] amount to open season on reputation”, nor does participation in political life amount to open season on groups protected by human rights legislation: *Grant* at para. 58. In running for office, did Ms. Oger also open herself up to criticism and scrutiny based on her gender identity? To answer this question, I adopt the position of former US Secretary of State Madeleine Albright: “when a woman participates in politics, she should be putting her hopes and dreams for the future on the line, not her dignity and not her life”: Krook at 85.

[127] In sum, I find that the nature of the expression in this case is such that it detracts from the core values of s. 2(b). So long as the type of attack contained in the Flyer is justified as the cost of doing politics, equity-seeking groups will continue to face impediments to full and free participation in the political life of the province: *Code,* s. 3(a). I therefore find that the expression is fundamentally inconsistent with principles of substantive equality, and the purposes of the *Code*. I am buttressed in this conclusion by my finding, later in these reasons, that the Flyer amounts to prohibited hate speech, which “strays some distance from the spirit of s. 2(b)”: *Whatcott* at para. 23.

4. Freedom of religion

[128] The essence of freedom of religion is “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination”: *R. v. Big M Drug Mart Ltd.,* [1985] 1 SCR 295 [***Big M***] at para. 94. Like free expression, the freedom to hold and manifest the religious beliefs of one’s choosing is a central tenet of Canada’s political and philosophical traditions: *Big M* at paras. 122-123.

[129] In his submission, Mr. Whatcott suggests that a finding that the Flyer violated the *Code* would amount to state coercion in respect of a matter of conscience. This is, of course, the very

antithesis of the freedom conferred by s. 2(a): *Big M* at para. 135; *R. v. Edwards Books and Art Ltd.,* [1986] 2 SCR 713 at para. 97. The argument is misguided.

[130] There are two aspects to freedom of religion: the right to hold religious beliefs and the right to manifest them: *Ktunaxa Nation* at para. 64. Nothing in this complaint threatens Mr. Whatcott's right to hold his religious beliefs about gender. The only potential limitation arises with respect to the way he is permitted to manifest them.

[131] The freedom to hold religious beliefs has always been broader than the freedom to act on them: *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 36. Religious freedoms must co-exist with other rights and values, in particular the right of equality-seeking groups to be treated as "human beings equally deserving of concern, respect and consideration": *Kapp* at para. 15; *Whatcott* at para. 161. In *Big M,* the Court was clear that the freedom to manifest religious beliefs stops at the point where those manifestations "injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own": para. 123; see also *Multani v. Commission scolaire Marguerite-Bourgeoys,* 2006 SCC 6 at para. 26.

[132] There is a conflict in this case between Mr. Whatcott's religious belief that he should do everything in his power to stop a transgender woman from being elected into political office, and Ms. Oger's right – and the right of transpeople more broadly – to enjoy equal and dignified participation in the political life of this province. In the language of *Big M,* the manifestation of Mr. Whatcott's belief injures the rights of his neighbours. To the extent that a decision by this Tribunal affects Mr. Whatcott's religious rights, it is a relatively minor limitation. He remains free to hold his religious beliefs and communicate them privately. He is only prohibited from practicing his religion in a way that violates the human rights of other people. The Supreme Court of Canada has described such minor limits on religious freedom as "often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society": *TWU* at para. 100.

5. Application of s. 7(1)(a)

[133] I have situated this complaint in its context of pervasive discrimination against transgender people and the barriers they face to participate in political life. I have determined that Mr. Whatcott's claims to religious and expressive rights cannot be reconciled with the purposes of the *Code* and the goal of substantive equality, particularly within the realm of politics. I have concluded that the expression in this case is far from the core values of s. 2(b) and that any threat to Mr. Whatcott's religious rights are minor and consistent with the recognition that a person's right to hold religious beliefs may be broader than their right to practice them, to the detriment of their neighbours. I turn now to the application of s. 7(1)(a).

[134] To establish a violation of s. 7(1)(a), a complainant must show that the publication "had a discriminatory effect, or likely effect, or was intended to do so": *Palmer* at para. 43. A discriminatory effect is one with specific adverse consequences for the complainant. It is not limited to adverse effects within the areas of activity regulated by ss. 8-14 of the *Code*: *Koehler*. The publication must include "more than a mere statement of opinion": *Stacey* at para. 51; *Palmer* at para. 43.

[135] I am satisfied that the Flyer violates s. 7(1)(a) of the *Code*. Mr. Whatcott deliberately identified Ms. Oger as a transgender woman and, on that basis alone, impugned her moral integrity and fitness to hold public office. Critically for the purpose of s. 7(1)(a), the Flyer then went on to advocate a specific adverse outcome for Ms. Oger and groups like the NDP which would support transgender people: do not vote for them. Indeed, in his submissions Mr. Whatcott says that "close scrutiny of [the 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". This intention, based as it is purely on Ms. Oger's gender identity, is sufficient to demonstrate an intention to discriminate against Ms. Oger in a critical area of public life.

[136] This finding of discrimination is consistent with the Tribunal's recognition in *Palmer* that "it is not a purpose of the *Code* to stifle public comment" or "democratic political action, on matters of legitimate public interest": para. 55. For reasons I have explained at length, the ideas

put forth in the Flyer do not concern matters of "legitimate public interest". This distinguishes this complaint from *Palmer,* where the BCTF's publication repeated allegations against the Mormon community that the Tribunal found **were** a matter of current public debate.

[137] Nor is this a case like *Stacey,* where the impugned publication called for the Alberta government to roll back rights afforded to gay and lesbian people. As I have said, the Flyer does not engage in policy debate about the scope of rights that should be conferred by law on transgender people. Its sole focus is the proposition that Ms. Oger is really a man, living a lie, and seeking to promote falsehoods and deceit. It is an attack on her inherent dignity and worth based solely on her gender identity, and a call for voters to reject her candidacy and the NDP based on its affiliation with her.

[138] Mr. Whatcott, the JCCF and CAFE argue that there is no evidence that the Flyer had any effect on the outcome of the election. To the contrary, they point out that Ms. Oger was able to rally public support behind her and that it was in fact Mr. Whatcott who was ultimately cast as the villain in the court of public opinion.

[139] Section 7(1)(a) does not require proof that a discriminatory publication had the particular discriminatory effect it intended. That is clear from the plain language of the section: it applies to discriminatory publications that either "indicates discrimination" **or** "an intention to discriminate". It is sufficient that Mr. Whatcott intended the Flyer to dissuade people from voting for Ms. Oger or the NDP purely based on her gender identity.

[140] In that regard, I reject Mr. Whatcott's argument that he did not intend to discriminate but only to "bring attention to what he views as immoral behaviour, based on his religious belief as a Christian". Respectfully, there is no difference. To cast a transgender person as immoral purely because of their gender identity is the very essence of discrimination.

[141] In my view, the Flyer is the modern version of a "whites only" sign. It is an attempt to block the doors of government with a message that the political realm is for "cisgender people only". Balancing all the factors I have laid out above, I find that the only outcome in this

complaint which furthers the purposes of the *Code* and respects the rights and values in the *Charter* is a finding that Mr. Whatcott has violated s. 7(1)(a) of the *Code*.

C. Section 7(1)(b): likely to expose to hatred or contempt

[142] Section 7(1)(b) of the *Code* is the provision which prohibits hate speech. The pressing and substantial objective of eradicating hate speech has long been recognized in the law: e.g. *Keegstra, Taylor, Ross, Whatcott.* The Supreme Court of Canada describes the objective, within a human rights framework, as follows:

> Hate speech is, at its core, an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. When people are vilified as blameworthy or undeserving, it is easier to justify discriminatory treatment. The objective of [the equivalent provision in Saskatchewan's human rights legislation] may be understood as **reducing the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity**.
>
> *Whatcott* at para. 71 (emphasis added)

Ultimately, the Court said, it is "the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech": *Whatcott* at para. 82.

[143] Hate speech creates two types of harm: individual and societal. At an individual level, hate speech humiliates and degrades its targets, with negative psychological and social consequences. At the societal level, hate speech can increase discord and affect "a subtle and unconscious alteration of views concerning the inferiority of the targeted group": *Whatcott* at para. 73. Hate speech can desensitize society to claims that its target group is "inferior, subhuman, or lawless". In doing so, it lays the ground work for discrimination, marginalization and violence against that group: *Whatcott* at para. 74; see also *Keegstra* at para. 62.

[144] The test for hate speech is "whether, in the view of a reasonable person aware of the context and circumstances, the representation exposes or tends to expose any person or class of persons to detestation and vilification on the basis of a prohibited ground of discrimination":

Whatcott at para. 95. It is an objective test, targeted to extreme manifestations of hatred or contempt, and focused on the effect of the expression at issue: *Whatcott* at paras. 56-58.

[145] Before I apply this test, I must address five arguments that Mr. Whatcott made in this hearing about why the test violates his rights. At the outset of this exercise, I observe that, in making these arguments, Mr. Whatcott did not once refer to the Supreme Court of Canada's decision in *Whatcott.* This is remarkable not only because this is clearly the leading case, and it was Mr. Whatcott himself who was the affected litigant in circumstances quite similar to the present ones, but also because many of the arguments he advanced before this Tribunal are essentially invitations to ignore or depart from Supreme Court of Canada jurisprudence. Even if I were inclined to accept those arguments, I obviously could not. This Tribunal is bound by those precedents, and it does not serve this process for Mr. Whatcott to repeatedly advance arguments here that he has already lost at the Supreme Court of Canada.

[146] For that reason, I intend to spend relatively little time with each argument falling into this category. I address them only briefly in turn.

[147] First, Mr. Whatcott argues that the complaint must fail because there is no evidence of "causation" or "actual harm". In *Whatcott,* the Court held that the fact there was no requirement that a complainant produce "actual evidence of harm" to establish hate speech was constitutionally permissible: paras. 105-106. The test accounts for "the difficulty of establishing a causal link between an expressive statement and the resulting hatred": para. 129. The Court pointed out that the end goal of hate speech is not necessarily to trigger immediate harmful effects but rather to "shift the environment from one where harm against vulnerable groups is not tolerated to one where hate speech has created a place where this is either accepted or a blind eye is turned": para. 131. It found that "the discriminatory effects of hate speech are part of the everyday knowledge and experience of Canadians" and so the legislature "is entitled to a reasonable apprehension of societal harm as a result of hate speech": para. 135.

[148] Second, Mr. Whatcott argues that the test is patently unworkable because "there is no definition of the 'reasonable person'". This same argument was advanced in *Whatcott.* There, the Court addressed the argument that the standard of a reasonable person would lead to "arbitrary and inconsistent results, depending on the subjective views of judges and arbitrators": para. 32. The Court began by acknowledging that, "as long as human beings act in the role of judge … there will be a subjective element in the application of any standard or test": para. 33. Nevertheless, the objective standard of the "reasonable person" is one well known in all corners of the law. It requires the judge to put aside their personal views and base their decision on what they perceive to be "the rational views of an informed member of society": para. 35. Common law traditions of developing legal principles, following precedent and applying the objective standard keep the test from being one based purely on the judge's subjective views: para. 36. It was thus in the face of the same argument that Mr. Whatcott makes to this Tribunal that the Court developed its "reasonable person" test for hate speech. I am bound to apply it.

[149] Third, Mr. Whatcott argues 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*". This has been a recurring theme in many of his submissions. My previous rulings that he would not be permitted to lead evidence to establish the 'truth' of his convictions expressed in the Flyer led to an unsuccessful application to have me recused based on a reasonable apprehension of bias: see *Oger v. Whatcott (No. 2),* 2018 BCHRT 131 [***Oger (No. 2)***] and *Oger v. Whatcott (No. 3),* 2018 BCHRT 193 [***Oger (No. 3)***] at paras. 44-47. Mr. Whatcott argued in that application that that "truth is integral to every judicial and quasi-judicial proceeding" and that, by denying him the opportunity to "admit proof the complainant was born a male and is biologically and genetically a male", he is deprived of the opportunity to "make full answer and defence". As a result, this is not the first time in these proceedings that I am compelled to cite, in full, the passages from *Whatcott* which establish that there is no defence of "truth" in respect of hate speech. In doing so, I note that in this passage, the Court was directly responding to very same argument that Mr. Whatcott repeats before this Tribunal. The Court said:

> I agree with the argument that the quest for truth is an essential component of the "marketplace of ideas" which is, itself, central to a strong democracy. The search for truth is also an important part of self-fulfillment. However, I do not think it is inconsistent with these views to find that not all truthful statements must be free from restriction. Truthful statements can be interlaced with harmful ones or otherwise presented in a manner that would meet the definition of hate speech.
>
> As Dickson C.J. stated in *Keegstra*, at p. 763, there is "very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world". To the extent that truthful statements are used in a manner or context that exposes a vulnerable group to hatred, their use risks the same potential harmful effects on the vulnerable groups that false statements can provoke. The vulnerable group is no less worthy of protection because the publisher has succeeded in turning true statements into a hateful message. In not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred. [paras. 140-141]

[150] Fourth, Mr. Whatcott argues that the test is unlawful because it has no requirement of *mens rea* and no consideration of the good faith, or religious, intentions of the author. Again, this position was advanced – and rejected – in *Whatcott.* The Court found that "[t]he preventative measures found in human rights legislation reasonably centre on effects, rather than intent": paras. 126-127. The intent of the publisher is irrelevant to the inquiry and to hold otherwise would "in effect, provide an absolute defence and would gut the prohibition of effectiveness": para. 143.

[151] Finally, Mr. Whatcott says that to characterise the Flyer as hate is an "indirect attack on the Bible itself". This is simply not true. The Court's decision in *Whatcott* makes clear that a biblical passage, in and of itself, is always capable of more than one interpretation and, as such, does not inspire detestation and vilification: para. 199. At the same time, reliance on biblical authority does not insulate a publication from such a charge. In fact, the Court recognized that the use of the Bible to "lend credibility to the negative generalizations" can be one of the "hallmarks" of hatred: para. 187. It upheld a finding that two of Mr. Whatcott's flyers in that case amounted to hate speech, in circumstances where they drew on biblical authority: para. 187. In this case, as I will explain, any biblical references in the Flyer are only relevant insofar as

they are read in the full context of the Flyer and understood as a tool to lend credibility to the ideas expressed within it.

