REPORT AND RECOMMENDATIONS OF BOARD OF REVIEW

Appointed pursuant to s. 44(1) of the Canada Post Corporation Act to Review the Interim Prohibitory Orders dated May 26, 2016
Issued Against Leroy St. Germaine, Laurence Victor St. Germaine and James Sears pursuant to s. 43(1) of the Canada Post Corporation Act

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Appearance and Materials List

Oral Submissions at Hearing on January 3, 22 – 26, and February 26, 2018 (in order of appearance):

1. Andrew Guaglio, for James Sears and Laurence St. Germaine
2. Paul Fromm, for Canadian Association for Free Expression
3. Louis Century, for the Canadian Civil Liberties Association
4. Professor Jamie Cameron, for the Centre for Free Expression
5. Raychyl Whyte
6. Lawrence McCurry
7. Alyssa Peeler, for the League for Human Rights of B'nai Brith Canada
8. Derek Richmond, for Canadian Union of Postal Workers, Scarborough Local
9. Mark J. Freiman, for the Centre for Israel and Jewish Affairs
10. David Reiter, for the Friends of Simon Wiesenthal Centre
11. Richard Warman
12. Kelly Fairchild
13. Sam Kary

Materials Received From:

1. Frank Addario, Andrew Guaglio, and Samara Secter,
   Addario Law Group LLP
   Lawyers for James Sears and Laurence St. Germaine
2. Michael H. Morris and Roger Flaim,
   Attorney General of Canada
   Counsel for the Minister of Public Services
3. Paul Fromm, Director
   Canadian Association for Free Expression
4. Jessica Orkin, Christine Davies, and Louis Century,
   Goldblatt Partners LLP
   Lawyers for Canadian Civil Liberties Association
5. Jamie Cameron, Professor and Dr. James Turk, Director
   Centre for Free Expression
6. Leo Adler and Alyssa Peeler,
   Leo Adler Law
   Lawyers for the League for Human Rights of B'Nai Brith Canada
7. Derek Richmond,
   Canadian Union of Postal Workers, Scarborough Local
8. Mark J. Freiman,
   Lerners LLP,
   Lawyers for Centre for Israel and Jewish Affairs
9. Patrick Clohessy
10. Richard Warman
11. Lilian Ma, Executive Director,
    Canadian Race Relations Foundation
12. Kelly Fairchild
13. Lawrence McCurry

The Honourable Carla Qualtrough, P.C., M.P.
Minister of Public Services and Procurement
11 Laurier St.,
Gatineau, Quebec,
Canada K1A 0S5
Building Portage III
Floor 18A1

Dear Minister Qualtrough:

Re: Interim Prohibitory Orders Issued Against James Sears, Leroy St. Germaine and Laurence Victor St. Germaine dated May 26, 2016, pursuant to s. 43(1) of the *Canada Post Corporation Act* (*"CPCA"*) and in the matter of a Review under s. 44(1) of the *CPCA*

We are writing to you with our report and recommendations pursuant to s. 45(3) of the *CPCA*.

BACKGROUND

Mr. James Sears ("Sears") is the editor-in-chief of a publication called *Your Ward News.* The publication is owned by Mr. Laurence Victor St. Germaine ("St. Germaine") who is also known as Leroy St. Germaine.

The then Minister of Public Works and Government Services (the "Minister") wrote to Sears and St. Germaine (collectively referred to as the "Affected Persons") and advised them that she believed on reasonable grounds that by means of mail they were "*either committing or aiding in the commission of an offence*" in "*sending or causing to be sent, items that include hate propaganda in contravention of s. 319(2) of the Criminal Code and/or that include the publication of defamatory libel in contravention of s. 300 of the Criminal Code".* The letters enclosed interim prohibitory orders dated May 26, 2016, issued to the Affected Persons pursuant to s. 43(1) of the *CPCA* prohibiting the delivery of mail posted by either of them "*or acting through an agent, or acting under any other personal or firm name and/or style"* (collectively referred to as the "IPO").

On June 6 and 9 2016, the Affected Persons requested a review of the matter by a board of review pursuant to s.43(2)(b) of the *CPCA.* This Board of Review (the "Board"), was appointed on December 9, 2016, pursuant to s. 44 of the *CPCA*, and given a mandate "*to review the matter referred to it where the Minister, in the making of the order, had reasonable grounds to believe that the Affected Persons were by means of mail, either committing or aiding the commission of an offence in sending, or causing to be sent, material that included hate propaganda in contravention of s. 319(2) of the Criminal Code and/or in the publication of defamatory liable in contravention of s. 300 of the Criminal Code".* The Board's mandate did not involve the adjudication of the issues raised before it nor did it involve the determination of any civil or criminal liability.

