

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:

BILL WHATCOTT

RESPONDENT

**BC TEACHERS' FEDERATION,
CANADIAN ASSOCIATION FOR FREE EXPRESSION,
JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS
AND WEST COAST LEAF**

INTERVENORS

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

PURSUANT TO THE
CONSTITUTIONAL QUESTIONS ACT

**WRITTEN SUBMISSIONS OF THE INTERVENOR,
WEST COAST LEAF**

INTRODUCTION

1. This human rights complaint raises questions about the interpretation of ss. 7(a) and 7(b) of the *Human Rights Code* (the “Code”) in light of the values enshrined in the *Canadian Charter of Rights and Freedoms* (the “Charter”), in particular the right to substantive equality.
2. The Complaint alleges that the Respondent has published flyers which indicate discrimination or an intention to discriminate or which are likely to expose the Complainant and transgender

people to hatred or contempt contrary to section 7 of the *Code*. The Respondent asserts that, in publishing or issuing the flyers, he was exercising his constitutionally protected right to freedom of expression and freedom of religion.

3. Central to the determination the Tribunal must make is the proper analysis to be undertaken when assessing whether there has been a breach of ss. 7(a) or 7(b) when *Charter* values are engaged. West Coast Legal Education and Action Fund (“West Coast LEAF”), among others, was granted intervenor status in this proceeding specifically to address this question.
4. West Coast LEAF acts to promote the equality of all women and gender-diverse persons in British Columbia. We recognize that gender-based discrimination threatens the safety, well-being, and human rights of women, trans people of all genders, Two Spirit people, and people with non-binary gender identities. Our work is informed by the recognition that intersecting and overlapping markers of historical disadvantage pose unique and complex challenges to achieving substantive equality in the law.
5. We apply an intersectional lens to the implementation of constitutional rights and values such that our legal arguments, educational programming, and law reform activities are informed by, and inclusive of, the breadth of women’s experiences and the experiences of transgender, Two Spirit, and gender-diverse persons.
6. It is West Coast LEAF’s position that in applying the established interpretative tests for whether there has been a breach of sections 7(1)(a) or 7(1)(b) of the *Code* to the facts of this complaint, the Tribunal must consider the *Charter* rights and values that are engaged in relation to freedom of conscience and religion (s.2(a)), freedom of expression (s. 2(b)), and the equal protection of the law, and freedom from discrimination (s.15(1)). The Tribunal must engage in a contextual analysis, in light of the pressing and substantial purposes of the *Code*.
7. West Coast LEAF submits that the contextual factors relevant to this complaint include:
 - a. the highly specific kinds of speech used to vilify transgender individuals and gender non-conforming communities more broadly;

- b. how that highly specific speech seeks to erase and deny transgender people's very existence in a manner that vilifies them as immoral, deceitful, and mentally ill;
- c. the acute vulnerability of transgender individuals to violence, discrimination, harassment, and marginalization as well as how virulent transphobic speech is likely to contribute to the continued exposure of transgender people to mistreatment; and,
- d. the critical importance of ensuring transgender women, and indeed all women and gender diverse people, have equal access to public life in order to achieve substantive equality.

FACTS

- 8. The Complainant, Ms. Oger, is a transgender woman.
- 9. The Respondent, Mr. Whatcott, distributed flyers attacking Ms. Oger, who was then running as a candidate for election in the provincial riding of Vancouver-False Creek. The flyers asserted, among other things, that:
 - a. "Trangenderism" is an impossibility;
 - b. The "practice" of "transgenderism" is harmful;
 - c. Those embracing the "transvestite" lifestyle (like Ms. Oger) are at greatly increased risk of diseases such as HIV, syphilis, HPV of the rectum, anal gonorrhea and hepatitis A, B and C;
 - d. Those who identify as transgender are also at increased risk of drug and alcohol abuse, suicide and domestic violence; and
 - e. Transgender individuals, like Ms. Oger, are liars, cowards, and sexually immoral.

10. The Complaint alleges that this publication violates ss. 7(a) and 7(b) of the *Code*.
11. The Respondent, Mr. Whatcott, asserts that the statements contained in his flyer are protected by his right to freedom of religion and freedom of expression as enshrined in ss. 2(a) and 2(b) of the *Charter*.

ISSUE

12. What is the appropriate analytical approach to determining whether Mr. Whatcott's pamphlets violate ss. 7(a) or 7(b) of the *Code* in light of *Charter* values?

ARGUMENT

Analytical Framework

13. Section 7 of the *Code* provides that:

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.