[152] I turn now to whether, in the view of a reasonable person aware of the context and circumstances, the Flyer exposes or tends to expose Ms. Oger or transgender people to detestation and vilification based on their gender identity: *Whatcott* at para. 95. "Detestation and vilification" are used in this articulation of the test to give meaning to the statutory language of "hatred or contempt". They exclude from their ambit expression which "while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects": *Whatcott* at para. 57. I find it useful to quote at length from the Supreme Court of Canada's description of the type of speech which reaches this threshold:

> … Representations that expose a target group to detestation tend to **inspire enmity and extreme ill-will** against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to **abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience.** Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims.
>
> …
>
> … in my view the term "hatred" in the context of human rights legislation includes a component of looking down on or denying the worth of another. The act of vilifying a person or group connotes **accusing them of disgusting characteristics, inherent deficiencies or immoral propensities which are too vile in nature to be shared by the person who vilifies**. Even without the word "contempt" in the legislative prohibition, **delegitimizing a group as unworthy, useless or inferior** can be a component of exposing them to hatred. Such delegitimization reduces the target group's credibility, social standing and acceptance within society and is a key aspect of the social harm caused by hate speech.
>
> … Hate speech often vilifies the targeted group by blaming its members for the current problems in society, alleging that they are a "powerful menace" …; that they are carrying out secret conspiracies to gain global control …; or plotting to destroy western civilization … Hate speech also further delegitimizes the targeted group by suggesting its members are

> illegal or unlawful, such as by **labelling them "liars, cheats, criminals and thugs"** …; a "parasitic race" or "pure evil"…
>
> Exposure to hatred can also result from expression that **equates the targeted group with groups traditionally reviled in society**, such as child abusers, pedophiles … or "deviant criminals who prey on children" ... One of the most extreme forms of vilification is to dehumanize a protected group by describing its members as animals or as subhuman. References to a group as "horrible creatures who ought not to be allowed to live" …; "incognizant primates", "genetically inferior" and "lesser beasts" …; or "sub-human filth" … are examples of dehumanizing expression that calls into question whether group members qualify as human beings. [Emphasis added, citations omitted, at paras. 41, 43-44]

[153] In my view, a reasonable person, informed of the context, would conclude that the contents of the Flyer meet this threshold. I reach this conclusion reading the Flyer as a whole and placing it in the specific contexts of this case which I have outlined above.

[154] The Flyer uses five rhetorical techniques which have the effect of exposing Ms. Oger, and transgender people, to hatred and contempt.

[155] First, the Flyer denies the reality of transgender people:

> **Ronan Oger (picture left) is a biological male who has renamed himself "Morgane Oger" after he embraced a transvestite lifestyle. Ronan is running for the NDP in the Vancouver-False Creek riding and BC's media and the NDP are promoting a false narrative that Ronan is a woman born into a male body …**
>
> The truth is there are only two genders, male and female and they are God given and unchangeable. Ronan may have government ID that refers to him by the French female name 'Morgane' and the media, NDP and everyone in the riding might try to pretend Morgan is a woman. But the truth is Ronan's DNA will always be male, he will never have a uterus, and no amount of cosmetic surgery, fake hormones, or media propaganda is going to be able to change these facts.
>
> "***God created man in His own image, in the image of God He created him; male and female He created them***." Genesis 1:27
>
> Because gender is God given and immutable, "transgenderism" is an impossibility. A male cannot "transition" into a female, nor can a female

> "transition" into a male. One can only cross dress and disfigure themselves with surgery and hormones to look like the gender they are not. This practice is harmful and displeasing to God… [as written]

[156] Here, context is critical. As Ms. Oger points out, for many social groups, public statements that they are not real and that members of the group lie about who they are may not expose them to hatred. Most protected groups do not have a social context or history of being told they do not exist and that people who claim to be a part of the group are lying or mentally ill. For example, "a publication stating that women are not real, and all people who call themselves 'women' are deluded men pretending to be other than they are" is unlikely to expose women to detestation and vilification because these are "not stereotypes ascribed to women as a group".

[157] However, as I have outlined above, this is perhaps the most pernicious stereotype about transgender people, and is one found at the root of most discrimination against them. Here again I rely on Dr. Bettcher's explanation for how the deceiver/pretender construct is harnessed to justify the marginalization of, and violence against, transpeople, on the basis that their very existence is – at best – an act of misguided make-believe or – at worst – a deliberate and malevolent deception. The effect of this stereotype is to dehumanize transgender people. They are rendered "invisible, deviant or inhuman": Barbara Perry and D. Ryan Dyck, "I Don't Know Where it is Safe: Trans Women's Experiences of Violence" (2013) Vol. 21 No. 4 *Critical Criminology* at p. 6. As West Coast LEAF points out, the stereotype allows the conditions for discrimination to flourish, because "the rights of those who do not exist, by extension, do not exist".

[158] Second, the Flyer associates transgender people with social problems and disease:

> … Those who embrace the transvestite and homosexual lifestyles put themselves at greatly increased risk of diseases such as HIV, syphilis, HPV of the rectum, anal gonorrhea, Hepatitis A, B, & C, etc… Homosexuals and transgenders are also at increased risk of drug and alcohol abuse, suicide, and domestic violence.

[159] In this passage, Mr. Whatcott accuses transgender people of "disgusting characteristics, inherent deficiencies [and] immoral propensities which are too vile in nature to be shared" by Mr. Whatcott or other 'right thinking' members of society: *Whatcott* at para. 43. They are portrayed as carriers of disease: *Whatcott* at para. 190.

[160] In interpreting the Flyer this way, I do not suggest that having any of these diseases or manifestations of social inequality is inherently repulsive. However, read in context, it is clear that the reference to sexually transmitted disease and social ills is to suggest that transgender people are a source of those problems and, as such, a menace to society more broadly: *Whatcott* at para. 44. It seeks to place transgender people in an inferior status: *Whatcott* at para. 43.

[161] I find that the reference to Walt Heyer "[cutting] off his penis, and [injecting] himself with female hormones" is of similar effect. The language here is intentionally shocking. While many transgender people may elect to have surgeries or take hormones, those choices are not only intensely personal but also medically-based. Mr. Whatcott's description characterises those choices as gross and wanton acts of self-mutilation and, in doing so, positions himself above any person who would engage in such behaviour.

[162] Third, the Flyer delegitimizes transgender people by asserting that they, and those who support them, are "liars and sexually immoral":

> In addition to the physical and social consequences of adopting a false sexual and gender identity, there are spiritual consequences too. Our God is a God of truth. Those who promote falsehoods like the NDP and BC's major media and say it is ok to indulge in homosexuality or embrace a transvestite lifestyle do so to their eternal peril. Liars and the sexually immoral will not inherit the Kingdom of Heaven, nor will cowards. The truth is many BC residents know that promoting homosexuality and transvestitism is wrong, but are too cowardly or morally corrupt to speak up and defend what is true:
>
> **"*As for the cowardly, the faithless, the detestable, as for murderers, the sexually immoral, sorcerers, idolaters, and all liars, their portion will be in the lake that burns with fire and sulfur, which is the second death*."**
> **Revelation 2:8** [as written]

[163] This passage aligns with the recognition in *Whatcott* that hate speech may delegitimize its target group by "labelling them 'liars, cheats, criminals and thugs'": para. 44. It associates Ms. Oger and transgender people with the worst types of people. The suggestion that transgender people are "sexually immoral" has implications that they may be prone to criminal or other types of transgressive behaviours.

[164] Fourth, throughout the Flyer, Mr. Whatcott uses biblical passages to lend credibility to his negative characterisations. In *Whatcott,* this was a factor which the Court recognized as a hallmark of hate: para. 187. To be clear, it is not the passages themselves which are hateful but rather the way they are deployed to invoke higher authority for the ideas expressed in the Flyer that supports my finding that the Flyer amounts to hate speech.

[165] Finally, I have already found that the Flyer advocates overt discrimination against Ms. Oger and transgender people, by calling on people not to vote for Ms. Oger or the NDP. In *Whatcott,* the Court said that advocating for discrimination is neither necessary nor sufficient to find a publication amounts to hate speech, but that "it can be an important factor in assessing the context of the expression and its likely effect": paras. 191-192. Here, a reasonable person reading the Flyer would receive a message that transgender people are inherently unworthy to hold public office.

[166] The overall effect of the Flyer, as I have already outlined in some detail above, is to inhibit the ability of transgender people to "find self-fulfillment by articulating their thoughts and ideas" and to meaningfully participate in the democratic process. The Supreme Court of Canada explains:

> … [Hate propaganda] impacts on that group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the group so that their reply will be ignored: it also **forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our society.**

Whatcott at para. 75.

[167] This effect is seen clearly in this case. The Flyer's central thesis is that Ms. Oger is lying about her gender identity and, by doing so, she shows herself to be inherently deceptive and untrustworthy. The first thing the reader sees when they look at the Flyer is a picture of Ms. Oger. The first sentence the reader reads calls Ms. Oger by the wrong name and accuses her of pretending to be someone she is not. To persuade people to vote for her, Ms. Oger necessarily needs them to trust her and to demonstrate to the public that she is a person of integrity. The Flyer, by design, attacks these very qualities and in doing so seeks to "cut off" any path of reply. Before she can enter any public debate, Ms. Oger is required to defeat the two absolutist positions that: (1) she is not who she says she is and (2) she has engaged in fraud or misrepresentation. A prerequisite to her political participation is to show that all transgender people are not, in fact, immoral liars: *Whatcott* at para. 76. In this way, the Flyer forces Ms. Oger to argue for her basic humanity as the price of admission to political life.

[168] Mr. Whatcott and the JCCF rely on two prior cases of this Tribunal to argue that the Flyer is not likely to expose Ms. Oger, or transgender people, to hatred or contempt: *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4),* 2008 BCHRT 378 and *Canadian Jewish Congress v. North Shore News and Collins*, 1997 BCHRT 35. I distinguish both of those cases from Ms. Oger's complaint.

[169] In *Elmasry*, the Tribunal considered whether an article written by Mark Steyn in Maclean's magazine violated s. 7(b) of the *Code.* The thrust of the article, summarized by the Tribunal, was that: "Muslims, adherents of the religion of Islam, have serious global ambitions for world religious domination, which they will be assisted in achieving by demographically outnumbering the populations in traditional Western cultures and, if necessary, by the use of violence": para. 2. On the cover of the magazine was a picture depicting a group of women fully covered in black burkahs and one young girl among them, her face exposed.

[170] The Tribunal accepted that the article deployed common stereotypes about Muslim groups and was intended to "rally public opinion by exaggeration and causing the reader to fear

Muslims", but held that it fell short of generating hatred or contempt: paras. 142 and 157. In large part, this conclusion was driven by the Tribunal's view that the evidence in the case fell short of linking the stereotypes "with the impact its use might have on the objective reader". The Tribunal found that the picture accompanying the article could be capable of various interpretations: para. 148. Finally, it held that, "read in its context, the Article is essentially an expression of opinion on political issues which, in light of recent historical events involving extremist Muslims and the problems facing the vast majority of the Muslim community that does not support extremism are legitimate subjects for public discussion": para. 150.

[171] In contrast, in the present complaint, I have the benefit of academic literature and argument which links the stereotypes transmitted in the Flyer with the ongoing marginalization and victimisation of transgender people in BC and in particular their exclusion from political life. Unlike the picture in *Elmasry,* the Flyer is not capable of multiple interpretations. And finally, I have already concluded that the Flyer, read in context, does not engage in topics of valuable ongoing public discussion.

[172] Likewise, I find the circumstances here different than *Canadian Jewish Congress.* There, the Tribunal considered whether an anti-Semitic publication violated s. 7(b). The ideas in the publication, summarized by the Tribunal, were "that films like Schindler's List are hate propaganda by Jews against Germans; that the generally accepted figure of six million Jewish victims of the Holocaust is grossly inflated and the Holocaust is no different than other wartime mass killings; that the popularity of the film and its likely success in the Academy Awards is a product of Jewish control of Hollywood": para. 269. The Tribunal found that the tone of the publication was nasty but informal, and that the content was not sufficiently hateful to trigger the prohibition in s. 7(1)(b): para. 272.

[173] First, I note that *Canadian Jewish Congress* was decided in 1997 and therefore the Tribunal did not have the benefit of the Court's analysis in *Whatcott,* which developed a different test for hate speech. In any event, I am satisfied that the context of Ms. Oger's complaint is sufficiently different to warrant a different outcome. In particular, the context of this complaint directly engages one of the core purposes of the *Code,* and values underlying the

Charter, namely ensuring equitable access to political life by groups which have long been excluded. The vilification of Ms. Oger in this complaint drew on the very stereotypes that would see transgender people treated as inferior and inherently unworthy to hold public office. The Flyer was disseminated at a time when Ms. Oger was in the public eye and targeted to those people in her riding who would be assessing her merit as a candidate. It referred to her genitals – something that Ms. Oger rightly points out that no person would want discussed publicly – and associated her directly with disease and social ills. The intent was to generate an immediate negative impact on her campaign, on the basis that she was inherently untrustworthy and not worthy of due regard or respect. Thus, the tone and content of the Flyer was more targeted than the publication in *North Shore News.*

[174] Mr. Whatcott and CAFE relied on two further cases which warrant comment. In *Christian Heritage Party of Canada v. Hamilton (City),* 2018 ONSC 3690, the Ontario Superior Court of Justice overturned a decision by the City of Hamilton to remove advertisements which had been placed on bus shelters on the basis that they were discriminatory against transgender people. However, that decision was based solely on the Court's conclusion that the City had not adopted a sufficiently robust process to balance the interests in the case and, as a result, the Christian Heritage Party had been denied natural justice: para. 47. There was no balancing of *Charter* interests, or conclusion that the restriction on the advertisement was not a reasonable outcome: para. 63. While the Court did express a view that a "dog whistle" message could not constitute obvious hate speech, that observation has no application to the Flyer in this case. The Flyer was not a "dog whistle", it was an air horn.

[175] Similarly, *Bracken v. Fort Erie (Town),* 2017 ONCA 668, turned on a very different issue than the present complaint. The issue was whether Mr. Bracken's expression amounted to violence and therefore fell outside the scope of s. 2(b) of the *Charter.* The Town, whose decision was under review, had concluded that it did and, on that basis, banned Mr. Bracken from Town property for one year. The Court concluded that the Town was incorrect to label Mr. Bracken's speech as violence and that its reaction was an unjustified infringement of his s. 2(b) rights. I cannot find any useful parallels in that case which would relate to Ms. Oger's

complaint. I have not found that Mr. Whatcott's speech is violence – indeed, all parties conceded it fell within the scope of s. 2(b). Otherwise, the principles laid out in *Bracken* are largely uncontroversial and consistent with my discussion of the right to free expression above.

[176] In my view, the Flyer in this case is akin to flyers that Mr. Whatcott previously distributed in Saskatchewan, and which the Supreme Court of Canada found met the threshold for hate: *Whatcott* at paras. 187-193. A reasonable person, aware of the context and circumstances, would view the Flyer as likely to expose Ms. Oger and transgender people to detestation and vilification based on their gender identity. This is a violation of s. 7(1)(b) of the *Code.*

V PROVINCIAL JURISDICTION TO ENACT SECTION 7

[177] Mr. Whatcott argues that s. 7 of the *Code* is *ultra vires* the province. In his Notice of Constitutional Question, he states his position as follows:

> … 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.

[178] There is no dispute that this Tribunal has jurisdiction to decide constitutional questions other than those relating to the *Charter: Administrative Tribunals Act,* s. 45; *Code,* s. 32(i). Before doing so, the Tribunal has the option of referring the constitutional question to the court in the form of a stated case; it is required to take this route on request of the Attorney General. In this case, the parties agreed that the Tribunal should decide the question at first instance.