1) Standing

The Board published notices of its appointment and invited any person who was a "*person affected*" or a "*person who has an interest in the matter*" and who wished to participate in the review process to notify it. The Board received several requests for standing in this proceeding. It granted standing to the Minister and to the Affected Persons. It also granted standing to the following persons and organizations (collectively referred to as the "Interested Persons"):

1) Those persons alleged to be the subject of defamatory libel, namely:

   Arthur Potts, MPP
   The Honourable Catherine McKenna, PC MP
   Councillor Janet Davis
   Cyrus Poonawalla
   Dalton McGuinty
   George Soros
   His Worship Mayor John Tory
   Olivia Chow
   The Honourable Kathleen Wynne, MPP
   The Right Honourable Justin Trudeau, PC MP
   Sir Evelyn de Rothschild
   The Right Honourable Stephen Harper, PC
   The Honourable Thomas Mulcair, PC MP
   Warren Kinsella
   The Honourable Michael Coteau, MPP
   Patrick Clohessy

2) Interested Persons, namely:

   Anna-Maria Goral
   Asim Ozses
   Dawn Chapman
   Ian Davey
   Jill Fairbrother
   Joanne Ingrassia (Ms. Ingrassia later withdrew her request for standing)
   Kelly Fairchild
   Lawrence McCurry
   Lisa Kinsella
   Martin Gladstone
   Sam Kary
   Vanessa Milne
   Raychyl Whyte
   Richard Warman
   Christine McLean

3) Community Organizations and Public Interest Groups, namely:

The League for Human Rights of B'nai Brith Canada ("BBC")
Canadian Association for Free Expression ("CAFE")
Canadian Journalists for Free Expression
Canadian Race Relations Foundation ("CRRF")
Centre for Free Expression ("CFE")
The Canadian Civil Liberties Association ("CCLA")
Derek Richmond – Canadian Union of Postal Workers, Scarborough Local ("CUPW")
East Enders Against Racism
Friends of Simon Wiesenthal Centre ("FSWC")
The Centre for Israel and Jewish Affairs ("CIJA")

The Board's decision on this issue dated April 25, 2017 is attached as Schedule A.

2) Notice of Constitutional Question

The Board received a letter dated April 21, 2017, from the office of the Attorney General of Canada (the "AG") on behalf of the Minister advising that counsel for the Affected Persons had filed a Notice of Constitutional Question. That Notice was filed with the Board and marked as "Exhibit 1" in this proceeding. Counsel for the Affected Persons filed an Amended Notice of Constitutional Question on June 5, 2017, which was marked as "Exhibit 2".

3) Preliminary Issues

On April 25, 2017, the Board held a hearing to address many of the preliminary issues which had been raised by the Affected Persons and some of the Interested Persons. The Board held further hearings on August 9 and 10, 2017. A list of the preliminary issues and the Board's rulings with respect to them are set out in the Board's decision dated November 2, 2017 which is attached as Schedule B.

4) Request for Adjournment Pending Outcome of Criminal Proceedings

On November 15, 2017, the Affected Persons were both charged with wilfully promoting hatred against Jews and women, contrary to s.319(2) of the *Criminal Code.* The charges arose from comments published in *Your Ward News.* The Board received requests from Warren Kinsella, Lisa Kinsella and Richard Warman to adjourn the hearings *sine die* pending disposition of the criminal charges laid against the Affected Persons. The request was supported by BBC, FSWC, CIJA and Sam Kary. It was opposed by CAFE and the Affected Persons who asked the Board to proceed with its review.

The Board convened a hearing on November 27, 2017 and denied the request for an adjournment. Its decision dated December 12, 2017 is attached as Schedule C.

HEARING ON THE MERITS

Following its ruling on the preliminary issues the Board convened hearings on January 3, 22 – 26, and February 26, 2018, to hear evidence and submissions on the merits of this matter. The issues raised at the hearing were:

1. Whether the IPO should be revoked due to a lack of procedural fairness because the Minister failed to provide reasons for her decision to issue the IPO, the *CPCA* lacks procedural safeguards and because of the delay in the board of review process;
2. Whether there were reasonable grounds to believe that the Affected Persons had by means of mail, sent or caused to be sent items that included hate propaganda contrary to s.319(2) of the *Criminal Code;*
3. Whether there were reasonable grounds to believe that the Affected Persons had by means of mail, sent or caused to be sent items that included defamatory libel contrary to s. 300 of the *Criminal Code;*
4. Constitutional Issues:
    a. Whether ss. 43(1) and 45(3) of the *CPCA* are unconstitutional because they violate s.2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and are not saved by s. 1 of the *Charter*;
    b. Whether the Minister in issuing the IPO failed to balance the rights of the Affected Persons under the *Charter* against the objectives of the *CPCA;*
5. What recommendations should be made to the Minister following the Board's review and what factors should affect those recommendations.