[Emphasis added]

14. The test to establish a breach differs as between section 7(1)(a) and 7(1)(b).
15. In order to establish a breach of section 7(1)(a), a complainant must prove, on a balance of probabilities, that the respondent published a representation that indicates discrimination or an intention to discriminate against an individual on the basis of a characteristic protected by the *Code*. The Tribunal makes such a determination in light of the purposes of the *Code* as

set out in s. 3.¹

16. It is not necessary that the discrimination or intent to discriminate be within a field of activity otherwise protected by the *Code* (such as, for example, in the context of tenancy or employment).² However, in order to succeed a complainant must establish an adverse effect or intention to cause such an adverse effect in relation to the impugned publication.³
17. Section 7(1)(b) requires a very different inquiry. In *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2013 SCC 11, the Supreme Court of Canada not only upheld the constitutionality of a provision of the *Saskatchewan Human Rights Code*, as read down, that is identical to s. 7(1)(b) of the *Code*, but modified and articulated the test for hate speech in the context of a prohibition of expression in human rights legislation. The Court articulated the test for hate speech as follows:
- [Such a provision] should be applied objectively to determine 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.⁴
18. The Court further confirmed that the focus of the inquiry is not on the ideas being expressed, but rather on the effect of the expression.⁵
19. However, irrespective of whether the Tribunal is considering ss. 7(a) or (b), the assessment of whether a publication violates section 7 is a contextual one.⁶ West Coast LEAF submits the relevant context must include an understanding of the unique ways in which transgender people experience discrimination and are likely to be exposed to hatred, including attempts to prevent them from participating in public life.

¹ *MacKenzie v. Village of Pemberton*, 2013 BCHRT 216 at para. 455; *Koehler v. Carson and others (No. 2)*, 2006 BCHRT 178 at para. 49, aff'd in 2006 BCSC 1779; *Palmer v. BCTF and others*, 2008 BCHRT 322 at para. 54.

² *Koehler v. Carson and others (No. 2)*, 2006 BCHRT 178 at paras. 46-50, upheld on judicial review, 2006 BCSC 1779.

³ *Li v. Brown*, 2018 BCHRT 218 at paras. 121-122.

⁴ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 59. See also *Li v. Brown*, 2018 BCHRT 228 at para 107

⁵ *Whatcott*, *supra* at para. 31

⁶ *Elmasry and Habib v. Rogers Publishing and MacQueen (No. 4)*, 2008 BCHRT 378 at para. 457.

The Relevant Context

20. Transgender people are among the most marginalized in society today.⁷ Human rights tribunals and courts have repeatedly recognized the particular vulnerability and disadvantage faced by transgender individuals.⁸ As the Ontario Human Rights Tribunal wrote:

164 The applicant argues that transgendered persons are a historically disadvantaged group, and I agree. In my view, it is beyond debate that transgendered persons such as the applicant are a historically disadvantaged group who face extreme social stigma and prejudice in our society. This is a notorious fact and it is appropriate for the Tribunal to take notice of it. Indeed, I have already done so at an earlier stage of this proceeding: *XY v. Ontario (Government and Consumer Services)*, 2010 HRTO 1906 (Ont. Human Rights Trib.), at para. 10.

165 If I did have any doubt about the disadvantaged position of transgendered persons in our society (which I did not), it would have been removed by Dr. Karasic's uncontradicted and unchallenged testimony about some of the difficulties facing transgendered persons. Specifically, Dr. Karasic testified that transgendered persons as a group tend to face very high rates of verbal harassment and physical assault and are sometimes even murdered because of their transgendered status. Dr. Karasic also testified that it is very difficult for transgendered persons to find employment, that there are very high rates of unemployment among transgendered people generally, and that many transgendered people are fired once they are exposed in the workplace as being transgendered. He testified that he himself has had "many" highly skilled and college-educated transgendered patients with very promising professional careers who were unable to find employment upon transitioning to their felt gender, sometimes ending up in homeless shelters. In addition, Dr. Karasic testified that suicide attempts and substance-related disorders are commonly associated with gender identity disorders. During his testimony, Dr. Karasic referred a couple of times to the ridicule which transgendered persons often experience. He testified that the fear of being ridiculed tends to limit transgendered persons' outside activity. Dr. Karasic described the social stigma attached to being transgendered as "pretty severe".

166 The disadvantaged position of transgendered persons in our society has also been recognized by the Ontario Human Rights Commission in its *Policy on Discrimination and Harassment because of Gender Identity*, which was put before me by the applicant in this case and which I am required to consider pursuant to s.45.5(2) of the *Code*. In its *Policy*, the Commission posits that that "there are, arguably, few groups in our society today who are as disadvantaged and disenfranchised as transgenderists and

⁷ Greta R. Bauer et al., "I Don't Think This is Theoretical; This Is Our Lives: How Erasure Impacts Health Care for Transgender People" (2009) Vol. 20, No. 5 *JANAC* p. 349

⁸ See for example, *F(C) v. Alberta (Vital Statistics)*, 2014 ABQB 237 at para. 58 and *Rainbow Committee of Terrace v. City of Terrace*, 2002 BCHRT 26 at paras. 47-51

transsexuals". The Commission's Policy goes on to state that transgendered persons tend to be "feared and hated" in our society and that there is hostility toward their very existence. The Commission also observes that transgendered persons, as a group, tend to experience a variety of problems, including discrimination in the workplace, harassment, denial of services, violence, high suicide rates, substance abuse and poverty. See also Hogan, above, at paras. 263, 329-331, and 402-410, where Vice-chair Hendricks, writing in a partial dissent, relied on evidence before her in that case, including expert evidence, to conclude that transsexuals were a "discrete and insular minority" who routinely suffer from prejudice and negative stereotyping, including "transphobia," and "transbashing," a targeted form of physical assault.⁹