[179] Sections 91 and 92 of the *Constitution Act, 1867,* define those matters over which the federal and provincial governments exercise exclusive legislative authority. There is a legal

presumption that provincial legislation is validly enacted: *Nova Scotia Board of Censors v. McNeil,* [1978] 2 SCR 662 [***McNeil***] at 687-688. As with all types of legislation, "one does not approach a provincial human rights code on the basis that it is constitutionally presumptively suspect": *Scowby v. Glendenning,* [1986] 2 SCR 226 at 233. Mr. Whatcott bears the burden of establishing its invalidity.

[180] I note at the outset that the Canadian Attorney General has not exercised his right to participate in this complaint. The federal government has thus signalled to this Tribunal that it does not share Mr. Whatcott's concerns about the validity of s. 7 of the *Code.* In these circumstances, the Supreme Court of Canada has cautioned decision-makers against invalidating provincial laws: *OPSEU v. Ontario (Attorney General),* [1987] 2 SCR 2 at pp. 19-20; see also *Kitkatla Band v. British Columbia,* 2002 SCC 31 at paras. 72-73.

[181] Finally, I preface my analysis by noting that this is not the first time that this Tribunal has considered the province's authority to enact s. 7(1)(b) of the *Code*. In *Canadian Jewish Congress,* Member Iyer (as she then was) rejected many of the same arguments advanced by Mr. Whatcott in this complaint: see paras. 34-77. Mr. Whatcott has advanced no argument for why the Tribunal should now decline to follow *Canadian Jewish Congress.* I find that the analysis in that case remains valid law and is essentially determinative of Mr. Whatcott's argument.

[182] The division of powers analysis proceeds in two well-known stages. First, I must determine the pith and substance of s. 7. To do so, I examine the purpose of the provision as well as its legal effect. Second, I determine whether that matter falls within the jurisdiction of the province: *Firearms Act* at para. 25. While the Attorney General made helpful arguments about the doctrine of interjurisdictional immunity, which could be considered at a third stage, in my view it is not necessary to engage that doctrine at any length. Mr. Whatcott has not argued it, and in any event, my conclusions about the pith and substance of s. 7 and the nature of the expression at issue leads me to conclude that s. 7 does not impair the core of any federal legislative power. This is determinative of the issue: *Canadian Western Bank v. Alberta,* 2007 SCC 22 at paras. 33-67, 77.

[183] This entire analysis is conducted within a framework of federalism that allows for "a fair amount of interplay and indeed overlap between federal and provincial powers": *OPSEU* at p. 17. The Supreme Court of Canada explains the 'dominant tide' of constitutional law in Canada as follows:

> The 'dominant tide' finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. Professor Paul Weiler wrote over 30 years ago that
>
> > the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.
>
> *Canadian Western Bank* at para. 37

[184] I begin with the pith and substance of s. 7.

A. Pith and substance analysis

[185] The purpose of s. 7 may be ascertained by having regard to the purposes of the *Code* set out in s. 3, the Hansard records, and the mischief which s. 7 targets: *Reference Re Firearms Act (Can),* 2000 SCC 31 [***Firearms Act***] at para. 17. In considering the law's effects, I am not concerned with whether it is likely to achieve its intended purposes; that is a matter for government to determine: *Firearms Act* at para. 18. Rather, the analysis is intended to aid my understanding of the law's real meaning.

[186] I have already addressed the purpose of s. 7 above. It aims to reduce "the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity": *Whatcott* at para. 71. While this expression of purpose is derived from the Supreme Court of Canada's analysis of a hate speech prohibition equivalent to that found in s.7(1)(b) of the *Code*,

in my view it applies equally to the purpose underlying s. 7(1)(a). I set out the basis for this conclusion in my analysis above with respect to the purpose of s. 7(1)(a), and I will not repeat it here: see paras. [91] - [104].

[187] Hansard records support this understanding of s. 7's purpose. I have traced the legislative history of s. 7(1)(a) above and will not repeat it here. Rather, I will add to that background a brief review of the legislative history of s. 7(1)(b), which prohibits hate speech.

[188] When the Legislature enacted the prohibition against hate speech, its intention was to make remedies for discrimination more accessible to people victimized by discriminatory speech and to expand protection for private expression. At the introduction of the bill, the Honourable A. Hagen (then Minister of Education) explained:

> Racial violence and racially motivated attacks are on the rise around the world. We do not want this kind of hatred to take root in British Columbia, a province of ethnic, cultural and religious diversity. The amendments proposed today will **provide meaningful protection to individuals and groups that are the victims of hate propaganda and activity**. The bill will prohibit the publication, issuance or display of any communication which is discriminatory or likely to expose a person, group or class of persons to hatred or contempt, based on the prohibited grounds of discrimination contained in the act.
>
> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 35th Parl, 2nd Sess (7 June 1993) at p. 6887 [emphasis added]

[189] At second reading, the Honourable A. Hagen cited the potential for hate speech to foster the conditions for discrimination – something that has also been recognized by the Supreme Court of Canada (see e.g. *Whatcott*):

> People subjected to hatred or contempt because of their race, religion, gender, sexual orientation or other characteristics suffer fear, humiliation and a loss of self-esteem. Hate propaganda depersonalizes people. It can even cause people to renounce personal differences that mark their diversity. Regrettably, it can operate to convince listeners – sometimes subtly, sometimes loudly – that members of particular groups or classes should be despised. **The result may be an increase in acts of discrimination…**

> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 35th Parl, 2nd Sess (10 June 1993) at 7056 [emphasis added]

[190] By incorporating a hate speech provision in the *Code,* the Legislature intended to make it "easier for the people of BC to access the remedies available to them… in a simpler, less intimidating and less expensive fashion": British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 35th Parl, 2nd Sess (10 June 1993) at 7061 (Hon. U. Dosangh). At the same time, the Legislature added s. 7(2), which was intended to confer express protection on private communications.

[191] The effect of s. 7 is that a person may file a complaint with the Human Rights Tribunal about discriminatory publications. The Tribunal will then resolve the dispute, either through voluntary mediation, an application to dismiss the complaint under s. 27, or after a final hearing of the merits of the complaint. If the Tribunal finds that a person has violated s. 7, then it may award remedies under s. 37(2) of the *Code.*

[192] Under s. 37(2), the Tribunal is required to order a person who has contravened the *Code* to cease doing so, and refrain from doing so in the future. It may also make declaratory orders or order a respondent to take steps to ameliorate the effects or conditions which gave rise to the discrimination. Finally, it can order financial compensation to the complainant for expenses incurred because of the discrimination, or for injury which the complainant suffered to their dignity, feelings, and self-respect. The intention of these remedies is to fulfill the purposes of the *Code,* including the broad public purposes of eradicating discrimination as well as the private purpose of providing victims of discrimination with a means of redress: s. 3.

[193] Section 7 thus sits comfortably within the *Code's* scheme for remedying the "exploitation of vulnerability" in particular contexts of provincial life. As the majority explained in *Schrenk:*

> … In my view, however, a contextual lens better captures the scheme of ss. 7 to 14 because it provides a complete explanation for the underlying logic of these sections of the *Code*. All of these provisions capture *contexts* of vulnerability in which "discrimination" (defined in s. 1 as applying to all of these contexts) may arise. This includes ss. 7 and 11.

> Discriminatory publications are prohibited by s. 7, not because they are public *per se* but because minority groups are particularly vulnerable to hate speech in the context of publication. The same goes for the context of discriminatory employment advertisements (s. 11), which, too, are publicly disseminated. [at para. 48; emphasis in original]

[194] Mr. Whatcott argues that s. 7 is, in pith and substance, criminal law. He argues that the provision "resurrects the crime of seditious libel that was once regulated in the *Criminal Code*". He says that, while the *Code* may not impose any penal sanction, the stakes in a human rights complaint are, at best, equivalent to criminal liability and, at worst, even more severe than a criminal conviction. He describes these stakes as follows: "the possible lifetime deprivation of his liberty to evangelize, to manifest his religion in the public square, and to use the pronouns he chooses", "a lifetime of unemployment", and "social isolation, ostracism and expulsion". He says that the result of any remedy imposed by this Tribunal would "amount to behaviour modification through a combination of financial penalties, social stigma, and forced re-education of his mind by social engineering". He goes so far as to liken the application of s. 7 to "compulsory re-education … 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".

[195] I reject this argument.

[196] There are three prerequisites for a law which is, in pith and substance, criminal: "a valid criminal law purpose backed by a prohibition and a penalty": *Firearms Act* at para. 27. In my view, Mr. Whatcott's argument fails because he has not established that s. 7 imposes a "penalty" within the meaning of criminal law.

[197] The law has long been clear that the *Code* is remedial, and not punitive, legislation. In *Robichaud,* the Supreme Court of Canada rejected importing principles from criminal or quasi-criminal regimes into the human rights analysis. It described such principles as "completely beside the point as being fault orientated, for, as we saw, the central purpose of a human rights Act is remedial – to eradicate anti-social conditions without regard to the motives or intention of those who cause them": para. 11.

[198] None of the potential remedies available under s. 37 amount to a 'penalty' so as to transform s. 7 into criminal law. Any financial remedy awarded to a complainant under s. 37 of the *Code* is not a fine or penalty against the respondent. Rather, it is "compensation paid to the victims of discrimination" and, as such, "private, not public in nature": *Canadian Jewish Congress* at para. 52; see discussion generally at paras. 46-58.

[199] Mr. Whatcott undermines his own argument by grossly exaggerating the stakes in this complaint. While I can appreciate that a finding of discrimination may generate negative consequences, including stigma and restrictions on a person's ability to discriminate in the future, likening liability for discrimination to a re-education detention facility treads into the realm of absurdity. No order by this Tribunal could compel Mr. Whatcott to change his fundamental beliefs, under threat of sanction. The *Code* simply prohibits him from expressing and manifesting those beliefs in a manner that results in prohibited discrimination.

[200] In summary, the main thrust of s. 7 is to reduce the social costs of discrimination and to provide a means of redress to persons whose rights have been violated under that section. It is not essentially criminal law because the *Code* is remedial and does not impose any penalty on a person found to violate s. 7.

B. Provincial jurisdiction

[201] The province's power to enact human rights legislation stems from its jurisdiction over property and civil rights in the province: *Constitution Act, 1867,* s. 92(13). Section 7 creates civil rights connected to speech which indicates discrimination, or an intention to discriminate, or which is likely to expose people to hatred. This, in my view, falls squarely within the domain of property and civil rights in the province.

[202] Mr. Whatcott argues that s. 7 is *ultra vires* the province because the province is incompetent to enact law that would restrict his freedom to express his political and religious beliefs. For this argument, he relies on an implied bill of rights doctrine developed in a series of pre-*Charter* cases from the Supreme Court of Canada: *Reference Re Alberta Statutes,* [1938]

SCR 100, aff'd [1939] AC 117 (PC) (per Duff J); *Switzman v. Elbing,* [1957] SCR 285 (per Rand J); and *Saumur v. Quebec (City),* [1953] 2 SCR 299.

[203] I begin with the observation that the substance of this argument is, in my view, better suited to the analysis of s. 7's interpretation and application in light of Mr. Whatcott's *Charter* rights to freedom of religion and expression. Here I adopt the following observation from *Canadian Jewish Congress*:

> In my view, the division of powers arguments, particularly as they relate to provincial legislative jurisdiction over speech, are really an indirect and rather technical way of addressing matters that are much more clearly and openly dealt with under the *Charter.* Judicial doctrines within division of powers analysis to restrict legislative jurisdiction over speech were developed well before the *Charter* expressly limited the power of any level of government to restrict freedom of expression beyond what is reasonable and demonstrably justified in a free and democratic society. Thus, although at least some of the pre-*Charter* doctrines retain their vitality today, restrictions on freedom of expression [and here I add freedom of religion] are essentially *Charter* issues and are most directly decided through the application of *Charter* doctrines. [para. 37; see also *OPSEU* at para. 26]

[204] In his division of powers argument, Mr. Whatcott has failed to acknowledge, much less grapple with, the development of the law past 1960. Not surprisingly, the law has evolved from where he invites us to find it. I begin with *Attorney General for Canada and Dupond v. City of Montreal,* [1978] 2 SCR 770 [***Dupond***]. There, the Supreme Court of Canada rejected the argument that *Switzman* and *Saumur* created a category of freedoms so 'fundamental' that they fell outside the competence of legislatures. The Court held:

> 1. None of the freedoms referred to [freedom of speech, of assembly and association, of the press and of religion] is so enshrined in the Constitution as to be above the reach of competent legislation.
>
> 2. None of those freedoms is a single matter coming within exclusive federal or provincial competence. Each of them is an aggregate of several maters which, depending on the aspect, come within federal or provincial competence.

[205] Twelve years later, in *Keegstra,* the Court returned to these early cases and held:

> These decisions confirmed the fundamental importance of freedom of speech and the press in Canada. The conception of freedom of speech embodied in these cases, however, was largely limited to the political process model. Subsequent cases… suggested an unwillingness to promote a broad concept of freedom of expression. Furthermore, in the pre-*Charter* context fundamental notions of free speech were ultimately recognized as subservient to legislative limits. The concept of an implied bill of rights put forward in *Saumur* and *Switzman* was rejected by the Court in [*Dupond*] … and the overriding power of legislatures to define the limits of free speech was confirmed in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307.

[206] Today, there is no question that the province has jurisdiction to enact legislation which impacts and even targets speech.

[207] As I have said, the same argument was considered and rejected by the Tribunal in *Canadian Jewish Congress.* I do not intend to reproduce or attempt to replicate the entire analysis from that case but am content to rely on its conclusion. After reviewing the development of the law beginning with *Reference re Alberta Statutes,* and continuing in *Saumar, Switzman,* and finally *OPSEU*, the Tribunal concluded:

> It seems clear, therefore, that there is authority to the effect that the province cannot legislate to curtail certain kinds of political speech. However, in relying on this doctrine, care must be taken to define the scope of protection it affords. In particular, it is important to note that, while he recognized some degree of protection for political speech under the *Constitution Act, 1867*, in the passage quoted above [from *OPSEU*], Beetz J. stated that the scope of protection for speech under this doctrine is narrower than that afforded to freedom of expression under s. 2(b) of the *Charter*.
>
> The speech that is protected from legislative restriction under the *Constitution Act, 1867* is speech that is "political" in the sense that it relates to the "essential structure of free Parliamentary institutions" so that restricting it would "substantially interfere" with the working of democracy… [paras. 71-72]

[208] To the extent there may still be a core of political speech that falls exclusively within federal jurisdiction – and that proposition is itself dubious – this would apply only to a very

limited range of speech essential to the operation of Canada's constitutional structure: *OPSEU* at para. 25.