The Affected Persons, Interested Persons and the Board faced challenges during the hearing because of the Minister's failure to provide reasons for the issuance of the IPO. In its ruling of November 2, 2017, the Board concluded that the Minister failed to comply with her statutory duty under s. 43(1) of the *CPCA* to provide reasons for her decision. The AG did provide the Board with a list of the persons alleged to have been the subject of defamatory libel on March 17, 2017. However, it was only after the evidence on the merits of the matter had been completed that the AG identified the target of the alleged hate speech as Jews.

The absence of reasons was exacerbated by the fact that the AG did not participate in the hearing on the merits and only provided written submissions on the issue of the constitutionality of the *CPCA*.

The ambiguous wording of the *CPCA* also provided challenges. The statute and its regulations lack clarity on the conduct of proceedings before a board of review including time limits for the appointment of a board or direction as to how a board is to conduct its affairs. There is

ambiguity regarding the remedies available to the Minister under ss. 43(1) and 45(3) of the *CPCA.* More is said about these issues later on in this report.

1) Evidence

The AG provided the Affected Persons and those who were granted standing with a binder described as "material reviewed by the Minister in rendering her decision to issue a prohibitory order" (the "Material") which was marked as Exhibit 6. CIJA filed a Compendium which included issues of *Your Ward News* from April 2015 to Winter 2017 (after the date the IPO was issued). It was marked Exhibit 9.

Derek Richmond was the only person who chose to give *viva voce* evidence on the merits of the matter at the hearing. Mr. Richmond gave evidence on behalf of CUPW and on his own behalf as a recipient of *Your Ward News*. Mr. Richmond reviewed portions of *Your Ward News* and explained how, in his view, some of the contents of *Your Ward News* did not comply with Canada Post's rules for mail distribution. He also gave evidence that members of CUPW had complained to the union that they were being harassed on their routes by people who did not wish to receive *Your Ward News*. As employees of Canada Post they were legally obliged to deliver the publication unless people followed Canada Post's process for cancelling the delivery of mass mail. Most people were unaware of this procedure and thought a simple sign on their door should suffice. CUPW has filed a grievance on behalf of some of these carriers alleging that Canada Post is not providing them with a safe workplace. That grievance had been submitted to arbitration, but as of the date of Mr. Richmond's testimony no date had been set for the arbitration.

The Board also received two sworn Affidavits into evidence. The Affidavit of Riaz Sayani-Mulji sworn January 3, 2018 was marked as Exhibit 8. It described Mr. Sayani-Mulji's review of the Canada Post website. The Affidavit of Noah Shack sworn January 4, 2018 was marked as Exhibit 10. It described the International Holocaust Remembrance Alliance and its definition of antisemitism.

2) Submissions

Participants were asked to file written submissions with respect to the constitutional challenges raised in this matter, but were not required to file written submissions if they wished to address any other issues. Written submissions were received from the AG, the Affected Persons, CAFE, CCLA, CFE, BBC, Derek Richmond, CIJA, FSWC, CRRF, Patrick Clohessy, Richard Warman, Sam Kary, and Kelly Fairchild. All of these participants, except for the AG, CRRF and Mr. Clohessy, also appeared before the Board to make oral submissions. Oral submissions were also received from Raychyl Whyte and Lawrence McCurry.

CONCLUSION

After reviewing the evidence and the written and oral submissions described above the Board has reached the following conclusions:

1. This process was not procedurally unfair such as to justify an unconditional revocation of the IPO;
2. There were reasonable grounds to believe that the Affected Persons have, by means of mail, sent or caused to be sent items that include hate propaganda contrary to s.319(2) of the *Criminal Code;*
3. There were reasonable grounds to believe that the Affected Persons have, by means of mail, sent or caused to be sent, items that include defamatory libel contrary to s.300 of the *Criminal Code;*
4. a) Ss. 43(1) and 45(3) of the *CPCA* are constitutional;

   b) It is not clear whether the Minister was under any obligation to balance the *Charter* rights of the Affected Persons against the objectives of the *CPCA* when issuing the IPO and in the absence of reasons it is not possible to determine whether she did so.