[Emphasis added]

21. Transphobia is a term used to describe discrimination and enmity against those who do not conform to traditional gender norms. Transphobic discrimination against transgender people can take many forms, including erasure and attempts at erasure.
22. Erasure is a condition imposed uniquely upon transgender people and is discussed in the literature as "a defining condition of how transsexuality is managed in culture and institutions, a condition that ultimately inscribes transsexuality as impossible", thereby denying the very existence or identity of transgender people.¹⁰ Erasure may be passive (e.g., a lack of knowledge about trans identity or assumptions about trans people) or active (e.g., the refusal of services, use of intimidation or deliberate infliction of harm). Both forms of erasure are harmful to transgender people and create systemic barriers to equality for transgender persons.¹¹
23. Among other things, erasure may take the form of asserting that transgender people are deceivers or pretenders and that only genitalia or chromosomal composition are the true determinants of sex or gender. Such erasure has the double effect of treating transgender people as both fictitious and morally suspect¹² Dr. Talia Mae Bettcher, a philosopher from California State University, posits that transphobic violence may then be justified on the basis

⁹ *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 at paras. 164-166;

¹⁰ Greta R. Bauer et al., "Depression in Male-to-Female Transgender Ontarians: Results from the Trans PULSE Project" (2011) Vol. 30 No. 2 *Canadian Journal of Community Mental Health* at p. 115.

¹¹ Greta R. Bauer et al., "I Don't Think This is Theoretical; This Is Our Lives: How Erasure Impacts Health Care for Transgender People" (2009) Vol. 20, No. 5 *JANAC* at p. 352 and 358.

¹² Talia Mae Bettcher, "Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion" (2007) Vol. 22, No. 3 *Hypatia* at pp. 50-51.

that deception has occurred.¹³

24. In West Coast LEAF's respectful submission erasure in and of itself is a form of adverse treatment which allows discrimination and hatred to flourish by delegitimizing and dehumanizing transgender people: the rights of those who do not exist, by extension, do not exist. Indeed, hostile language – including erasure – often provides the launching off point for violence against transgendered people:

Hostile language is often used as a precursor to violence. The negative representations that underlie the use of derogatory terms render trans individuals as invisible, deviant, or inhuman, and thus assailable.¹⁴

25. Even if such speech does not lead to directly physical violence there is evidence to show that exposure to hate speech leads to desensitization and, consequently an increase in prejudice.¹⁵
26. The concept of erasure underlies many successful complaints involving discrimination on the basis of gender identity. For example, the Ontario Human Rights Tribunal in *XY* found that the requirement that transgender individuals have sex reassignment surgery before Vital Statistics would issue a birth certificate that accorded with a transgender complainant's female gender identity was discriminatory. In reaching its decision, the Tribunal wrote:

171 First, giving transgendered persons an official government document with a sex designation which is dissonant with their gender identity conveys the message that their gender identity in and of itself is not valid. This message, in turn, is the very same message that lies at the root of the stigma and prejudice against transgendered persons. As the applicant stated during her testimony, this official government document tells the transgendered person, "You are not who you say you are." This might not be the aim of the law. As the applicant points out, however, it is the effect of the law on transgendered persons who receive birth certificates with sex designations that are not aligned with their own sense of who they are.

¹³ *Ibid*

¹⁴ 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

¹⁵ Wiktor Soral et al., "Exposure to hate speech increases prejudice through desensitization" (2018) Vol. 44 *Aggressive Behavior* at p. 144; see also Sam Winter et al., "Transpeople, Transprejudice and Pathologization: A Seven-Country Factor Analytic Study" (2009) Vol. 21 *International Journal of Sexual Health* at pp. 109-114.

27. This Tribunal has accepted expert sociological evidence confirming the continued and systemic disadvantages faced by transgender individuals. For example, in *Nixon v. Vancouver Rape Relief*, this Tribunal relied on the evidence of sociologist Dr. Becki Ross:

135 Dr. Becki Ross was called to give evidence on behalf of Ms. Nixon. I qualified her as a sociologist with expertise in the issues of gender and transgender. She testified that our society and others define gender along binary lines: male and female. Consequently, there is enormous pressure on individuals, almost from birth, to conform to society's view of what is acceptable male or female behaviour.

136 Dr. Ross described the sociological research which details the extent of the stigma transsexuals experience in our culture which is designed to exclude or cause fear of them. She described the myths and multiple stereotypes that circulate in popular culture about the transgendered and transsexuals as diseased, confused, monsters and freaks. Male to female transsexuals are seen as men in dresses, masquerading women or impostors, and are often displayed in a comic light.