[209] In my analysis above, I have concluded that the speech at issue in this case is not properly characterised as "political speech" and is in fact hate speech. Any interference with such speech would not "substantially interfere with the operation of [Canada's] basic constitutional structure": *OPSEU* at para. 25; *Canadian Jewish Congress* at para. 76. In fact, as I have explained, s. 7 enhances Canada's democratic values by removing barriers to the equitable participation in the political life of the province. Because the scope of protection afforded by s. 2 of the *Charter* is broader than the scope of speech that may lie outside the province's jurisdiction, my conclusion above that the speech in this case strays far from the type of political expression that lies close to the core values of s. 2(b) is sufficient to dispense with the argument that it is the type of speech that cannot be regulated by the province.

[210] The mere fact that this complaint has arisen in the context of an election does not render s. 7 *ultra vires*. Importantly, it was a provincial election: contrast, e.g. *R. v. McKay,* [1965] SCR 798 which concerned provincial regulation of signs during a federal election. The province clearly has jurisdiction over matters of property and civil rights that may arise in connection with provincial elections. For example, the law of defamation applies to statements made about candidates in provincial elections: e.g. *Marley v. Kains,* 2011 BCSC 1306 and *Austin v. Lynch,* 2016 BCSC 1344. There is no suggestion in these cases that provincial jurisdiction over tort law would not extend to speech in a provincial election.

[211] The provinces regularly exercise jurisdiction over speech during elections through legislation such as BC's *Election Act.* Groups have challenged such legislation under the *Charter,* citing violations of the freedoms of expression and association. Those cases have been resolved without suggestion that the legislation was *ultra vires* the province. For example, when the Supreme Court of Canada found that aspects of Quebec's election advertising law violated freedom of expression and association under the *Charter,* the remedy was to remit the legislation to the provincial government for appropriate amendments: *Libman v. Quebec (Attorney General),* [1997] 3 SCR 569; see also *BC Teachers' Federation v. Attorney General of*

British Columbia, 2009 BCSC 436, in which the Court considered a challenge to third party election advertising restrictions in BC's *Election Act.*

[212] While these cases did not engage in a division of powers analysis and are not themselves determinative of the issue, in my view they demonstrate how comfortable courts and governments are with the concept that the province has jurisdiction over speech during a provincial election. Again, in the absence of any objection from the Canadian Attorney General, I am hard pressed to conclude that s. 7 of the *Code* intrudes in any significant way – if at all – on a federal head of power.

[213] The same principles apply with respect to Mr. Whatcott's argument that the province cannot enact legislation that touches on the practice of religion. In *R v. Harrold* (1971), 19 DLR (3d) 471, the BC Court of Appeal rejected the proposition that any laws that impacted religious practices would be *ultra vires* the province. In that case, a Hare Krishna practitioner was convicted of violating a noise bylaw after chanting and drumming in accordance with his religious beliefs. Like Mr. Whatcott, he relied on *Saumar* to argue that any law that interfered in the practice of religion was *ultra vires* the province. The Court rejected that argument in terms that I find apply equally to the circumstances here:

> [T]he bylaw in question in this appeal is part of the law of British Columbia, limited, of course to the City of Vancouver. It is a law of general application and is in no way directed to religious freedom or interference therewith…
>
> In my opinion the members of all religious communities when in Vancouver, as well as all other persons, must obey the by-law. The right to freedom of religion does not permit anyone, acting under the umbrella of his religious teachings and practices, to violate the law of the land, whether that law be federal, provincial or municipal. …
>
> In effect the respondent's submission amounts to this, namely, that he is exempt from all laws that in any way interfere with the manner in which and the means by which he sees fit to engage in the practice and propagation of his particular religion, no matter how detrimental that may be to the other members of the community, except only laws enacted by the Parliament of Canada. To take one example, that if his religion as interpreted by whoever has been appointed to interpret it

> permits its followers as a group to make their prayers and pronounce their teachings in the middle of the intersection of Hastings and Granville streets, one of the busiest traffic spots in Vancouver, and thus block all traffic, he and all his fellow religionists are quite free to do so and only the Parliament of Canada can prohibit them. I am quite unable to accept such a submission. [pp. 479-480]

[214] Likewise in this case, I reject the suggestion that the mere fact that s. 7 of the *Code* may impact Mr. Whatcott's religious practices renders it *ultra vires* the province. Unlike the by-law at issue in *Saumar,* s. 7 does not directly target or attack religious freedom. It targets discrimination and hate. The impact on Mr. Whatcott's religion is properly considered under s. 2(a) of the *Charter,* and not as part of an attack on the province's jurisdiction.

C. Conclusion on jurisdiction

[215] Section 7 of the *Code* is part of the civil law of this province. It aims to reduce and ultimately eradicate discrimination in all areas of provincial life, including in the political life of the province. It provides a mechanism whereby people whose rights have been violated under that section may seek a remedy. In other words: it confers civil rights. There is no criminal law penalty that this Tribunal could impose against a person found to violate s. 7, and Mr. Whatcott has not persuaded me that its impact on expression and religion renders it *ultra vires* the province. Section 7 is, in pith and substance, a matter of civil rights and, as such, falls within the jurisdiction of the province pursuant to s. 92(13) of the *Constitution Act, 1867.*

VI STATE NEUTRALITY

[216] In his constitutional argument, Mr. Whatcott argues that the "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 and s.27 of the charter rights, by not respecting the doctrine of state neutrality" (as written). He argues:

> 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.

[217] The doctrine of state neutrality requires the state to remain neutral in respect of religion and beliefs. This requires that the state "neither favour nor hinder" any particular belief or non-belief: *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16 [***Saguenay***] at para. 72. Rather, the state must preserve "a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally": *Saguenay* at para. 74. A person alleging a breach of this duty of neutrality must prove "that the state is professing, adopting or favouring one belief to the exclusion of all others … and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion": *Saguenay* at para. 83.

[218] In *Saguenay,* the issue was the municipal council's practice, later formalized in a bylaw, of beginning its meetings with the recitation of a prayer. The Supreme Court of Canada found that the effect of the prayer was to turn "the meetings into a preferential space for people with theistic beliefs", in which non-believers would be isolated, excluded and stigmatized: at para. 12. This was a violation of the council's duty to remain neutral in respect of religion.

[219] I can find no merit in Mr. Whatcott's argument. The Tribunal is a creature of statute. It is bound to enforce and implement the *Code,* and the means by which it does this is to accept and adjudicate human rights complaints. In this decision, I have found that Ms. Oger has established a violation of s. 7 of the *Code.* A significant part of my analysis has entailed balancing Mr. Whatcott's religious rights under the *Charter* and thus accounting for his religious freedoms. In *Saguenay,* the Court recognized that the application of human rights legislation may impose reasonable and justifiable limits on freedom of religion: paras. 89-90.

[220] The Tribunal's exercise of jurisdiction over this complaint is not an expression of religious preference or intolerance. Rather, it is an interpretation and application of the Tribunal's home statute, in accordance with the law. In that regard, the Supreme Court of Canada distinguished between "unbelief and true neutrality": *Saguenay* at paras. 133-134. The Tribunal, in interpreting and applying the *Code,* has not expressed a preference for a religious

belief or absence of belief. It has abstained from taking any position at all and, in doing so, remained neutral in respect of religious beliefs.

[221] Mr. Whatcott's argument, if accepted, would require the Tribunal to reject any complaint for filing if it could impact on a person's religious beliefs. Not only would this amount to an improper abdication of jurisdiction, but it would itself be an act of preferring one religious belief over another. "True neutrality" requires the Tribunal to abstain from such positions and rather adjudicate each complaint on its merits, weighing religious rights where appropriate: *Sageunay* at para. 134. That is precisely what it has done in this case.

[222] This argument is dismissed.

VII REMEDY

[223] I have found that Mr. Whatcott violated s. 7 of the *Code.* I declare that his conduct in publishing the Flyers was discrimination contrary to the *Code* and order him to cease the contravention and refrain from committing the same or a similar contravention: *Code,* s. 37(2)(a) and (b).

[224] Ms. Oger seeks an award to compensate her for injury to her dignity, feelings, and self-respect: *Code,* s. 37(2)(d)(iii). She argues that, given the nature of the discrimination in this case, the fact that it is ongoing, and that it had a serious impact on a vulnerable person, an award of $35,000 is appropriate. Mr. Whatcott opposes the award and argues it is unduly punitive.

[225] In assessing compensation for injury to dignity, feelings, and self-respect, the Tribunal generally considers three broad factors: the nature of the discrimination, the complainant's vulnerability, and the effect on the complainant: *Torres v. Royalty Kitchenware Ltd.* (1982), 3 CHRR D/858 (Ont. Bd. Inq); *Gichuru v. Law Society of British Columbia (No. 2),* 2011 BCHRT 185 , upheld in 2014 BCCA 396, at para. 260. The purpose of these awards is compensatory, and not punitive. The quantum is "highly contextual and fact-specific", and the Tribunal has considerable discretion to award an amount it deems necessary to compensate a person who

has been discriminated against: *Gichuru* at para. 256; *University of British Columbia v. Kelly,* 2016 BCCA 271 [***Kelly***] at paras. 59-64.

[226] I begin with the nature of the discrimination. I agree with Ms. Oger that it was severe. It was intentional and designed to interfere with her participation in the political life of this province. It drew on the most insidious stereotypes and myths about transgender people and called on the electorate to conclude that Ms. Oger was, by sole virtue of her gender identity, unsuitable for public office. I have concluded that the effect of the Flyer was to expose Ms. Oger to hatred and contempt. This is unquestionably a serious and damaging form of discrimination.

[227] Ms. Oger argues that the discrimination was ongoing, and relies on the fact that, after its initial distribution, Mr. Whatcott continued to re-publish the Flyer online and to make degrading statements about Ms. Oger related to the Flyer and this complaint. I will set out those statements in detail below, in my analysis of Ms. Oger's application for costs. For present purposes, suffice to say that for the duration of this complaint Mr. Whatcott has continued to make public statements about Ms. Oger that mirror those articulated in the Flyer. When asked in direct examination how long the effects of the discrimination have lasted, Ms. Oger explained:

> The effects of this flyer are ongoing. The last piece of hate literature I read happened from this courtroom, while we were here. This isn't ending. This is never going to end. The truth is what Mr. Whatcott has done is never going to go away.

While the issue before the Tribunal was solely whether the Flyer violated the *Code,* I do take into account the injury that Ms. Oger has continued to suffer to her dignity while pursuing this complaint, up to and including during the hearing. This indignity was a direct result of the discrimination, and resultant complaint.

[228] I accept that the impact on Ms. Oger was serious. She was emotional in testifying about that impact. She testified that, when she learned about the Flyer, she immediately had to divert scarce campaign resources to address it. This took her off her main political messages at a

critical time in the campaign. As Ms. Oger put it, in a political campaign, "you live or die by staying on the message and keeping the message under control and this completely threw my team upside down". The Flyer caused mayhem, and the team spent days dealing with police, security, and the outcome of the Flyer. Even Ms. Oger's supporters took up time, detracting from the message. The effect was to deprive Ms. Oger of the opportunity to run a political campaign on equal footing with other candidates who did not have to first contend with an argument that they were, because of characteristics protected by the *Code,* unfit to stand office.

[229] More importantly, though, the Flyer and its potential ramifications terrified Ms. Oger. In her testimony, she explained:

> I was afraid because these flyers were appearing everywhere. And we didn't know if it was one person or multiple people doing this. But what we did know was these people were really, really, really driven and [had] very, very, very strong negative feelings against me.
>
> And I'm a transgender woman. People kill transgender women because of who we are. And they start with this. This is where they start. And it's impossible to tell whether this is the ramblings of a person who's likely to do that, or if it's not. And at the time, I lived in a home and my face and my name was plastered in every window. All of my neighbours for a number of blocks knew that I lived there, they knew I was a candidate. I was very easy to find and I was very scared, and my team was very scared, that this was not actually the end result – that it was a prelude to something else ... I mean violence.
>
> … After this flyer came out, I had to worry about what Mr. Whatcott looked like but I also had to worry about other people who maybe gave him credibility. Who were they? How much did I have to worry about someone attacking me while I'm going around knocking on doors by myself at night? This was, you know, it's a vulnerable place already to be a candidate. And to be a transgender candidate is really vulnerable. Because people listen to outrageous things like this. Even though maybe my friends don't listen, the people who I associate with don't take this very seriously, they still in the back of their head, there's a little bit of an impact. But more importantly is that people that are likely to be triggered by this are enraged by it.

[230] As Ms. Oger says in this passage, she is particularly vulnerable to this kind of publication as a transwoman. I have already recognized the unique and pervasive vulnerability of transgender people in this decision, and I will not repeat that context here: see above at paras. [60]-[65]. Given the high levels of violence and hatred that are still perpetrated against transwomen in our society, it was not unreasonable for Ms. Oger to fear a violent outcome from this Flyer, even though – as Mr. Whatcott, JCCF, and CAFE repeatedly argued – there was no express call to violence within the Flyer itself. As Ms. Oger explained, it was not necessarily Mr. Whatcott she had to worry about, but the person who might be emboldened by the Flyer to act on their own hatred for transwomen.

[231] The risk that the Flyer posed to her personal safety is evident by the fact that Ms. Oger had to engage the Vancouver police to ensure her protection for the remainder of the campaign. Under their direction she changed her behaviour. For a period, they advised her not to park her car in front of her home, to avoid a person tampering with it. She had to advise the police hate crimes division when she was going to appear at a public event and follow complex security arrangements as a result. To this day, she finds herself more worried about strangers in a crowd, and who may be behind her.

[232] Ms. Oger also testified about the impact that the Flyer had on her relationship with her family. She explained:

> I have two children. And I had to tell my children to be careful. And I had to ask them... to keep an eye out for strangers. I had to explain to them why. And… no mum wants to have to sit her children down and say to them that someone might want to hurt her or her children because [of] who she is. I had to tell my children that somebody hates me because of who I am.

I accept that this experience would be difficult and degrading. I agree with Ms. Oger that it is an experience that no mother would wish to have and, in a climate where all are treated with mutual understanding and respect, they should not have to.

[233] By using her birth name, Ronan, Mr. Whatcott further caused Ms. Oger to feel hurt and angry. She was emotional in her testimony explaining why:

> … I hate that people have taken my birth name, Ronan, and used it as a weapon against me… It's a beautiful name. It's a name I had to change because of people like that … because of the harassment, because I would have had to deal with even more harassment and so I made this pragmatic decision. Also, it's a name that my parents gave me.

[234] The Flyer was humiliating for Ms. Oger. As she points out, "I don't think anybody likes to have reference to their genitals put on a flyer and spread around the internet or around your neighbourhood". The Flyer associated her with disease, and she had to worry about whether people might believe that she in fact had those diseases.

[235] The Flyer caused Ms. Oger to question her decision to run for public office. She explains: "You question your validity for a moment, you question whether you're strong enough, you question whether it's worth it." Clearly this type of effect is a serious impact on a person's dignity.