Our analysis and our recommendations follow:

ANALYSIS

1) Procedural Fairness

a) Absence of Reasons

The Affected Persons argued that the proceedings before the Board were procedurally unfair because the Minister failed to provide reasons for the issuance of the IPO. They asked that the Board recommend to the Minister that the IPO be revoked on this basis.

The Affected Persons claimed that they have been hampered in providing a full defence by the failure of the Minister to provide reasons for issuing the IPO. On May 1, 2017, the AG provided the participants and the Board with the Material. At no time did the AG indicate what portions of the Material allegedly constituted either defamatory libel or hate propaganda, though some sections were physically highlighted. On March 31, 2017, the AG provided the names of individuals who may have been the subject of defamatory libel. On January 3, 2018 (after all the evidence had been tendered) the AG advised the Board by letter dated January 3, 2018, that it took the position that the alleged hate propaganda was directed towards Jews.

On August 9 and 10, 2017, the Board held a hearing to address a number of preliminary issues that had been raised by some of those granted standing. One of those issues was the following:

1. Has the Minister complied with the obligation to provide reasons under subsection

> 43(2) of the *CPCA*? If not, is the failure to provide reasons fatal to these proceedings? If there is a failure to provide reasons and this omission is not fatal, can it be cured and if so, how can it be cured?

The Affected Persons took the position that while the Minister had not complied with her obligation to provide reasons for the issuance of the IPO, the Board should nevertheless proceed to review the matter. At paragraph 17 of their Factum they stated:

> For administrative efficiency and fairness, it is appropriate in this case for the Board to review the matter without the reasons of the Minister, **consider the evidence, consider the legal requirements of the statute and the offences,** consider the constitutionality of the matter and make a recommendation. (emphasis added).

During the hearing, counsel for the Affected Persons was specifically asked whether the Board should proceed with this review if it were to find that the Minister had not complied with her obligation to provide reasons under s. 43(2) of the *CPCA.* It was the position of the Affected Persons' counsel that the provision of reasons was not a condition precedent to the Board proceeding. She asked the Board to proceed with the hearing stating that "fairness dictates no less". Counsel was also asked whether she saw it as the Board's role to go through the excerpts of the publication relied upon by the Minister to determine whether there were reasonable grounds to believe that the postal system was being used to commit an offence. She responded that *"it's incumbent on the Board to go through it".*

In the Board's ruling of November 2, 2017, the Board concluded that the Minister failed to comply with her obligations under s. 43(2) of *the CPCA* to provide reasons for issuing the IPO. The Board indicated that at the request of the Affected Persons and others, it would proceed with its review and agreed that the provision of reasons was not a condition precedent to proceeding. The Board said that it would address the failure to provide reasons in its final report and recommendations.

The Board advised the Affected Persons that if they required an adjournment after hearing the evidence of other Interested Persons the Board would be open to such a request.

By the time of final submissions, the Affected Persons had both been charged criminally. They declined to give evidence before the Board because they claimed it could potentially prejudice their criminal trials. They were offered an opportunity for an adjournment, pending the outcome of the criminal proceedings, but that offer was rejected by their counsel. They reiterated their position in a letter to the Board dated February 26, 2018. (See Schedule D).

In their final submissions, the Affected Persons changed their position and submitted that the Board should only address the constitutional issues. They argued that the failure to provide reasons rendered the process procedurally unfair and that dealing with the issue of hate speech

created further unfairness by forcing the Affected Persons to choose between their s. 2(b) rights and their rights to remain silent.

In the Board's opinion the process has not been procedurally unfair to the Affected Persons. The Affected Persons asked the Board to proceed in the absence of reasons. The Affected Persons opposed the request for an adjournment once they were charged criminally. The Affected Persons contemplated that the Board would hear evidence regarding the issues of criminal conduct and in fact had earlier submitted that the Board should consider this evidence "for administrative efficiency and fairness". Having acceded to the requests of the Affected Persons and having offered them adjournments at critical times in the process, the Board is not prepared to limit its report to constitutional issues only.

However, the Board still must address the effect of the Minister's failure to provide reasons.

The Board was given a broad mandate to "review" this matter. However, it does not sit in judicial review of the decision to issue an IPO nor does it sit on appeal of that decision. It has no jurisdiction to revoke or affirm the Minister's order. Its only jurisdiction is to review and thereafter report and make recommendations.

It is clear from the language used in s. 45(1) of the *CPCA* that it was not contemplated that the Board would only review the evidence that was before the Minister when she issued the IPO. If the Board was so restricted it would not have been directed under the *CPCA* to hear evidence from any "interested person". Other interested persons may have evidence to give or submissions to make that were not considered by the Minister. Therefore, even with the benefit of reasons, the possibility existed that the Affected Persons would be met with evidence and/or submissions not covered in the Minister's reasons. It is the role of the Board to consider all this material when reviewing the matter and making its report.