137 Dr. Ross testified that some in society fear the transgendered because they do not adhere, or conform, to the conventional gender boxes of male and female. Some male to female transsexuals are able to pass, that is to live in the role of their chosen gender identity without raising fears or concerns, but they live with the constant fear of discovery. She described the risks taken by transsexuals who are 'out' in that they iterate their transsexualism publicly. They risk social censure, employment discrimination, and misunderstanding from everyone from their family members to religious leaders. She likened the discrimination transsexuals experience to that of homosexuals in earlier history living in fear of discovery or that of mixed race individuals historically hiding their 'blackness.'¹⁶

28. The conclusions in the jurisprudence cited above remain apposite today. Research continues to evidence that transgender people experience disproportionately high rates of violence and harassment, and are disproportionately discriminated against in employment and the provision of public services.¹⁷ They suffer significant financial hardship and harmful health effects as a result.¹⁸ A recent Ontario study revealed the significant extent to which transgender individuals avoid public spaces because they fear harassment or being outed as trans. This impact was most significant among those who had begun to live, full or part time, in their felt gender: 83% of those who had begun to live full or part time in their felt gender

¹⁶ *Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1, rev'd but not on this point, 2003 BCSC 1936, rev'd in part on other grounds 2005 BCCA 601.

¹⁷ Greta R. Bauer et al., "I Don't Think This is Theoretical; This Is Our Lives: How Erasure Impacts Health Care for Transgender People" (2009) Vol. 20, No. 5 *JANAC* at p. 349.

¹⁸ Greta R. Bauer & Ayden I. Scheim, *Transgender People in Ontario, Canada: Statistics to Inform Human Rights Policy* (London, ON: Trans PULSE Project Team, 2015) at pp. 5-8.

reported avoiding public spaces.¹⁹

29. In the context of public debate, including during an election, active erasure inhibits the ability of trans people to engage in democratic debate and discourse by requiring them to first defeat the absolute position that they are not who they say they are, and second that they have not engaged in fraud or misrepresentation before they can establish sufficient social standing to actually engage and be heard in public debate irrespective of what the subject of debate might be. In the present complaint, the repeated, single-minded suggestion that Ms. Oger is a man and that “transgenderism” is an impossibility seeks to actively erase from or “cut off any path” to, public participation, election and debate by Ms. Oger and other transgender individuals.
30. Erasure forces transgender people to argue for their basic humanity and social standing before they can meaningfully participate in the democratic and social life of the province.

Consideration of Charter Values

31. By virtue of section 45 of the *Administrative Tribunals Act*, S.B.C. 2004 C. 45, the BC Human Rights Tribunal is without jurisdiction to address constitutional questions relating to the *Charter*. However, the Tribunal can, and must, nevertheless consider *Charter* values.²⁰
32. The framework to be used by the Tribunal when seeking to apply *Charter* values in the exercise of its statutory mandate was set out by the Supreme Court of Canada in *Doré v. Barreau du Québec*, 2012 SCC 12 (“*Doré*”) and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (“*Loyola*”). The *Doré/Loyola* approach has most recently been affirmed in *Trinity Western University v. Law Society of BC*, 2018 SCC 32. In short: the Tribunal must balance *Charter* values with the objectives of the legislation at issue.
33. The appropriate method for doing so is described by the Supreme Court of Canada at paragraphs 55-56 of *Doré*:

¹⁹ Mona Lena Krook, “Violence Against Women in Politics”, (2017) Vol 28 No. 1 *Journal of Democracy* p. 5.

²⁰ *Pardy v. Earle*, 2013 BCSC 1079 at paras. 309-310. See also *Duncan v. Retail Wholesale Union Pension Plan*, 2017 BCSC 2375 at paras. 83-86.

... In effecting this balancing, the decision-maker should first consider the statutory objectives...

Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives...

34. Thus, a three-step approach emerges: 1) consider the statutory objectives; 2) determine what *Charter* protections are engaged; and 3) balance the *Charter* protections and the objectives of the *Code*.

Statutory Objectives

35. Any interpretation of section 7 of the *Code* must, first, be informed by the purposes of the *Code* and the broader purposes of human rights legislation.

36. The purposes of the *Code* are set out in section 3:

3 The purposes of this Code are as follows:

- (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.
37. The purpose and nature of human rights legislation has been considered and emphasized in innumerable decisions from the Supreme Court of Canada affirming that human rights legislation is unique and quasi-constitutional in nature and that it must be given a large,

purposive and liberal interpretation.²¹

38. The import of human rights legislation is perhaps best summarized in *Zurich Insurance*:

Human rights legislation is amongst the most pre-eminent category of legislation...One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed [notations omitted]²²

39. Aimed as it is toward the elimination of discrimination, human rights legislation inevitably impacts some speech. Discrimination on the basis of a protected characteristic in one of the areas to which the *Code* applies (i.e. employment, tenancy, services customarily available to the public etc.) will often involve speech in the form of verbal harassment or discriminatory comments. The *Code*'s prohibition against discrimination will therefore necessarily impact freedom of expression with some frequency.

40. Nowhere, however, is the *Code*'s potential impact on freedom of expression more apparent than in section 7, which prohibits a person from publishing, issuing or displaying a statement, publication or notice which indicates discrimination or an intention to discriminate or which is likely to expose a person, a group or a class of persons to hatred or contempt because of a protected characteristic.