[236] Ultimately, Ms. Oger testified that the effect of the Flyer was to teach her a "terrible lesson":

> … it made me ask myself if it was too dangerous, that maybe our society wasn't ready to have a transgender candidate because – not because they wouldn't elect me, that's a different story, whether they elect me or not- but there are still people in our society that would do me violence because of who I am because I run for office. And that's a terrible lesson that I now have to pass on to the other people I give advice to. Be careful: you'll attract people who are violent or have unpredictable responses.
>
> …
>
> ... what this flyer is, is a reminder to the transgender community … that "we're gonna get you". That's what this flyer says. The experience lived by me and every transperson, especially transwomen, because this kind of hatred is specifically targeted at transwoman, it's the reminder that we'll come after you. That's what this flyer does. And me, it's true, I have some resilience, I have some protections. When I call the police, I have access to a police officer's cell phone and they believe me. But if I call 911, I don't get that. And I know I can't count on a response still today because I'm transgender. And this is what this flyer is trying to do. It's trying to amplify that problem by calling me all kinds of names, saying that the

> nature of gender identity is disease and moral trespass. This was even mentioned in this room by lawyers. This is what this flyer is to me.

[237] In all of these circumstances, I accept that the injury to Ms. Oger's feelings, dignity and self-respect was severe, and that the effects are ongoing. The circumstances warrant a higher award than in previous cases arising out of s. 7. In *Dahlquist-Gray*, the Tribunal awarded both complainants $5,000. In my view, the discrimination in this case is more severe, and its effects longer-lasting, than the publication at issue there. The publication in that case, which challenged the complainants' bid for a public art exhibit, did not carry the same risk of violence faced by Ms. Oger as a transwoman. Similarly, in *Li,* the Tribunal awarded the complainant $5,000 in circumstances less egregious than the present case. There, the publication was only shown to a limited audience and was not itself hateful. It only violated s. 7(1)(a), whereas in this case I have found that the Flyer violated both ss. 7(1)(a) and (b).

[238] The trend in the Tribunal's awards for damages for injury to dignity is upwards. In the last seven years, the Tribunal has made awards of up to $75,000 (*Kelly*); $50,000 (*PN v. FR,* 2015 BCHRT 60); $35,000 (*Davis v. Sandringham Care Centre and another,* 2015 BCHRT 148; *Brar v. BCMA,* 2015 BCHRT 151; *Biggings obo Walsh v. Pink and others,* 2018 BCHRT 174); and $30,000 (*Wells v. Langley Senior Resources Society,* 2018 BCHRT 59). In my view, the discrimination in this case, and its impact on Ms. Oger, warrants an award in keeping with the trend expressed in these cases.

[239] Taking into account all of these circumstances, I find that an award of $35,000 for injury to dignity, feelings and self-respect is appropriate.

VIII APPLICATION FOR COSTS

[240] On September 11, 2018, Ms. Oger applied for an order of costs against Mr. Whatcott for improper conduct during the course of the complaint: *Code,* s. 37(4)(a). The application concerned Mr. Whatcott's public comments that denigrate her, her counsel, the Tribunal, and me in my capacity as Tribunal Member managing the complaint. He made the impugned comments on his personal website and social media accounts, and in a podcast interview.

[241] Mr. Whatcott filed a response submission, arguing that his conduct was not improper and that, in any event, the Tribunal does not have jurisdiction to award costs for a party's behaviour outside its process.

[242] On November 1, 2018, I wrote to the parties in response to the application. I observed:

> There is no question that Mr. Whatcott's public comments are deliberately derogatory towards Ms. Oger. In many ways, his statements reflect those which have given rise to this complaint in the first place. He is also, in colourful terms, highly critical of the Tribunal and me personally, and clear in his view that this process is a "kangaroo show trial". He refers to Ms. Oger's counsel as a "lesbian lawyer" and does not intend the phrase as a compliment.
>
> The issue is whether these comments, made outside the Tribunal's process but clearly related to it, can give rise to an order for costs under s. 37(4) of the Code.

[243] In my view, that issue required further submissions about "whether the phrase 'during the course of complaint' in s. 37(4) should be interpreted in light of *Charter* values or, alternatively, how *Charter* values may be relevant to the exercise of discretion under s. 37(4)". I indicated that I would hear the parties' further submissions with respect to the *Charter* at the conclusion of the hearing and invited intervenors to make submissions on the issue as well.

[244] At the hearing, Ms. Oger amended her costs application to add further publications and videos issued by Mr. Whatcott since her original application, as well as allegations that Mr. Whatcott and/or his representatives had acted improperly by: their conduct toward Ms. Oger during the hearing; repeatedly re-arguing issues that had already been decided by the Tribunal; showing a disregard for deadlines set by the Tribunal; breaching Tribunal orders; and testifying in a manner that demonstrated a flagrant disregard for the Tribunal's process. Mr. Whatcott had the opportunity to respond to these arguments during his closing argument. The JCCF and West Coast LEAF also provided helpful submissions on the interpretation of s. 37(4) of the *Code.*

[245] The Tribunal's jurisdiction to make an order for costs is derived from s. 37(4) of the *Code,* which provides:

(4) The member or panel may award costs

(a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and

(b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3 (2) or an order under section 27.3 (3).

[246] The purpose of a costs award is punitive: *Terpsma v. Rimex Supply (No. 3),* 2013 BCHRT 3 at para. 102. It aims to deter conduct that has a significant and detrimental impact on the integrity of the Tribunal's process. Participants in the Tribunal's process are entitled to be treated with respect, and a costs award is available to sanction parties who engage in conduct that is inflammatory, derogatory, disrespectful and inappropriate.

[247] I address Mr. Whatcott's impugned conduct under three headings: (1) conduct during the hearing; (2) conduct while engaging directly in the Tribunal's process; (3) conduct outside, but connected to, the Tribunal process.

A. Conduct during the hearing

[248] I have no difficulty concluding that Mr. Whatcott's conduct during this hearing was improper.

[249] I begin with Mr. Whatcott's t-shirt. For each day of this five-day hearing, Mr. Whatcott wore a white t-shirt with a large picture of Ms. Oger on it. On the front of the shirt, it read: "Mr. Oger, no matter how you use the state to silence your critics, you are still a guy." On the back there was a quote from the Bible: "Male and Female he created them: Genesis 5:2". Mr. Whatcott ensured that the shirt was visible as he sat in the gallery, directly facing Ms. Oger, throughout the hearing. The message of the shirt, and Mr. Whatcott's clear intent in wearing it, was to deny Ms. Oger's gender identity and to publicly humiliate her once more.

[250] Before Mr. Whatcott gave his testimony to the Tribunal, the panel took the parties' counsel into a separate room to discuss Mr. Whatcott's intention to testify wearing the t-shirt. The panel advised Mr. Whatcott's counsel that the shirt was improper, and it would be improper for Mr. Whatcott to testify while wearing it. We gave Mr. Whatcott's counsel the

chance to speak with his client privately about the potential consequences of continuing to wear the shirt. It is our understanding that he did so.

[251] When the hearing reconvened, Mr. Whatcott sat in the witness chair still wearing the shirt. At that point I advised him as follows:

> Mr. Whatcott, you're about to give evidence to this Tribunal. The Tribunal is a place for vulnerable people to come. It's part of our role as Members of this Tribunal to ensure that the public and participants before it know that this is a safe space to air difficult questions.
>
> This t-shirt is, in the view of the panel, a direct affront to the dignity of Ms. Oger in this proceeding. It undermines the very purpose of the legislation we are bound to enforce. It is, in our view, improper. It may be the subject of an award of costs against you and we are putting you on notice of that now.
>
> So we will give you an opportunity if you would like legal advice on the potential ramifications of continuing to wear the shirt in this proceeding. Otherwise, we will allow you to continue on the understanding that, in our view, this is improper conduct.

[252] Mr. Whatcott's response reflected his attitude towards the entire process: "I see this Tribunal as an affront to freedom of speech, freedom of conscience, and is a completely inappropriate process so there is no point in talking to me in private on this matter". He continued to wear the shirt throughout his testimony and until the conclusion of the hearing.

[253] This Tribunal has consistently held that participants in its process are entitled to be treated with dignity and respect: *Stone v. BC (Ministry of Health Services and others),* 2004 BCHRT 221 at para. 61. Not only did Mr. Whatcott's conduct fall short of that basic expectation, but he engaged in the very type of behaviour that could be the subject of a human rights complaint, and which the *Code* aims to eradicate. He targeted Ms. Oger for ridicule based on her gender identity, again drawing from the most insidious myth about transgender people: that their very existence is a lie. He likened her recourse to this Tribunal as an attempt to "use the state to silence [her] critics", sending a message intended to delegitimize this Tribunal's role in upholding the *Code.* This type of conduct runs counter to every purpose of the *Code.* Rather

than creating a climate of understanding and mutual respect, it creates a climate of discrimination and disregard for human dignity. It undermines this Tribunal's mandate for providing a means of redress for victims of discrimination, by sending a message that complainants may, because of their participation in this process, make themselves a target for further discrimination and public humiliation.

[254] Mr. Whatcott continued the conduct knowingly in the face of the Tribunal's clear message that it was improper, and so he should not be surprised to learn now that I have concluded that it warrants an order for costs.

[255] Next, I turn to the issue of Mr. Whatcott's persistent refusal to comply with the Tribunal's repeated orders that he respect Ms. Oger's gender identity in this process. From the beginning of this complaint, Mr. Whatcott has referred to Ms. Oger as a man and deliberately referred to her using male pronouns. On June 9, 2017, Member Rilkoff ordered him to stop this practice:

> The Complainant is entitled to use her name in this complaint process. It is certainly not for Mr. Whatcott to determine what the Complainant will call herself, and his unilateral attempt to do so is disrespectful and will not be tolerated.
>
> If Mr. Whatcott chooses not to use the name "Morgane Oger" or refer to Ms. Oger as she or her, then he may use "the Complainant"… He may not refer to the Complainant as "Ronan Oger", "Mr. Oger", "he" or "him".
>
> The Tribunal expects that the parties will treat each other respectfully. Further instances of such behaviour may also subject Mr. Whatcott to an order to pay costs pursuant to s. 37(4)(a) of the *Human Rights Code*.

[256] Mr. Whatcott continued to refer to Ms. Oger as a man, and on September 13 ,2017, Member Rilkoff again warned him of the possible consequences of his conduct:

> This brings me to Mr. Whatcott's submissions. They are disrespectful (and in my view deliberately so). He refers to counsel for Ms. Oger as "Susanna" and Ms. Oger as "Ronan". He has already been admonished that if he does not wish to refer to Ms. Oger as such, or refer to her as "she" or "her", he is to refer to Ms. Oger as "the Complainant".

…

> … As noted, Mr. Whatcott is to refer to Ms. Oger as the Complainant, if he chooses not to use "Ms. Oger", "she" or "her".
>
> Failure to abide by this directive will likely lead to an order of costs against Mr. Whatcott and may lead to the Tribunal refusing to accept or hear submissions that violate this directive.

[257] Mr. Whatcott then retained legal counsel and raised the issue again by complaining that my use of female pronouns to describe Ms. Oger constituted evidence of bias. Rejecting that argument, I explained:

> … The *Code* confers protection on Ms. Oger to express her gender identity. For trans and gender non-conforming people, being properly 'gendered' by the service providers they are required to interact with is a critical part of their ability to participate with dignity in the economic, social, political and cultural life of the province: *Code*, s. 3; *Dawson v. Vancouver Police Board (No. 2),* 2015 BCHRT 54. In my view, this Tribunal's ability to "promote a climate of understanding and mutual respect where all are equal in dignity and rights" is strengthened when it leads by example. Any person involved in a human rights complaint is entitled to have their gender identity respected throughout the process.
>
> *Oger (No. 3)* at para. 39

[258] The Tribunal's expectation was thus clear: Mr. Whatcott and his representatives were to respect Ms. Oger's gender identity in this process. They could refer to her as the woman that she is, or they could use gender neutral language. They could not continue to call her a man and refer to her as "he" or "him". This base level of respect is a necessary pre-requisite to a Tribunal process that honours the purposes of the *Code,* and the dignity of people who come before it.

[259] Again, Mr. Whatcott deliberately and knowingly refused to comply with the Tribunal's orders. Prior to his testimony, his counsel, Dr. Lugosi, had made frequent 'slips' and referred to Ms. Oger as a man. The panel repeatedly reminded him of the Tribunal's prior orders, and expectations that Ms. Oger not be referred to as a man. This continued throughout the hearing.

[260] After one occasion on which the panel reminded Dr. Lugosi not to refer to Ms. Oger as a man, Mr. Whatcott interrupted the proceedings:

> I object to my lawyer being bullied! The emperor has no clothes – it's a "he". You guys call him she, but I don't wanna call him a she. That's why we're here!

The panel told Mr. Whatcott to refrain from his outburst, to which he replied "It's a fake thing! That's the whole problem here." Ms. Oger's lawyer then raised a concern that Ms. Oger was being subjected to discrimination in the hearing room. The Chair's response was to remind everyone in the room of the Tribunal's expectations for a respectful hearing:

> … I will welcome this opportunity to remind the parties and everyone in the room of Member Rilkoff's letter decision, dated September 13, 2017, in which he provided a direction to the respondent to refer to Ms. Oger as, and I quote "The complainant, Ms. Oger, she, or her". That is the direction that was given in September 2017 and the panel expects parties in this proceeding to abide by it.

Kari Simpson, who was at the time identified as one of Mr. Whatcott's representatives, then burst out:

> Shouldn't the panel also refer to Complainant Oger as "Complainant Oger" so it doesn't offend a number of us in this room? Would the panel undertake that courtesy and show us that kind of respect?

[261] It was unsurprising, then, that when Mr. Whatcott gave his testimony he exclusively referred to Ms. Oger as a man, making no attempt at all to respect the Tribunal's orders, and in fact flagrantly demonstrating the opposite. Unlike with his counsel, the panel did not bother to interrupt his testimony to remind him of its prior orders because it was clear that he refused to comply with them. It was, in our view, more expedient to have Mr. Whatcott complete his testimony than derail the hearing to engage with him on the issue. Ms. Oger's counsel acknowledged as much in caucus with the panel and Dr. Lugosi and did not raise any objection to the use of male pronouns during Mr. Whatcott's testimony.

[262] Mr. Whatcott's conduct in persistently referring to Ms. Oger as a man throughout the hearing and the duration of this complaint was improper. It was in direct and deliberate violation of this Tribunal's orders and ran contrary to the purposes of the *Code* and the protection it confers on transgender people. It undermines public confidence in this Tribunal's

ability to deliver its services in a discrimination-free environment. It interfered with the integrity of the process and warrants an order for costs.

[263] I do not find it necessary to award costs against Mr. Whatcott arising from the conduct of Dr. Lugosi or Ms. Simpson during the hearing. Although Dr. Lugosi could have done better in demonstrating respect for the Tribunal and the *Code* in the manner he referred to Ms. Oger, I am satisfied that for the most part his failures were inadvertent and not a deliberate display of disrespect. Ms. Simpson's outburst, while inappropriate, was short-lived and she was later removed as Mr. Whatcott's representative.