In this case all of the evidence of hate propaganda and defamatory libel before the Board was contained in the Material provided to the Affected Persons before the hearing on the preliminary issues and in the Compendium.

The Board has tried to ensure that the Affected Persons were not at a disadvantage as a result of the Minister's failure to provide reasons. While the absence of reasons is regrettable and a violation of s. 43(2) of the *CPCA,* in the Board's view it is not a basis for recommending that the IPO be revoked.

b) Lack of Procedural Safeguards

The Affected Persons, CAFE, and CFE submitted that the IPO should be revoked because the *CPCA* lacks procedural safeguards. The *CPCA* contains no timelines within which the Minister must appoint a board of review, no timelines for a board of review to commence or complete

its review, no requirements regarding burden of proof and no automatic review mechanisms in the case of a final order. CLE relied upon US jurisprudence to the effect that the absence of timelines aggravated a constitutional violation. However, the Board was not directed to any authority which suggested that this line of cases has been adopted in Canada.

A similar argument was made in *Little Sisters Book and Art Emporium v. Canada,* [2000] 2 SCR 1120 ("*Little Sisters"*). In that case the appellant argued that customs legislation lacked the basic procedures necessary for fair and accurate determination of whether something was obscene and that the regulatory procedures set out in the legislation were so "cumbersome and procedurally defective" that the legislation could not be administered in accordance with *Charter* rights. The appellants complained that there was no provision for a hearing and that no reasons were typically given for prohibition.

The Court held that it was open to Parliament in creating this type of government machinery to lay out a broad outline in the legislation and leave its implementation to regulation by the Governor-in-Council or departmental procedures. The Court found that the legislation was quite capable of being administered in a manner that respected the *Charter* and that any obstacles experienced by the appellants were not "inherent in the statutory scheme". The Court noted that a failure at the implementation level should be addressed at the implementation level and upheld the legislation notwithstanding its procedural deficiencies.

In our opinion the principles in *Little Sisters* apply to this legislation. As in *Little Sisters*, the statute is silent on timelines for a board of review. The statute does not mandate delay; it is silent. Ordinarily, when a statute is silent on procedure, the common law fills the omission of the legislature. The court held that these criticisms were really criticisms of the operation of the statutory scheme rather that criticisms of the scheme itself. The Court noted at para. 78 "*The only expressive material that Parliament has authorized Customs to prohibit as obscene is material that is, by definition, the subject of criminal penalties for those who are engaged in its production or trafficking (or have possession of it for those purposes)*". Similarly, under the *CPCA* an IPO only issues in the face of conduct which could be the subject of criminal penalties.

The *CPCA* contains a multi-step procedure which constrains the Minister's exercise of discretion and allows affected persons to participate in the process to obtain revisions to, or revocation of, the IPO. To the extent that freedom of expression might be affected by an IPO, the statutory regime ensures any such impact is subject to review.

In the Board's opinion it was open to Parliament to lay out a broad outline in the *CPCA* and leave the implementation to regulation or procedure. Nevertheless, for the reasons discussed later in this report, the Board recommends that the *CPCA* and/or its regulations be amended to provide more procedural guidance to the Minister in issuing an IPO.

c) Delay

The Affected Persons, CAFE and CFE argued in the alternative that if the lack of procedural protections in the statute does not make the IPO invalid, the implementation of the statute and the pace with which it was administered indicate "a casual attitude" towards the Affected Persons' rights. In argument, counsel for the Affected Persons referred specifically to a significant delay in the appointment of this Board. CAFE submitted that a delay of seven months in appointing this Board was "unconscionable".

The process set out in *CPCA* is, by its very nature, time consuming. However, no reason has been provided for the delay of approximately seven months in appointing the Board. The CPCA is silent on timelines for the appointment of a board of review. There is nothing in the statute itself that prevents it from being administered in a manner that is consistent with procedural fairness principles and the rights guaranteed under the *Charter.*

The Board was not provided with any case law in support of the position of the Affected Persons that the IPO process was procedurally unfair because of a delay of this length. Further, once the Board was appointed it attempted to proceed in an efficient manner and sought input from the participants on the best way to proceed in an efficient and expeditious manner. Given that board of review proceedings are mostly unchartered territory (there have only been three prohibitory order cases in the last 35 years) and given the lengths the Board has taken to ensure adequate process, and the additional complexity raised in the Notice of Constitutional Question, it does not appear to the Board that the delay has been egregious or that it has brought the administration of justice into disrepute.