41. Hate speech causes harm to targeted vulnerable groups and to society at large. The Supreme Court of Canada has recognized that hate speech perpetuates stereotypes and creates barriers to the social, economic and political participation of targeted groups in Canadian society. Further, hate speech causes physical, psychological and social harms:

[74] Hate speech, therefore, rises beyond causing emotional distress to individual group members. It can have a societal impact. If a group of people are considered inferior, subhuman, or lawless, it is easier to justify denying the group and its members equal rights or status. As observed by this Court in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 147, the findings in *Keegstra* suggest "that hate speech always denies fundamental rights". As the majority becomes desensitized by the effects of hate speech, the concern is that

²¹ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at para. 95.

²² *Zurich Insurance Co v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at para.18.

some members of society will demonstrate their rejection of the vulnerable group through conduct. Hate speech lays the groundwork for later, broad attacks on vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide: see *Taylor and Keegstra*.

[75] Hate speech is not only used to justify restrictions or attacks on the rights of protected groups on prohibited grounds. As noted by Dickson C.J., at p. 763 of *Keegstra*, hate propaganda opposes the targeted group's ability to find self-fulfillment by articulating their thoughts and ideas. It 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 democracy.²³

[Emphasis added]

42. The legislative history of now section 7 of the *Code* confirms the provincial legislature has consistently and consciously sought to curtail freedom of expression in order to further the goal of preventing discrimination and fostering a society in which there are no impediments to the full and free participation in the economic, social and political life of British Columbia.
43. A prohibition on discriminatory publications was first inserted into human rights-like legislation through the *Public Accommodations Practices Act*, S.B.C. 1961 c. 20 which prohibited notices, signs, symbols, emblems or representations that indicated discrimination or an intention to discriminate. This particular focus on signs and similar objects was motivated by then-prevalent "whites only" signs.²⁴ The *Public Accommodations Practices Act* included an express free speech statement to the effect that nothing in the *Act* would be deemed to interfere with the free expression of opinions upon any subject by speech or writing.
44. In 1969, the province enacted its first meaningful consolidated piece of human rights legislation in the *Human Rights Act*, S.B.C. 1969 c. 10. Section 10 of the *Human Rights Act* then provided:

²³ *Whatcott*, *supra* at paras. 74-75

²⁴ John D. McAlpine, Report Arising Out of the Activities of the Ku 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.

10(1) No person shall

- (a) publish or display, or cause to be published or displayed; or
- (b) permit to be published or displayed on lands or premises or in a newspaper, through a television or radio-broadcasting station, or by means of any other medium which he owns or controls

any notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate, against any person or class of persons for any purpose because of the race, religion, colour, nationality, ancestry, or place of origin of that person or class of persons.

(2) Nothing in this section shall interfere with, restrict, or prohibit the free expression of opinions upon any subject by speech or in writing.

45. The form (though not the substance) of subsection (2) was amended in 1973.²⁵ A short Hansard debate focused on subsection (2) while the legislature was considering the *Human Rights Code of British Columbia Act*, S.B.C. 1973 c. 119 confirmed the legislative intention behind what the prohibition on discriminatory publications plainly said – it protects expression other than discriminatory expression:

MR. D.A. ANDERSON: This, Mr. Chairman, is apparently...not a contradiction, but I would like the explanation of the Minister. In section 2 (1) it says that, "No person shall publish or display before the public, or cause to be published or displayed before the public, any notice, sign, symbol...." which would discriminate against anybody — and quite rightly too.

Section 2 (2) goes on: "Notwithstanding subsection (1), any person may, by speech or in writing, freely express his opinions on any subject." As this wipes out the effect of subsection (1) I presume that if you write out your objection to a particular racial group or sexual group, or whatever it is that you particularly dislike, you can do so as long as you use a paint brush and use a large piece of paper. As long as you are writing, you can get away with it.

The two appear to be contradictory and 2 (9) seems a fairly large loophole to place in this particular section.

HON. MR. KING: 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

²⁵ The revised language ultimately read: (2) Notwithstanding subsection (1), any person may, by speech or in writing, freely express his opinions on any subject.

not an attempt to inhibit or restrict the free expression of one's opinion and one's right to free speech. That is spelled out in subsection (2).

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.

[Emphasis added]

46. Human rights legislation in British Columbia continued to include an express free speech statement until the current language of s. 7(1) was first introduced through the *Human Rights Amendment Act*, 1993, S.B.C. c. 27. The *Human Rights Amendment Act*: added a prohibition on publications which expose persons to hatred or contempt; eliminated the free speech language; and added an exception for speech which is private or intended to be private:

2 (1) No person shall 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 or age of that person or that group or class of persons.

(2) Subsection (1) does not apply to a private communication or to a communication intended to be private.

47. Legislative debate on this new language confirmed the legislature's intention to bring the relevant section of the *Code* in line with the Supreme Court of Canada's then recent decision in *Taylor* and that the prohibition on discriminatory and hateful publications is specifically intended to curtail and set reasonable limits on freedom of expression:

HON. A. HAGEN: ... as a free and democratic province, we draw a line at allowing people to be attacked by hatred and contempt.