[264] Ms. Oger also argues that Mr. Whatcott's tone throughout his testimony demonstrated "a lack of respect for the integrity of the Tribunal's process and disregard for the solemnity of the witness's promise to tell the truth".

[265] There is no question that, through his testimony, Mr. Whatcott took every opportunity to express his contempt for the Tribunal. He referred to the Tribunal as a "kangaroo tribunal" and "kangaroo court", indicated his view that the panel's mind was already "made up", and explained "I don't like human rights tribunals so you'll likely never find me here unless I need to make a political point". He took a mocking and cavalier tone and indicated an intent to manipulate the Tribunal. In his direct examination, he testified as follows:

> Q: If my memory is correct you said you were described as a Christian jihadist?
>
> A: Yes the Complainant referred to me as a Christian jihadist. So that should at least be worth a few thousand less costs that you guys get around to imposing on me. My feelings were hurt, you know.
>
> …
>
> Q: How did you feel to be called a Christian jihadist?
>
> A: For the purposes of the Tribunal, I was devastated and crying. For the purposes of me, I found it to be entertaining. I don't care what he says, honestly.

Later, in cross examination, Mr. Whatcott acknowledged that Ms. Oger's reference to him being a "Christian jihadist" arose from his own description of himself as a "jihadist for Jesus".

[266] This type of conduct was Mr. Whatcott's way of playing to the audience in the room and leaving no room for doubt about his view that Ms. Oger's complaint, and the Tribunal's power to adjudicate it, was a joke to him. It was conduct that undermined the integrity and solemnity of the serious subject matter of the complaint, and it was improper.

[267] Finally, as I will describe below, Mr. Whatcott kept his audience updated about the progress of the hearing through his Facebook page. On the first day of hearing, he posted a picture of the inside of the hearing room and the people inside of it. This was contrary to the Tribunal's "Public Access & Media Policy", which prohibits filming or photographing a hearing room from inside or outside the room without permission of the Tribunal. Mr. Whatcott posted the photograph after being alerted by the Tribunal to this policy during the hearing. This deliberate violation of a Tribunal policy was improper.

[268] A final note about the hearing. Most people would not have been able to withstand the level of discrimination that Ms. Oger faced during the Tribunal's hearing. More importantly: they should not have to. All people, and here I identify transgender people in particular, should know that if they choose to file a complaint at this Tribunal they will be treated with dignity and respect. Ms. Oger's experience suggests the opposite. I cannot think of conduct that strikes more directly at the heart of the integrity of this Tribunal's process and its mission. To her immense credit, Ms. Oger comported herself with grace and dignity in the face of the persistent efforts to insult, undermine, and humiliate her. It will be – in my view – necessary to make a substantial award of costs to signal this Tribunal's strongest possible condemnation of Mr. Whatcott's conduct during the hearing. I return to quantum later in this analysis.

B. Conduct while engaging directly in the Tribunal's process

[269] Ms. Oger also argues that Mr. Whatcott's conduct throughout the pre-hearing process was improper. I agree.

[270] At the very initial stages of the complaint, Mr. Whatcott represented himself. He filed a response which called Ms. Oger by a male name, "Ronan", and indicated that he would refuse to use her real name. He accused Ms. Oger of "whining" and described her as a "dude in a dress". He said "Thanks to ideas like Ronan's actually being implemented in Ontario, a deaf woman was sexually assaulted by a male sex offender who self identified as a 'trans-woman' to gain access to a women's homeless shelter", and further associated Ms. Oger's complaints with allegations that men were trying to film women in change rooms and that panic rooms have had to be installed in gender neutral bathrooms. He called Ms. Oger a "transvestite", a "male who cross dresses" and called on the Tribunal to "toss Ronan (he is not Morgane) Oger's spurious human rights complaint into the waste basket immediately".

[271] This response was wholly improper and in fact uses many of the rhetorical techniques that I have found above to constitute hate speech. He denies Ms. Oger's very existence as a woman, associates her with serious criminality, ridicules her, and likens her access to the Tribunal to a child's whining. This is not something that anyone accessing the Tribunal's process should be forced to endure.

[272] After more communications along the same lines, Member Rilkoff issued his directive to Mr. Whatcott, ordering him to stop referring to Ms. Oger as a man. Mr. Whatcott's response was an "Open Letter to Walter Rilkoff, LGBT Activist and BC Human Rights Tribunal Kangaroo Adjudicator". The letter was filed with the Tribunal and further disseminated as a flyer. In the letter, Mr. Whatcott likened Member Rilkoff's directive to one which required him to call Ms. Oger a "tomato, a dog, or a cat" and said it was exhibiting "obvious bias". He wrote: "Please be advised I have no interest in cooperating with such a biased and fraudulent process and I will not use the fake pronouns you describe 'she' or 'her', nor will I use Ronan's transvestite fantasy name 'Morgane'". He repeatedly stated his intention to ignore and disobey the Tribunal's rulings with respect to Ms. Oger's gender identity – an intention which, as I have explained above, he followed through to the conclusion of the hearing. This again exposed Ms. Oger to the type of harm that was at issue in the complaint and demonstrated a flagrant disregard for the Tribunal's orders and process. It was improper.

[273] After this letter, Mr. Whatcott retained legal counsel and these types of communications were no longer made directly to the Tribunal. However, his behaviour in the process, through his counsel, continued to undermine the integrity and efficiency of this process.

[274] Throughout the process, Mr. Whatcott repeatedly raised issues that had already been decided by the Tribunal, forcing the parties and Tribunal to needlessly expend resources responding to matters that had already been resolved. For example, on May 31, 2018, I ruled that Mr. Whatcott would not be permitted to lead evidence on the truth of the statements in the Flyers:

> Finally, I wish to state my clear expectation that the parties should only call witnesses in this proceeding if they have evidence that is relevant to the issue in Ms. Oger's complaint. In that regard, the only issue in the complaint is whether Mr. Whatcott's distribution of the two flyers in issue violated s. 7(1) of the *Code*. The legal test for s. 7(1)(b) is "whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination": … [*Whatcott*] at para. 59. To the extent s. 7(1)(a) is at issue, it will have to be interpreted in light of the constitutional parameters established in *Whatcott*. Either way, the "truth" of the statements is not a defence: *Whatcott* at paras. 140-144. **Therefore, to the extent that Mr. Whatcott intends to call witnesses to establish the truth of his impugned publications, that evidence is simply not relevant to the legal issue and will not be heard by this Tribunal**.
>
> *Oger (No. 2)* at para. 18 (emphasis added)

[275] If Mr. Whatcott disagrees with this decision, his remedy lies in judicial review. It is not appropriate or efficient to continue to re-argue evidentiary rulings once they are made. Yet that is what he did. He filed an application seeking my recusal, citing this decision as evidence of bias. Again, Ms. Oger was forced to respond to the issue and the Tribunal was required to address it. After quoting at length from *Whatcott,* I ruled again:

> These passages make clear that the focus of the analysis under s. 7 is on the effect of the speech on its targeted group, and whether the speech meets the definition of hate. Any evidence that may be relevant to that

> issue is admissible in this proceeding. The truth-seeking that the Tribunal is tasked with in this complaint is whether the content of Mr. Whatcott's flyers meet the high threshold which is constitutionally required to amount to a violation of s. 7 of the Code. Mr. Whatcott is at liberty to lead any evidence he sees fit that is relevant to that issue.
>
> However, to the extent that Mr. Whatcott intends to lead evidence or argument to establish the truth of the content of his flyers, that evidence will not assist me to determine whether the flyers violate s. 7. That 'truth' advanced by Mr. Whatcott includes that: Ms. Oger was born a male, "transgenderism" is an impossibility; being transgender is "harmful and displeasing to God"; and being transgender exposes people to "greatly increased risk of diseases … drug and alcohol abuse, suicide, and domestic violence". In fact, I agree with Ms. Oger that to allow Mr. Whatcott to lead evidence "about the moral rectitude, medical pathology, or genuineness of transgender identity" would risk "unduly extending the hearing and wasting the complainant's and Tribunal's resources, as well as turning the hearing into an exercise in espousing discriminatory views against transgender people".
>
> It is the function of a Tribunal Member who is case managing a complaint and presiding over a hearing on its merits to make decisions about the admissibility of evidence. The *Code* empowers the Tribunal to receive evidence that it considers "necessary and appropriate": s. 27.2(1). In my view, no reasonable person would view my decision to identify the scope of the issues before me and to only allow evidence in the hearing that is relevant to those issues as raising a reasonable apprehension of bias.
>
> *Oger (No. 3)* at paras. 46-48

[276] Nevertheless, after this decision, Mr. Whatcott amended his will-say statement for his proposed witness, Dr. Gutowski, which indicated that a primary purpose of his testimony would be to prove that the content of the flyers was "factually, medically and scientifically correct and true, based upon reality". This necessitated an application from Ms. Oger, on the eve of hearing, to exclude this evidence. In his response to the application, Mr. Whatcott repeated his submissions that he was entitled to call evidence of the truth of his Flyers. In a letter decision dated December 6, 2018 – three business days before the hearing began – I ruled on the issue a third time:

> The proposed evidence summarized at points 1 – 6 in Dr. Gutowski's amended will-say statement is not relevant to this complaint. As I have

> already said, Mr. Whatcott's mental health or motives in distributing the flyers are not relevant to the objective standard for assessing hate. The Tribunal has also previously addressed Mr. Whatcott's arguments which rely on a defence of 'truth'. This was addressed in paras. 140-144 of *Whatcott*. Simply put, evidence intended to prove that the contents of the flyers are "factually, medically and scientifically correct and true, based upon reality" will not assist this panel to determine whether they meet the objective definition of hatred. As the Supreme Court of Canada has said "In not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred": *Whatcott* at para. 141.

[277] Mr. Whatcott took a similarly improper route to challenging my decision not to recuse myself. Rather than seeking judicial review of that decision, he instead raised the issue again through a response submission to Ms. Oger's application for costs. Again, Ms. Oger and this Tribunal were then required to expend time and resources addressing a matter that had already been decided.

[278] Finally, Mr. Whatcott has continued to advance arguments that s. 7 of the *Code* violates the *Charter,* long after being alerted to s. 45 of the *Administrative Tribunals Act,* which deprives this Tribunal of jurisdiction over that issue. I wrote to the parties on May 16, 2018, reminding them:

> … the Tribunal does not have jurisdiction to find that ss. 7(1)(a) or (b) of the *Human Rights Code* [***Code***] are unconstitutional violations of ss. 2(a), 2(b), 15(1) or 27 of the *Charter.* Nor can the Tribunal issue a remedy for any infringement of Mr. Whatcott's *Charter* rights.

Nevertheless, Mr. Whatcott has continued to advance arguments that s. 7 violates the *Charter,* including most substantially in his final submissions to this Tribunal.

[279] It is important to note that all these issues involving repetitive arguments arose during the period of time that Mr. Whatcott was represented by legal counsel. While I can appreciate that a self-represented litigant may struggle to understand the proper route to challenge decisions of this Tribunal, or the Tribunal's constitutional jurisdiction, a lawyer should not. The cumulative effect of litigating in this manner was to unnecessarily prolong and complicate a

process that is intended to be just and efficient. As such, it interfered with the integrity of the Tribunal's process and was improper.

[280] Ms. Oger also argued that Mr. Whatcott's conduct in the complaint process demonstrated a disregard for the Tribunal's deadlines. She points to two occasions on which Mr. Whatcott's counsel "overlooked" or had "confusion" about a deadline set by the Tribunal and the process was delayed as a result. On one of these occasions, Mr. Whatcott sought an extension to file a submission and then did not file the submission, creating a delay on the eve of hearing that was completely undue. While I agree with Ms. Oger that this conduct falls short of best practice, in my view it was not so prejudicial that it warrants an award for costs.

C. Conduct outside, but connected to, the Tribunal process

[281] This brings me to the most contentious issue, which is Mr. Whatcott's conduct concerning Ms. Oger's complaint, but which took place outside the Tribunal's process. That conduct arose from Mr. Whatcott's public communications about the complaint on his blog, in flyers, in video clips posted to social media, and on a podcast. These communications were voluminous, and I do not propose to go through each of them. They share four common themes that form the basis for Ms. Oger's costs application: attacks against me personally, attacks against the Tribunal, attacks against Ms. Oger's counsel and – most significantly - attacks against Ms. Oger. I will first address Mr. Whatcott's public communications that took place before the hearing, and then describe those which took place during the hearing.

1. Communications before the hearing

[282] I begin with the attacks against me personally. For much of this process, I was Tribunal Member managing this complaint. I made decisions about interim applications and procedure. The general tenor of Mr. Whatcott's public comments about me is that I am biased against him and closely aligned with the "far left", "homosexual agenda" that he stands against.

[283] On his website, Mr. Whatcott describes me as a "hard left 'judge'" and a "homosexual activist kangaroo judge". He says he has "no confidence in this far left, pro-homosexual activist

who is attempting to pass herself off as a credible judge at all". After discussing 2014 activity on my Twitter account, he asks: "And I am supposed to expect impartial justice from this leftist kangaroo, who believes the truthfulness of my statements is irrelevant?" He speculates, wrongly, that it is "highly probable" that Ms. Oger and I know each other "at least socially", since we travel "in the same far left/ regressive / pro-homosexual circles". On Twitter, he announces "Damning evidence judge adjudicating Whatcott v. Oger is a pro-homosexual activist". He posts records of my charitable contributions and volunteer history. He repeatedly posts a photograph of me engaging in advocacy prior to my appointment to this Tribunal.

[284] With respect to the Tribunal as an institution, he consistently refers to the upcoming hearing as a "kangaroo show trial" and "kangaroo inquisition", and refers to the Tribunal as a "kangaroo court". He writes that "in a case where the prosecution is LGBT and the defendant is a Christian, such niceties as the truth and following the rules don't matter much". After I issued a decision denying his applications to anonymize the names of his witnesses and obtain disclosure of Ms. Oger's medical records, he wrote:

> [Cousineau's] rejection of giving any consideration to the truthfulness of my statements and her admonishment that I can't have any expert testimony that testifies to the truthfulness or accuracy of my statements in my election flyer pretty much means **this trial will be no more credible than Stalin's show trials in the former USSR.** [emphasis added]

[285] In one post, he complains about my decision granting leave to intervene to West Coast LEAF and BCTF. He neglects to mention that he did not oppose those applications in the Tribunal process, but in fact took no position.