2) Hate Speech

The Material and the Compendium formed the basis for all of the submissions received by the Board on the issues of hate speech and defamatory libel.

CAFE, Raychyl Whyte and Lawrence McCurry argued that the issues of *Your Ward News* before us did not contain hate speech. Richard Warman, BBC, Sam Kary, Kelly Fairchild, FSWC, CRRF, and CIJA all provided the Board with submissions to the effect that *Your Ward News* did contain hate speech. The AG took no position with respect to this part of the proceeding. The Affected Persons took the position that the standard of proof required to establish wilful promotion of hate speech was not satisfied. The Board disagrees and will address this issue later in this report. The Affected Persons also argued that the requisite *mens rea* does not exist to find that *Your Ward News* contained hate speech. While a lack of *mens rea* may be a defence to criminal charges, this is not a consideration in the determination of whether the Minister had reasonable grounds to believe that the Affected Persons were sending or causing to be sent items that included the publication of hate speech.

The offence of wilful promotion of hatred is set out in s. 319(2) of the *Criminal Code* which provides:

> **319 (2)** Every person who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> **(a)** an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> **(b)** an offence punishable on summary conviction.

The Supreme Court of Canada has provided significant jurisprudence on the issue of what constitutes hate speech. In *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11 ("*Whatcott*"), Justice Rothstein adopted the language in *Canada Human Rights Commission v. Taylor*, [1990] 3SCR 892 ("*Taylor*") at p. 928, which defines "*hatred*" as detestation, extreme ill-will and the failure to find any redeeming qualities in the target of the expression. Hatred refers to "*unusually strong and deep-felt emotions of detestation, calumny and vilification*". Hatred connotes emotion of an intense and extreme nature. To promote hatred is to instill detestation, enmity, ill will and malevolence in another. The Court in *Whatcott* stated at para. 41:

> 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.

The types of expression and devices used to expose groups to hatred were summarized as the "*hallmarks of hate*" in *Warman v. Kouba*, ("*Kouba")* 2006 CHRT 50 (CanLII), at paras. 24-81, and cited with approval in *Whatcott*. Paragraphs 44 and 45 of *Whatcott* provide:

> [44] … Hate speech often vilifies the targeted group by blaming its members for the current problems in society, alleging that they are a "powerful menace" (para. 24); that they are carrying out secret conspiracies to gain global control (*Citron v. Zündel (No. 4)* (2002), 41 C.H.R.R. D/274 (C.H.R.T.)); or plotting to destroy western civilization (*Taylor*). 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" (*Citron*, at para. 140); a "parasitic race" or "pure evil": *Warman v. Tremaine (No. 2)*, 2007 CHRT 2, 59 C.H.R.R. D/391, at para. 136.
>
> [45] Exposure to hatred can also result from expression that equates the targeted group with groups traditionally reviled in society, such as child abusers, pedophiles (*Payzant v.*

McAleer (1994), 26 C.H.R.R. D/271 (C.H.R.T.), aff'd (1996), 26 C.H.R.R. D/280 (F.C.T.D.)), or "deviant criminals who prey on children": *Warman v. Northern Alliance*, 2009 CHRT 10 (CanLII), at para. 43. 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" (*Northern Alliance*, at para. 43); "incognizant primates", "genetically inferior" and "lesser beasts" (*Center for Research-Action on Race Relations v. www.bcwhitepride.com*, 2008 CHRT 1 (CanLII), at para. 53); or "sub-human filth" (*Warman v. Winnicki (No. 2)*, 2006 CHRT 2, 56 C.H.R.R. D/381, at para. 101) are examples of dehumanizing expression that calls into question whether group members qualify as human beings.

CIJA, Richard Warman and FSWC noted several instances of hate speech in editions *Your Ward News* that were published before the IPO was issued. These instances include many of the hallmarks of hate identified i*n Kouba.* For example, one hallmark is *"calls to take violent action against the targeted group." Your Ward News* contains both text and visual references which encourage violent action:

- The covering page of the April 2015 edition contains a call to action for Canadian postal workers to continue delivering *Your Ward News*. The message to letter carriers is headed by a picture of Jesus Christ, wearing a crown of thorns and pointing to the reader. The image is an allusion to more famous recruitment posters from the second world war. In the image, Christ is carrying a rifle and is bloodied on his chest and arms. Beside him is a grenade. At the end of Sears' message is a common refrain used frequently in *Your Ward News*: "*EXPEL THE PARASITE!*". A clear inference can be made here: there is a violent struggle to be taken up by Christians against Jews.