I want to just take a moment to speak to those words, because they are not words we normally use in this House. I believe that they refer to strongly held emotions that are often expressed in vilifying words that are harmful to those to whom they are addressed. All of us have seen those words, depictions and signs. I believe that all of us agree that when that language, those symbols and those signs express the strong emotions of hate, contempt and vilification of an extreme nature, we do not tolerate that, and we would not want to have that as part of a free and diverse democracy.

There is also strong jurisprudence dealing with these issues. For example, in 1990 the Supreme Court of Canada ruled on a case involving John Ross Taylor and the Western Guard. It was a federal case tried under the Canadian Human Rights Act. The Western Guard produced telephone messages that exposed Jewish people to hatred and contempt. The court ruled that the right of equality must be balanced with the right of freedom of expression. This case provides us with one of our most recent and significant rulings in jurisprudence on this important issue of drawing the line with respect to extremes of behaviour through speech, writing, symbols and signs, which this amendment addresses. The Supreme Court of Canada made it very clear that courts and human rights tribunals must balance freedom of expression with the rights of individuals not to be discriminated against nor to be objects of hatred or contempt. It is up to our courts and tribunals to determine that balance on the merits of each case.

British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 35th Parl, 2nd Sess, Vol 11, No 1 (10 June 1993) at 7056-7057 (Hon. A. Hagen).

HON. A. PETTER: The Supreme Court of Canada upheld the cease-and-desist order made by the commission pursuant to section 13(1) of the Canadian Human Rights Act in the Taylor case. The court upheld the provisions of the Canadian Human Rights Act as a reasonable and justifiable limit on freedom of expression in a free and democratic society. Most important for today's debate, on behalf of the majority of the court Chief Justice Dickson had the following to say. I really want to go through this judgment somewhat carefully, because I think it points out some of the misunderstandings and misrepresentations that have been attached to this legislation. Here is what Chief Justice Brian Dickson, probably the greatest jurist in this century in Canada, said about human rights legislation generally:

"Though not wishing to disparage legislative efforts to bolster the guarantee of free expression, for several reasons I think it mistaken to place too great an emphasis upon the explicit protection of expressive activity in a human rights statute." And further: "...having decided that there exists an objective in restricting hate propaganda of sufficient importance to warrant placing some limits upon the freedom of expression, it would be incongruous to require that section 13(1) exempt all activity falling under the rubric of 'expression'."

What the Supreme Court said in the Taylor case holds for our province's Human Rights Act. 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, 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. [Emphasis added]

British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 35th Parl, 2nd Sess, Vol 11, No 1 (10 June 1993) at 7056-7057 (Hon. A. Hagen).

HON A. HAGAN: 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; and we all know how some of them manifest themselves in our society as a denial of equal opportunity in the provision of employment, housing, goods and services, and the feeling of being able to move freely, confidently and with dignity in our society and in our communities. In its extremist [sic] form, hate propaganda may even result in incidents of violence.

It is not enough for government merely to speak out against discrimination and hate propaganda. Government must take a lead through legislation, sending a strong message to those who promote or advocate racism and acts of hatred -- a message which says that these organizations and activities are not welcome in British Columbia.

48. In West Coast LEAF's respectful submission, the legislature clearly intended section 7 of the *Code* to limit the constitutionally protected right to freedom of expression in furtherance of the *Code*'s purposes, specifically the goals of fostering a society in which there are no impediments to full and free participation in the economic, social, political and cultural life of the province, the prevention of discrimination and the elimination of persistent patterns of inequality associated with discrimination prohibited by the *Code*.
49. The Tribunal must next identify and define the scope of the *Charter* protections engaged by the Complaint. West Coast LEAF submits that these include:
 - a. The right to freedom of expression (s. 2(b) of the *Charter*);
 - b. The right to freedom of conscience and religion (s. 2(a) of the *Charter*); and
 - c. The right to equal treatment and freedom from discrimination (s. 15(1) of the *Charter*).

Freedom of Religion

50. The jurisprudence takes a broad and purposive approach to the interpretation of religious freedom. The right to religious freedom includes the right of individuals to entertain such religious beliefs as they choose, the right to declare their beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice, or by teaching and dissemination.²⁶
51. Freedom of religion will be engaged where an individual sincerely believes in a practice or belief that has a nexus with religion and interference with the ability to act in accordance with that belief or practice is more than trivial or insubstantial.²⁷
52. In the present complaint, the parties appear to agree that Mr. Whatcott's freedom of religion will be engaged by any finding that section 7 of the *Code* applies to the publications at issue. West Coast LEAF, as an intervenor in these proceedings, therefore accepts this as fact for the purposes of legal argument.

Freedom of Expression

53. As with freedom of religion, courts have taken a broad and purposive approach to understanding the scope of expressive freedoms under s. 2(b) of the *Charter*. The *Charter* does not, however, recognize an absolute protection for freedom of expression. Rather, when the harms of expression outweigh its benefits, freedom of expression may legitimately be curtailed.
54. The values underlying the guarantee of freedom of expression, are threefold:

The guarantee of free expression in s. 2(b) of the *Charter* has three core rationales or purposes: (1) democratic discourse; (2) truth-finding; and (3) self-fulfillment: *Irwin Toy Ltd v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 976. These purposes

²⁶ *Law Society of BC v. Trinity Western University*, 2018 SCC 32 ("TWU") at para. 62 and *R. v Big M. Drug Mart*, [1985] 1 S.C.R. 295 at p. 336.