[286] After I informed the parties that this complaint would be heard by a three-member panel, Mr. Whatcott posted:

> We also won a small victory perhaps (I must admit my lawyer seems more excited about the development than me) in that Devyn Cousineau asked for two other members of the BCHRT to hear and adjudicate my case, in addition to her. Even though Cousineau appears dismissive of my concerns about her lack of impartiality, I suspect she really can't ignore the fact that I dug up evidence of her donating money to transvestite

> rights organizations, her affiliation with the NDP, etc…. By having my case heard by three pro-homosexual/left-wing kangaroos, instead of just one kangaroo (Devyn), she probably hopes to give the process more of a veneer of impartiality. Of course, I expect the outcome to be the same. I have pointed out for years human rights tribunals are systemically kangaroo show trials. The Chairpersons overseeing these abominations tend to be left wing, pro-homosexual, dismissive of religious liberty concerns, and restrictive in terms of their view of free speech. The types of adjudicators these Chairpersons appoint to hear human rights cases are lawyers who share the same views as them. I do not believe a single conservative lawyer has ever been appointed to a Canadian human rights tribunal in the last three decades and hence why I will never dignify this process with any title more flattering than kangaroo court …

[287] Next are the references to Ms. Oger's lawyer. Throughout his posts, Mr. Whattcot repeatedly referred to Ms. Quail as Ms. Oger's "lesbian lawyer" and "lesbian activist lawyer". In context, it was clear that this was intended as an insult to denigrate Ms. Quail on the basis of her sexual orientation.

[288] The primary target of Mr. Whatcott's attacks was, of course, Ms. Oger herself. Throughout the months while this complaint was underway, Mr. Whatcott used every public platform at his disposal to talk about the complaint and repeat his hateful rhetoric about Ms. Oger. The volume of these communications is too great to exhaustively review but suffice to say that the same themes are repeated throughout. He insists that Ms. Oger's real name is not Morgane and repeatedly refers to her as Ronan. He calls Ms. Oger a man, a "transvestite activist", "deluded tyrant", and "a transvestite with tyrannical tendencies". He describes her as a "deluded tyrant who cross-dresses, persecutes Christians who tell the truth that he is a man, and hangs out with homosexuals in assless chaps at shame parades". He says that what Ms. Oger "actually needs is psychiatric and pastoral help to overcome his gender identity issues, not public platforms and human rights tribunals that enable him to proclaim his mental illness to the world and prosecute those who refuse to go along with his delusion". He describes Ms. Oger's human rights complaint as part of "a campaign to bully and intimidate people into buying into his delusional thinking that women can have penises", and "a mission to use state resources [to] punish everyone who refuses to call him a woman". He refers to the "self-evident truth that transvestite males remain males even if they put on dresses and call themselves

women". He accuses Ms. Oger of owing money to various individuals and being a "bad credit risk".

2. Communications during the hearing

[289] In the lead up to this hearing, Mr. Whatcott posted regular updates on his website. On October 18, 2018, he posted:

> Next hearing in Vancouver before the British Columbia Human Rights Tribunal, for the Orwellian 'crime' of 'misgendering' the NDP Vice President, Mr. Morgane (actually Ronan) Oger, a transvestite, biological male, who demands on pain of legal repercussion that everyone refers to him as a woman; this kangaroo trial will be held …

[290] On November 20, 2018, Mr. Whatcott announced that he had created "a new hard hitting flyer accurately exposing the tyrannical and perverse nature of the BCHRT" and that up to 5,000 copies would be "hitting the streets" during the hearing. True to his word, Mr. Whatcott printed 2,000 copies of a flyer titled "British Columbia Human Rights Tribunal protects transvestite deviant, enables him to prey on vulnerable biological women". He distributed copies of this flyer on the streets outside the Tribunal's offices on the days when the hearing was in session.

[291] At the top of this flyer are three pictures: one of me, one of Ms. Oger (with the caption "100% Biological Male"), and the third a censored photograph of another transgender complainant who has filed complaints at the Tribunal. Due to a publication ban, Mr. Whatcott was not able to identify this other complainant by name but did call her a "freak" and a "sicko" and promised to "expose and hopefully prevent the freak's shakedown (with the complicity of the BCHRT) and victimization of these poor women" who were named as respondents. The flyer then continues with Mr. Whatcott's usual themes about Ms. Oger: that she is a "transvestite activist", a "biological male", and a "man in women's closing" (as written). He again called the Tribunal a "Kangaroo Tribunal" and "tyrannical BCHRT", and referred to the hearing as a "kangaroo trial". He calls me a "pro-homosexual adjudicator" and a "financial donor to so-called transgender rights organizations and … an outspoken left-wing activist". He indicated his

contempt for the process and his intention to disregard any order the Tribunal may make against him: “Bill fully expects to be fined tens of thousands of dollars in this process and eventually jailed, as he will never comply with an order demanding he compensate Mr. Oger for anything”. He asserts, without foundation, that human rights for transpeople have led to “physical and sexual assaults in Canadian women’s shelters and correctional centres”. In short, Mr. Whatcott again publicly attacked Ms. Oger based on her gender identity and sought to delegitimize the Tribunal and its decision-makers. He also added threats against another transgender woman with complaints before the Tribunal.

[292] Throughout the hearing, Mr. Whatcott posted updates on his social media accounts. In these hearing missives, he continued to call the Tribunal a “kangaroo inquisition” and members of the panel “kangaroo judges”. He referred to Ms. Oger as a man and by the name “Ronan”. At the end of the first day of hearing, he posted: “Ronan Oger is still a man though the Tribunal Chairs try to pretend otherwise”. He called me a “NDP supporter and financial contributor to transvestite political groups” and again posted photographs of me on his Facebook page. He accused the panel, without foundation, of “bullying” and berating his lawyer, and of “yelling” at him. He expressed his view that the “whole process is disgusting”.

3. Analysis

[293] As I have said, what sets this behaviour apart is the fact that it was occurring outside of the Tribunal’s process. The question then arises as to whether it properly constitutes “improper conduct **during the course of the complaint**”, so as to be the subject of a cost award under s. 37(4)(a). This is a question of statutory interpretation. Because a costs award would engage Mr. Whatcott’s *Charter* freedoms of expression and religion, I undertake this exercise in a manner that “gives effect, as fully as possible, to the *Charter* protections at stake given the particular statutory mandate”: *Loyola* at para. 39; see discussion above.

[294] Before I begin this analysis, I acknowledge that Mr. Whatcott’s counsel made extensive submissions about the jurisdiction of administrative tribunals to punish parties for contempt outside their process. I do not intend to exhaustively review or address these submissions,

because the principle he advances is not controversial. There is no question that the Tribunal does not have powers to punish a party's conduct beyond what is conferred expressly by the statute. It is not necessary to review the legal authorities he cites, which go back as far as 1765 and trace the development of the law of contempt in England through the 1800s and first half of the 20th century. It is trite law that this Tribunal is a creature of statute and all its powers derive from the *Code* and the applicable provisions of the *Administrative Tribunals Act.* Any power to punish a party for improper conduct must be rooted in s. 37(4).

[295] Interpreting s. 37(4)(a) requires me to read the words of the *Code* "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the [Legislature]": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.

[296] In addition, there are specific interpretive principles that apply to human rights legislation. Courts and tribunals must interpret the *Code* purposively, to ensure that it can achieve its public purpose of protecting human rights: *McCormick v. Fasken Martineau DuMoulin LLP,* 2014 SCC 39 at para. 17. We must "favour interpretations that align with the purposes of human rights laws like the *Code* rather than adopt narrow or technical constructions that would frustrate those purposes": *Schrenk* at para. 31. These principles stem from the recognition that the *Code* is fundamental, quasi-constitutional legislation that enshrines a commitment to work toward a society "where all are equal in dignity and rights": *Code*, s. 3(b). It is the "law of the people": *Tranchemontagne* at para. 33.

[297] I begin with the text of the section, reproduced here for convenience:

> (4) The member or panel may award costs
>
> (a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and
>
> (b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3 (2) or an order under section 27.3 (3).

The conduct at issue did not concern the Tribunal's rules or orders, and so the subsection at issue is s. 37(4)(a).

[298] Ms. Oger argues that the ordinary meaning of "during", "course" and "complaint" support an interpretation that allows an award of costs "against a party who has engaged in improper conduct during the period of time when a complaint is progressing". I agree with her analysis respecting the time period governed by s. 37(4), and adopt it here:

> The ordinary sense of the word "during" refers to a period of time. The Oxford English Dictionary defines 'during' as 'throughout the course or duration of (a period of time)'. The Cambridge Dictionary defines 'during' as 'from the beginning to the end of a particular period'.
>
> 'Course' means, according to the Oxford English Dictionary, 'the way in which something progresses or develops', or 'a procedure adopted to deal with a situation'; according to the Cambridge Dictionary 'course' means 'the often gradual development of something, or the way something happens, or a way of doing something'.
>
> 'Complaint' is defined in the *Code*. It means a complaint under section 21 of the *Code.*
>
> Together, these meanings support an interpretation of 'during the course of the complaint' as: 'throughout the duration of the period of time while a complaint filed under section 21 of the *Code* progresses or develops'.

[299] This interpretation is consistent with the Tribunal's case law, which has established that s. 37(4) "clearly contemplates that costs will be awarded for conduct arising throughout the processing of the complaint": *Stopps v. Just Ladies Fitness (Metrotown) and D. (No. 4),* 2007 BCHRT 125 at para. 32; see also *Xiaoling v. Coral Sea Garment Manufacturing Ltd*., and others, 2004 BCHRT 13 at para. 24.

[300] This establishes the time period governed by s. 37(4)(a) but does not answer the question of what conduct is captured. This question must be answered in light of the purpose of the provision.

[301] The Tribunal's power to award costs is a primary tool by which it can control its process and ensure the protection of the people who come before it: *McLean v. B.C. (Min. of Public*

Safety and Sol. Gen.) (No. 3), 2006 BCHRT 103 at para. 7. Former Attorney General Geoff Plant described it as the Tribunal's "muscle": British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 37th Parl, 3rd Sess (23 October 2002) at 3990.

[302] The Tribunal uses this "muscle" to serve two important purposes: the immediate purpose of managing its process and parties' conduct in an individual complaint and the public purpose of maintaining public confidence in the Tribunal as an arbiter of human rights: see e.g. *Wells v. UBC and others (No. 4),* 2010 BCHRT 100 at para. 63. This dual purpose was explained by the Tribunal in *Xiaoling*:

> I have noted above that the primary purpose of an award of costs under s. 37(4) is punitive. Punishment of a wrongdoer, however, is not an end in itself. It also, of course, serves as a deterrent to discourage and prevent others from committing the same or similar wrongful acts. Such deterrence is an important consideration in the context of human rights. It is vitally important that complainants and witnesses know that they are protected by the law when they file a complaint or offer evidence. The elimination or denigration of that protection would have a dangerously chilling effect on the willingness of people to come forward to enforce their rights and, perhaps even more so, the rights of others. [para. 33]

[303] A costs award thus not only punishes a wrongdoer in a given complaint, but also serves to strengthen confidence in the Tribunal's ability to fairly and efficiently resolve disputes. It sends a message to the public that, when they come before this Tribunal, they will be afforded a fair process in which they are treated with dignity and respect. I agree with Ms. Oger that:

> Persons who experience discrimination will be dissuaded from availing themselves of the *Code's* means of redress if they know that one of the consequences of pursuing a complaint will be to unleash a torrent of insulting and demeaning public commentary that the Tribunal is powerless to control.

Such public confidence is particularly important for the type of disputes which this Tribunal adjudicates. This is a forum for people who may face disadvantage and discrimination in important aspects of public life. They come to the Tribunal with sensitive grievances which engage their most personal details and characteristics. Any interpretation of s. 37(4)(a) must ensure that the Tribunal remains meaningfully accessible to the people which the *Code* is

intended to protect – people who include the "most vulnerable members of our society": *Zurich* at 339.

[304] Attacks against the Tribunal and participants in its process are in fact more damaging when they are made in the public domain, such as on the internet or media: *Stopps* at para. 43; see also *Gichuru v. Pallai,* 2011 BCHRT 2 at para. 18. I accept that the spectre of harassment or denigration in a highly public forum is more likely to dissuade individuals from bringing forward complaints or evidence than when the treatment occurs in private submissions or correspondence within the Tribunal process. Likewise, the erosion of public confidence in the Tribunal can, by definition, only be accomplished by expression made in the public domain.

[305] The Tribunal has previously awarded costs against parties for their conduct arising, at least in part, outside of the Tribunal process but clearly connected to it. For example, in *Stone,* the Tribunal ordered costs against a complainant in part because of a message he had posted on a website. That message called the respondent's lawyer "a parasite, a leach of society and a femenist bed hopper [who] might even have been a woman before a sex change altered him": at para. 59 (as written). The Tribunal found:

> No participant before this Tribunal, nor their counsel, should be subjected, as a result of their participation in proceedings before the Tribunal, to this kind of scurrilous attack on their character. Mr. Stone says nothing in defence of these remarks, nor is any kind of defence possible. [para. 61]

[306] In *MacGarvie v. Friedman (No. 4),* 2009 BCHRT 47*,* the Tribunal found that the respondent landlord had engaged in misconduct outside the process when he defamed the complainant to other tenants in the building: see paras. 207 and 218. In *Bakhtiyari v. BCIT (No. 5),* 2007 BCHRT 200, the Tribunal found that the complainant demonstrated a "serious and flagrant disregard for the Tribunal processes" when she continuously challenged the Tribunal's orders by sending public correspondence "to various individuals and institutions [who] have nothing to do with the Tribunal processes or decision making powers": para. 64. In a previous decision, the Tribunal member had ordered the complainant to refrain from making unfounded public allegations against her personally and the Tribunal as an institution: *Bakhtiyari v. BCIT*

(No. 4), 2007 BCHRT 200 at para. 31. Nonetheless, the complainant continued to make "unfounded and very serious allegations in emails and letters" which were sent to "various media outlets, politicians and BCIT personnel who had nothing to do with the complaint". The Tribunal found that such communications had "an adverse effect on the processing of this complaint and those involved in this process" and thus fell within the definition of improper conduct: *Baktiyari v. BCIT (No. 6),* 2007 BCHRT 320 at para. 53.

[307] Taking into account the text and purpose of s. 37(4)(a), and its previous interpretations by this Tribunal, I am satisfied that s. 37(4)(a) is capable of capturing any conduct which:

a. occurs during the period of time when a complaint is progressing;

b. is connected to the complaint or stems from a person's participation in the complaint before the Tribunal; and

c. has a significantly prejudicial effect on the processing of the complaint and/or an individual involved in the process.

[308] In my view, this approach to improper conduct under s. 37(4)(a) impairs expressive rights as minimally as possible while giving effect to the purposes of the *Code* generally and the section specifically. First, the restraint on expression is time limited, lasting only for the duration of the time that the complaint is before the Tribunal. Second, it is limited to expression that is "improper". Parties are free to say whatever they want about a complaint so long as they do so without significantly impacting the integrity of the Tribunal's processes or having a significantly prejudicial impact on another party. It is consistent with *Charter* values to require that parties to a human rights complaint participate in that complaint in a manner that fosters dignity and respect, and ensures that the Tribunal is able to effectively exercise its mandate: *Code,* s. 3.

[309] I turn now to the conduct at issue in this case. There is no question that the behaviour I have outlined above took place during the life of Ms. Oger's complaint and was connected to it.

Indeed, it is clear on the face of Mr. Whatcott's communications that they were a direct response to Ms. Oger's decision to file a complaint at this Tribunal.