Another hallmark is that, *"messages communicate the idea that nothing but the banishment, segregation or eradication of this group of people will save others from the harm being done by this group." Your Ward News* repeatedly employed the slogan "*EXPEL THE PARASITE!*". Most frequently, the paper identifies the parasite as "*ZioMarxists*", or some variation of that phrase. As argued by CIJA and FSWC, this phrase was frequently analogized to Jews, in particular the "*Babylonian Talmudic*" Jews, i.e. Ashkenazi Jews. It was made clear that the desired response to finding a parasite is not accommodation, but wholesale eradication.

Another hallmark of hate involves messages using *"true stories', news reports, pictures and references from purportedly reputable sources to make negative generalizations about the targeted group."*. These acts are embellished in the publication and then used to generalize about the entire Jewish community, both inside and outside of Israel. These examples also resonate with the hallmark of a group portrayed as *"dangerous or violent by nature".*

- The September 2015 issue of *Your Ward News* presents the story of two Israelis who murdered members of a Palestinian family (pg. 3, Tab 6, September 2015 issue, Compendium, Exhibit 9), in an article entitled, "*Jewish Terrorists Burn Palestinian Child Alive."* The article noted: "*It is not the first time Jews have burned Palestinians alive. They justify these acts based on the Satanic Jewish Babylonian Talmud, a book which would be banned in Canada as "Hate speech"*). The "They" in this final sentence generalizes this justification to all Jews. This unquestionably criminal act is then generalized to the entire Jewish community. *Your Ward News* argues "*The ZioMarxist-controlled mainstream media, the Canadian Jewish community, and all three major party leaders, continue to ignore acts of genocide and terror perpetrated against Palestinians by bloodthirsty Zionist Talmudic Jews."* The CIJA noted that the phrase "*Talmudic Jew*" is used repeatedly in a derogatory manner to portray Jews as being under the spell of a satanic version of the Talmud. The article concludes by saying "*Jews are obsessed with myths about gas chambers and ovens. But there is one* ***REAL*** *oven that the Zionist Talmudic Jews who murdered this boy should be worried about:* ***GOD'S OVEN'.***

The dehumanizing of subjects *"through comparisons to and associations with animals, vermin, excrement, and other noxious substances"* is another hallmark of hate. Examples of this practice can be found in images of Jews with horns and other non-human features, suggesting a satanic nature and/or a non-human nature (pg. 7 and pg. 11, Tab 12, Summer 2016, Compendium, Exhibit 9). Moreover, the publication regularly portrays a Jewish lawyer working alongside a rat holding a bag of money (pg. 8, Tab 12, Summer 2016, Compendium, Exhibit 9). The implication is clear: these individuals work with and among vermin.

Mr. Warman submitted that hate speech also has the hallmark characteristic of portraying a group as *"a powerful menace that is taking control of the major institutions in society and depriving others of their livelihoods, safety, freedom of speech and general well-being."* Examples of this hallmark include:

- References to conspiracies between Jewish financiers, Israeli intelligence, and the media to create "*false flag*" events, which are then used as a pretext for war. For example, in the December 2015 issue, at page 10, there is a claim that the Israeli government was responsible for the September 11 attacks on the World Trade Centre, that the Mossad warned Jewish Americans to leave the towers, and that the Mossad subsequently produced false evidence that Suddam Hussein had weapons of mass destruction. There is also a claim that "ZioMarxists" staged a false flag attack on the Charlie Hebdo magazine and that Jews and Israelis are responsible for training the Islamic State. (pg. 11, Tab 9, December 2015 Edition, Compendium, Exhibit 9). This is all drawn together in a claim that the way to world peace is to point all nuclear

weapons at Tel Aviv, on the grounds that the Israelis will then stop their ceaseless creation of war. (pg. 11, Tab 9, December 2015 Edition, Compendium, Exhibit 9).

- Several instances in which it is implied that Jews have control over the global economy and over Canadian politicians. In doing so, some Jews are portrayed as non-human. For example, the cover of the August 2015 issue includes an image of Lord Rothschild with a forked tongue and green claws rather than fingernails (cover, Tab 5, August 2015 issue, Compendium, Exhibit 9). He is controlling puppet strings with politicians on the other end of them. The implication is one of control by a wealthy, evil, and not fully human Jew. Similar implications can be drawn from the cover of the September 2015 issue.

- Reference in the December 2015 issue to the allegedly Jewish President of France, François Hollande being involved in a conspiracy with NATO to remove ISIS from power in Syria in order to install a bank controlled by Jewish bankers (pg. 17, Tab 9, December 2015 Edition, Compendium, Exhibit 9). The implications here are clear: Jews and Israelis are responsible for many wars in the world, and these wars are often prosecuted for the benefit of Jewish commercial interests.