²⁷ *TWU* at para 63, *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 65 and *Ktunaxa Nation v. British Columbia*, 2017 SCC 54 at para. 68.

inform the content of s. 2(b) and assist in determining what limits on free expression can be justified under s. 1.

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 MacLachlin 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.”²⁸

55. The framework for determining whether freedom of expression is engaged looks first to the definition of expression to assess whether the activity at issue falls within the scope of s. 2(b) and next inquires into whether there has been an infringement of that expressive activity. In order to fall within the scope of s. 2(b), an expressive activity need only convey meaning. There is no question that hate speech – which does convey meaning – falls within the scope of s. 2(b).²⁹ However, as Dickson C. J. reiterated in both *Taylor* and *Keegstra* – and as the Court affirmed again in *Whatcott* – hate speech “strays some distance from the spirit of s. 2(b) of the *Charter*.”³⁰ In the result, its suppression through human rights legislation does not severely curtail the values underlying the guarantee of freedom of expression.
56. In West Coast LEAF’s respectful submission, the Tribunal must appreciate the multiple dimensions of free expression and avoid focusing solely on Mr. Whatcott’s publications as simply an exchange of ideas. Democratic discourse and individual self-fulfillment, in particular, are at the core of the values enshrined in section 2(b)³¹ and the Tribunal must consider these values from both the Respondent’s and the Complainant’s perspectives to determine

²⁸ *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 47-50.

²⁹ *Keegstra*, *supra* at para. 34.

³⁰ *Whatcott*, *supra* at para 23

³¹ *Torstar*, *supra*. See also *Irwin Toy v. Québec (Attorney General)*, [1989] 1 S.C.R. 32 at p.976.

whether the harms of Mr. Whatcott’s expression outweigh its benefits.

57. Where expression which might be contrary to s. 7 of the *Code* is used expressly as a tool to try to prevent engagement of a targeted group in democratic discourse, that expression runs counter to the core values underlying s. 2(b). Far from furthering democratic discourse through the free exchange of ideas, the expressive activity at issue in the present case was clearly and unambiguously directed at preventing Ms. Oger – among other things, an advocate and representative of the trans community – from participating in public life by running for office, in furtherance of democratic discourse in the province of British Columbia.
58. In West Coast LEAF’s respectful submission, the same reasoning should apply to the Tribunal’s consideration of the underlying value of individual self-fulfillment. Where the expression at issue, while perhaps furthering the Respondent’s self-fulfillment, has as its aim, the specific denial of another individual’s or group’s self-fulfillment (the goal of excluding them from public life), a consideration of this *Charter* value should only serve to reinforce a reading of s. 7 which curtails such expression. In short, a finding that Mr. Whatcott has breached s. 7 of the *Code* by publishing the pamphlets is *consistent* with the values underlying section 2(b) of the *Charter*.

Equality Rights

59. Section 15(1) of the *Charter* provides that: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
60. Section 15(1) offers protection not just from discrimination on the basis of the grounds enumerated therein – it also protects from discrimination on the basis of analogous grounds, including on the basis of gender identity or expression.
61. The value underlying section 15(1) of the *Charter* is that of substantive equality. Substantive equality is concerned with equality of outcome, rather than opportunity. A substantive

equality analysis requires that discrimination be considered contextually. Section 15(1) in particular, demands a “flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group.”

62. For women, including and perhaps especially transgender women and other particularly vulnerable groups of women, substantive equality in relation to running for and holding public office must include a consideration of the unique and specific barriers to participation they face. In particular, it is increasingly recognized that the context into which women step when entering or attempting to enter public life includes being targets of virulent speech, sexual harassment, threats of violence and physical violence, including rape and murder³².
63. Dr. Mona Lena Krook, professor of political science at Rutgers University, writes: “A growing body of documentation is casting light on the diverse, creative and nefarious obstacles to women’s political participation around the world”, including efforts to harm, intimidate, and harass which are instigated by opponents of women’s participation in political life and have as a goal sending a broad and unambiguous message that “women *as a group* should have no part in political life”.³³
64. Dr. Krook emphasizes that certain women seem “particularly susceptible to attack”, giving the example of racial or ethnic minorities and younger women, which may further harm “inclusion by exacerbating other forms of inequality”.³⁴ West Coast LEAF submits that, in light of transgender women’s well-documented extreme marginalization and vulnerability as discussed above, they are also particularly susceptible to the kinds of attacks documented in the literature.
65. Notably, one of the key elements animating the harassment and violence experienced by women in politics is the goal of deterring their participation in order to preserve traditional and stereotypical gender roles. One of the ways this goal is accomplished is harassment and

³² Mona Lena Krook, “Violence Against Women in Politics”, (2017) Vol 28 No. 1 *Journal of Democracy* p. 75. Krook and other researchers use “violence” in this context as an umbrella concept that includes but is not limited to the physical: Krook p. 78.