[310] I have no difficulty finding that Mr. Whatcott's public commentary about Ms. Oger was improper. As I have already said, it reflected language that I have found in this decision to violate the *Code.* It subjected Ms. Oger to public disrespect and humiliation as a consequence of her participation in this process. As such, not only did it prejudice her but it also sent a message to other transgender people about the possible price of bringing forward their own complaints. In response, this Tribunal must be clear in its unequivocal condemnation for such conduct. It was improper.

[311] Likewise, Mr. Whatcott's public derision for Ms. Oger's counsel, expressed through contemptuous reference to her sexual orientation, was improper. No participant in this Tribunal's process should be subjected to that type of conduct.

[312] I reach a different conclusion about Mr. Whatcott's comments about me personally and the Tribunal generally. I agree completely with the JCCF that it is "essential to a democracy and crucial to the rule of law that the courts are seen to function openly": *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 SCR 1326 at para. 84. The Supreme Court of Canada has consistently recognized the "fundamental importance of open, and even forceful, criticism of our public institutions": *Doré* at para. 66. Unlike lawyers, self-represented litigants are not required to meet certain standards of civility in the manner in which they express such criticism. This Tribunal is, and should be, prepared to tolerate public, forceful, and uncomfortable criticism. Its costs authority is not a tool to unduly silence such critics. Rather, a costs award is only warranted where such public criticism has a significant impact on the integrity of the Tribunal's process.

[313] In my view, Mr. Whatcott's public comments about the Tribunal and its members did not significantly impact the integrity of this process. They were not made directly to the Tribunal or any of its staff. Mr. Whatcott's audience was marginal and likely quite accustomed to such critiques of human rights bodies. Mr. Whatcott continued to participate in the

Tribunal's process and that process was, in my view, not impacted by his public expressions of contempt for it. I do not find it necessary to sanction this conduct through an award of costs.

[314] In sum, I have found that Mr. Whatcott's public comments about Ms. Oger and her counsel, made during the course of this complaint and connected to it, had a significantly prejudicial effect on their participation in this complaint and the integrity of the Tribunal's process. These communications were improper and I find that an award of costs under s. 37(4)(a) is appropriate.

[315] I turn now to the quantum of the costs award.

D. Amount of costs award

[316] I have found that Mr. Whatcott engaged in the following improper conduct during the course of this complaint:

a. attending the hearing, and giving his testimony, wearing a t-shirt that denigrated Ms. Oger based on her gender identity, in the face of the panel's clear statement that it was improper;

b. throughout the process, referring to Ms. Oger as a man, in violation of the Tribunal's direct, and repeated, orders to stop;

c. testifying in a manner that demonstrated contempt for the Tribunal and its process;

d. filing a response to the complaint that denigrated Ms. Oger based on her gender identity, in terms very similar to the Flyer which I have found violated s. 7 of the *Code*;

e. publicly posting a photograph of the inside of the hearing room, in violation of the Tribunal's "Public Access & Media Policy";

f. repeatedly re-arguing issues that had already been decided by the Tribunal;

g. repeatedly denigrating Ms. Oger in connection with her gender identity and this complaint, in his public posts through social media, his website, a printed flyer, and on a podcast; and

h. denigrating Ms. Quail in connection with her sexual orientation in his public communications about this complaint.

This conduct was deliberate, flagrant, and struck at the core of the *Code's* purposes and this Tribunal's ability to adjudicate Ms. Oger's complaint in a fair and efficient manner.

[317] Ms. Oger argues that $35,000 is an appropriate amount for a costs award. She relies on the recent decision in *Gichuru v. Purewal,* 2017 BCHRT 19, in which the Tribunal expressed concern that the quantum of the Tribunal's typical costs awards, being in the range of $1,000-$5,000, would not send the necessary strong message that such conduct will not be tolerated. There, the Tribunal awarded $10,000 in costs as a penalty for intentionally misleading the Tribunal, and needlessly prolonging the hearing, by giving false evidence. This conduct in this case, she argues, is more egregious and warrants a much higher award.

[318] Mr. Whatcott opposes the amount and argues that its effect would be to deter him and others "from criticizing the lack of due process, coercion and bias [which he alleges has] permeated the human rights proceedings". This argument is not relevant, given that I have not found that any of his public criticisms of the Tribunal or its members was improper.

[319] The costs award must be sufficient to signal the Tribunal's condemnation of Mr. Whatcott's conduct and to serve the punitive purpose of the award: *Ma v. Cleator,* 2014 BCHRT 180 at para. 285. It must deter others from repeating this behaviour and, in doing so, signal to the broader community that this Tribunal remains a place to bring forward difficult complaints. In addition, the Tribunal may consider factors including Mr. Whatcott's ability to pay the award, his relative culpability with respect to the conduct, and any other consequences that he faces as a result of the behaviour: *Kelly v. ICBC*, 2007 BCHRT 382 at para. 91.

[320] In my view, the severity of Mr. Whatcott's conduct, the fact that it was intentional and flagrant and persisted for the entire duration of the complaint, and the possible deterrent effect it could have on other transgender complainants seeking recourse at this Tribunal, mean that a high award is warranted in this case.

[321] While Mr. Whatcott did not expressly make submissions about his ability to pay a costs award, I feel comfortable in my assumption that he is a man of somewhat limited means. In addition, I note that I have already ordered him to pay $35,000 to Ms. Oger as a remedy for discrimination and that the Tribunal has expressed its condemnation for his conduct through this decision.

[322] Taking all these factors into account, I find that an award of $20,000 is appropriate to signal the Tribunal's condemnation of Mr. Whatcott's conduct. This is lower than the Tribunal's highest award of $31,898.30, but likely higher than any other award since: *Theodoridis v. Long & McQuade and Martel,* 1999 BCHRT 35; *Ma* at paras. 306-311.[2] In my view, anything less would not be sufficient to signal the Tribunal's strong condemnation of Mr. Whatcott's conduct and to deter similar behaviour in the future. At the same time, anything more would almost certainly be beyond Mr. Whatcott's ability to pay and would add little to the public rebuke which the Tribunal has communicated through this decision.

[323] I order Mr. Whatcott to pay Ms. Oger $20,000 in costs for improper conduct.

IX CAFE INTERVENTION

[324] The Tribunal has greatly benefited from the submissions made by the intervenors JCCF, West Coast LEAF and the BCTF. Those submissions provided unique and important legal and

[2] I say "likely" because, in one case, the Tribunal ordered the respondent to pay one half of the complainant's actual legal costs for a portion of the hearing. It is fair to assume that this was a substantial amount, but the final figure is not set out in the decision: *C.S.W.U. Local 1611 v. SELI Canada and others (No. 9),* 2009 BCHRT 161.

factual perspective to the issues in this case, and in this way these organizations served the proper purpose of intervenors.

[325] In contrast, the intervention of CAFE was not helpful or – at some points – even appropriate. I feel compelled to acknowledge this in my decision because of the risk that CAFE's intervenor status in this complaint could be used to buttress further applications for intervention in future cases. It should not be.

[326] In a previous letter decision, I admonished CAFE for repeatedly filing unsolicited submissions in respect of the parties' interim decisions: letter decision dated November 1, 2018. I expressed concern that "CAFE has demonstrated a pattern of disregard for the Tribunal's clear instructions, and a persistent misunderstanding about its role in these proceedings". Critically, I also found that the substance of CAFE's submissions was improper:

> In [its] submission, CAFE directly attacks Ms. Oger based on her gender identity and her decision to bring forward this complaint. It argues that Mr. Whatcott's comments about her are "true", that she cannot produce "evidence of actually being a woman", refers to Ms. Oger's name as a "fantasy name", and calls her a "transvestite … with tyrannical tendencies" and a "cruel or terrifying person". And it goes on.
>
> … In my view, CAFE's comments about Ms. Oger are completely improper and could fairly be the subject of a costs award if made by a party…
>
> The circumstances are, in my view, even more egregious because they come from an intervenor who is a participant in the process by invitation of the Tribunal. The role of the intervenors in this case is to assist the Tribunal with the substantive question of law. These types of submissions are not helpful and, more importantly, are inflammatory, derogatory, disrespectful and inappropriate…

At that point, I put CAFE on notice that if it continued that type of behaviour, I would revoke its status as an intervenor.

[327] At the hearing, each intervenor was allotted 45 minutes to make their final, closing submissions. The panel instructed them to submit their written arguments at the same time as those closing submissions. This was intended to allow everyone ample time to understand, and

respond, to each other's arguments. During his allotted time, Mr. Fromm, representing CAFE, did not submit any written argument but instead made all his submissions orally.

[328] Those submissions were not helpful. They did not, as I had previously directed, "focus on how s. 7 of the *Code* should be interpreted in light of ss. 2(a) and (b) of the *Charter*". The panel had to cut Mr. Fromm off when he began to stray into criticisms of another transwoman who had filed human rights complaints. For the most part, Mr. Fromm's submissions appeared to be rooted in his own beliefs about the case.

[329] Mr. Fromm delivered his closing submissions on the Friday so that he could return home over the weekend. On the Monday, he delivered to the Tribunal and the participants his "final written submission". This was contrary to the panel's clear instruction that all participants submit their written submissions along with the oral argument.

[330] CAFE's final written submission was 65 pages of dense, disorganized and barely intelligible text. It included a section labelled "PART II – A VERY IMPORTANT DISCUSSION OF 'MISGENDERING' – IS IT OR CAN IT EVEN BE AN OFFENCE?", in which Mr. Fromm described the Tribunal's orders to respect Ms. Oger's gender identity as a "clear example of BIAS" and a form of "Kafkaesque-Orwellian Newspeak". He denies the existence of transgender people, likening it to "acting, role-playing, being theatrical" and calls gender identity a "recognized MENTAL DISORDER". He includes what appear to be quotes from the National Post which criticized Canada's human rights commissions, and asserts that Tribunal members are not properly vetted, "resulting in appointments of persons not properly qualified for judicial office". Suffice to say that his argument was – at best – mostly irrelevant and unhelpful and – at worst – improper.

[331] It is possible that these failings of the CAFE intervention arose from the fact that it was not represented by a lawyer. Regardless of the reason, however, the intervention was not helpful and at times constituted an unwelcome and inflammatory distraction from the substance of the issues at hand. CAFE's participation in this complaint should not be used to support further applications to intervene at this Tribunal or any level of court.

X CONCLUSION

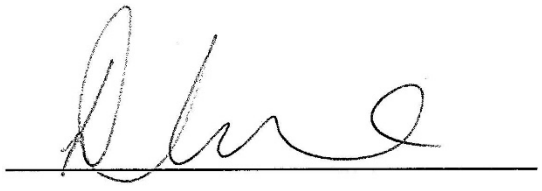
[332] The panel has found that Mr. Whatcott violated s. 7 of the *Code*. We order as follows:

a. Pursuant ss. 37(2)(a) and (b) of the *Code*, we declare that Mr. Whatcott's conduct was discrimination contrary to the *Code*, and we order him to cease the contravention and refrain from committing the same or a similar contravention.

b. Pursuant to s. 37(2)(d)(iii), we order Mr. Whatcott to pay Ms. Oger $35,000 as compensation for injury to her dignity, feelings, and self-respect.

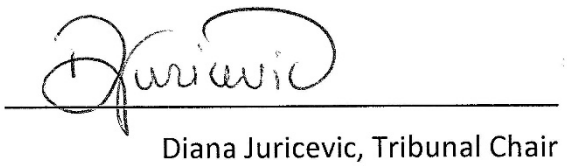
c. Pursuant to s. 37(4), we order Mr. Whatcott to pay Ms. Oger $20,000 as costs for improper conduct.

d. We order Mr. Whatcott to pay Ms. Oger post-judgement interest on the amounts awarded until paid in full, based on the rates set out in the *Court Order Interest Act.*



Devyn Cousineau, Tribunal Member

I AGREE:



Diana Juricevic, Tribunal Chair

I AGREE:

Norman Trerise, Tribunal Member

APPENDIX A: THE FLYER

Transgenderism vs Truth in Vancouver-False Creek

Ronan Oger (picture left) is a biological male who has renamed himself "Morgane Oger" after he embraced a transvestite lifestyle. Ronan is running for the NDP in the Vancouver-False Creek riding and BC's media and the NDP are promoting a false narrative that Ronan is a woman born into a male body. Walt Heyer (picture right) lived as a transvestite for eight years, cut off his penis, and injected himself with female hormones, in an effort to delude himself and everyone around him into thinking he was a female. Walt repented of his sin, reclaimed his God given male identity, and is now living as a born again Christian helping others to avoid the mistake he made of embracing transgender propaganda and trying to live a lie that he was a different gender from the one God made him.

Dear Vancouver-False Creek residents:

I am writing this flyer this election to share my concern about the promotion and growth of homosexuality and transvestitism in British Columbia and how it is obscuring the immutable truth about our God given gender.

The truth is there are only two genders, male and female and they are God given and unchangeable. Ronan may have government ID that refers to him by the French female name "Morgane" and the media, NDP, and everyone in the riding might try to pretend Morgan is a woman. But the truth is Ronan's DNA will always be male, he will never have a uterus, and no amount of cosmetic surgery, fake hormones, or media propaganda is going to be able to change these facts.

"God created man in His own image, in the image of God He created him; male and female He created them." **Genesis 1:27**

Because gender is God given and immutable, "transgenderism" is an impossibility. A male cannot "transition" into a female, nor can a female "transition" into a male. One can only cross dress and disfigure themselves with surgery and hormones to look like the gender they are not. This practice is harmful and displeasing to God. Those who embrace the transvestite and homosexual lifestyles put themselves at greatly increased risk of diseases such as HIV, syphilis, HPV of the rectum, anal gonorrhea, Hepatitis A, B & C, etc.... Homosexuals and transgenders are also at increased risk of drug and alcohol abuse, suicide, and domestic violence.

In addition to the physical and social consequences of adopting a false sexual and gender identity, there are spiritual consequences too. Our God is a God of truth. Those who promote falsehoods like the NDP and BC's major media and say it is ok to indulge in homosexuality or embrace a transvestite lifestyle do so to their eternal peril. Liars and the sexually immoral will not inherit the Kingdom of Heaven, nor will cowards. The truth is many BC residents know that promoting homosexuality and transvestitism is wrong, but are too cowardly or morally corrupt to speak up and defend what is true:

"As for the cowardly, the faithless, the detestable, as for murderers, the sexually immoral, sorcerers, idolaters, and all liars, their portion will be in the lake that burns with fire and sulfur, which is the second death." **Revelation 2:8**

Thankfully Jesus Christ paid the price for your sin. You can turn to the merciful Christ and ask for forgiveness and when the NDP come knocking at your door you can tell them you won't vote for them because you believe in God's definition of gender and marriage. Truth matters and God wants you standing for what is true!

In Christ's Service,
Bill Whatcott, Ph: 778-837-3650, Email: billwhatcott@gmail.com, Web: www.freenorthamerica.ca

"The Word became flesh and dwelt among us, and we have seen His glory, glory as of the only Son from the Father, full of grace and truth." ***St.*** **John 1:14**