³³ Krook at p.75.

³⁴ Krook at p.83.

speech that questions the sexual identity and morality of politically active women.³⁵

66. Data indicates that violence against politically active women is prevalent worldwide. In fact, the prevalence of sexual harassment of women in government in Canada has been recognized by Parliament: an all-party committee developed a process for handling sexual harassment complaints within Parliament in addition to calling for Members of Parliament to receive training on a code of conduct and take a pledge condemning sexual harassment.³⁶
67. West Coast LEAF submits that this targeting of politically active women for gender-based harassment and violence must also be taken into account when considering the individual self-fulfillment and equality of all women, including transgender women:

The right of women to participate in public affairs, including by voting and standing for election, is an internationally recognized human right. It is important to consider genuine democratic elections within an international human rights framework using a human-rights based approach. Through participation in elections women exercise, women exercise their human rights to participate in political and public life, in particular their right to vote and to be eligible for positions in all public elected bodies on equal terms with men, in line with the Convention on the Elimination of All Forms of Discrimination against Women (art.7) Since elections are a key moment in which power is established and voting rights are realized, violence against women in elections remains a major barrier to the realization of women of their right to participate in political and public life and constitutes a specific category of violence against women in politics.³⁷

68. In the words of the former Secretary of State for the United States, 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.”³⁸
69. Further and in any event, in West Coast LEAF’s submission, the impact of violence, harassment, threats, and vilification of women in or trying to enter public life have serious adverse impacts on democracy itself. This too must be considered in the contextual analysis:

³⁵ Krook at p. 78; *Report of the Special Rapporteur on violence against women, its causes and consequences on violence against women in politics*, UNGAOR, 73d Sess, UN Doc A/73/301, (2018) at para. 16.

³⁶ Krook at p. 86.

³⁷ *Report of the Special Rapporteur, supra* at para 32.

³⁸ Krook at p. 85.

Efforts to harm, intimidate, and harass women should thus be seen as a serious threat and affront to democracy, rather than dismissed as an unfortunate feature of “politics as usual”... Such actions, moreover, deprive citizens of exposure to full debate and to the contributions that women can make to solving society’s problems. Recognizing and combatting such abuses is an emerging global priority, essential both to a just equality between women and men and to the development of robust democracies.³⁹

70. Beyond the political sphere, however, West Coast LEAF submits that the substantive equality rights of transgendered and gender diverse persons must be central to any decision the Tribunal will make in the present case. The right to self-identification and gender expression goes beyond mere self-fulfillment to the very core of an individual’s identity and existence. Indeed, it is fundamental to, and inseparable from, the human dignity of transgendered and gender diverse persons.
71. Hate speech and discriminatory publication provisions, like section 7 of the *Code*, are essential to the equality rights, and access to justice for, transgender persons. As noted by Sopinka J. in *Zurich Insurance*, human rights legislation like the *Code* is “often the final refuge of the disadvantaged and disenfranchised.”⁴⁰
72. There is perhaps no more marginalized group in Canadian society today than transgendered persons. It is therefore incumbent on the Tribunal, in West Coast LEAF’s respectful submission, to ensure that any interpretation of section 7 (a) or (b) of the *Code*, takes a robust and contextual approach to protecting the equality rights of transgendered persons.

CONCLUSION

73. In summary, West Coast LEAF submits that in applying the tests for both sections 7(1)(a) and 7(1)(b) the Tribunal must identify and consider the *Charter* rights and values that are engaged, balancing those rights and values, with the pressing and substantial purposes of the *Code*. The Tribunal’s consideration must be contextual and must take into account the following:
- a. the highly specific kinds of speech used to vilify transgender individuals and gender non-conforming communities more broadly;

³⁹ Krook at p. 75.

⁴⁰ *Zurich Insurance, supra* at para. 18.

- b. how that highly specific speech seeks to erase and deny transgender people's very existence in a manner that vilifies them as immoral, deceitful, and mentally ill;
- c. the acute vulnerability of transgender individuals to violence, discrimination, harassment, and marginalization as well as how virulent transphobic speech is likely to contribute to the continued exposure of transgender people to mistreatment; and,
- d. the critical importance of ensuring transgender women, and indeed all women and gender diverse people, have equal access to public life in order to achieve substantive equality.

74. In West Coast LEAF's submission, taking into account the context, purposes, legislative intent and plain language of the *Code* can lead to no conclusion other than that Ms. Oger's complaint – based as it is on largely uncontested facts – must succeed. The expression here at issue does not contribute to the values underlying s. 2(b) and, in fact, undermines them, while any infringement on the Respondent's freedom of conscience and religion is minimal. In contrast, Ms. Oger and other transgender peoples' equality, dignity, and safety interests are fundamentally and significantly impaired by the hate speech to which they were exposed in this publication.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF THE INTERVENOR,
WEST COAST LEAF.**

Date: December 14, 2018

LINDSAY A. WADDELL

RAJWANT MANGAT