- Claims that the Canadian government is involved in a Jewish conspiracy (pg. 10, Tab 10, January 2016 Edition, Compendium, Exhibit 9) to open Canada to a "fifth column" of Syrian refugees. The article claims that the real danger comes not from the Syrian refugees, but from the Israeli spies among them, who will commit "false flag" attacks. The article further asserts that Jews have regularly acted as fifth columns, disloyal to their host nations. The article recounts a long apparent history of Jews killing Christians, including Bolshevik Jews killing 50 million Christians in the Russian Revolution of the early 20th century. This is then linked into a larger revival of Orthodox Christianity, which is opposed by liberal Jews who support access to abortion and homosexual liberty. As counsel for CIJA notes, we have within this single article "the indicia of anti-Semitism: association between loathsome people, loathsome practices including abortion and homosexuality, and economic power".

Finally, the publication regularly engages in another hallmark of hate, namely to *"trivialize or celebrate past persecution or tragedy involving members of the targeted group."* *Your Ward News* at various times trivializes or celebrates the persecution of Jews. The editions of *Your Ward News* in question suggest that Jews both exaggerate the scale of the Holocaust and use existing laws to deny rights to other Canadians, namely their freedom of speech. For example:

- In the April 2015 edition at page 11 the publication cautions the reader not to believe the "*LIES that the ZioMarxist-controlled mainstream media is feeding you about Adolf Hitler*".

- The cover of the June 2015 issue includes a photo of a Jewish postal worker with earlocks, wearing a kippah. His eyes are red and he is foaming at the mouth. He is dropping a bagel. He is exclaiming "*IT'S THE HOLOCAUST ALL OVER AGAIN.*" The implication is clear: the Holocaust is exaggerated and a Jew is once again claiming discrimination where none exists. The picture to the right of this makes the case further: two Jewish lawyers (they appear to be in law chambers) are reviewing a previous issue of *Your Ward News*, and one lawyer remarks to the other "*These goyim are meshuga (ie. these non-Jews are crazy), but where's the hate?*" The combination of these two photos tells a story in which Jews are knowingly exaggerating the content of the publication and are likening it to the Holocaust, in an attempt to deny the freedom of speech rights of the creators of *Your Ward News*. This at once trivializes the Holocaust and suggests that Jews are a menace to other people's rights.

- In a column on page 3 of the June 2015 edition, the columnist J.J. - identified in the masthead as a "Senior Journalist JJ" – compares the concentration camps used by the British in the Boer War to those used by the Germans in World War II. He notes "*Like later German installations, most deaths were caused by diseases which included typhoid and dysentery, despite chambers used to disinfect and de-louse clothes and linens with various gaseous concoctions of varied import."* The implication here is clear: gas chambers were merely "de-lousing" facilities. Most Jews in the Holocaust died not because they were murdered, but because they were unclean. If the reader misses the implication, they are reminded of it two paragraphs later, when the Holocaust is compared to Canada's residential schools and the Canadian "*Aboriginal Holocaust*". A museum to Canada's mistreatment of Aboriginals would be based on "*ACTUAL events".* The denial of the Holocaust is repeated in other editions.

- The September 2015 edition at page 3 (Tab 6, Compendium, Exhibit 9), states that "*Jews are obsessed with myths about gas chambers and ovens. But there is one <u>REAL</u> oven that the Zionist Talmudic Jews who murdered this boy should be worried about…".* The implication is again clear: the Holocaust is a fantastic obsession. This observation comes at the end of an article which recounts the burning of the Church of the Multiplication in northern Israel by an Israeli terrorist group. The article suggests two things: first, this important place of worship was burned to the ground by Jews. Second, Jewish Israelis are, as a whole, committed to the destruction of Christianity. The article fails to note two relevant facts: first, that the pictured sanctuary was not itself burned down. The images of the burned building are of another building on the

site. Second, that those who committed to attack were both roundly denounced in Israel and convicted of a crime. The intention of this article is clear: to place in the reader's mind the idea that Jews wish to destroy Christianity. As Sears notes at page 1: "*The Talmud is the reason why brainwashed Jews destroy churches"* suggesting that Jews have a religious mandate to destroy churches.

The Board was directed to several other examples of hate speech which relied upon visual references to Jews by way of easily recognizable features such as earlocks, kippot, traditional black clothing and the Star of David. In other instances, the contents of *Your Ward News* suggested that an individual is Jewish by having them use Yiddish idiom. These references range in how direct they are, but the vast majority of readers - sophisticated or not - would understand that they are referring to Jews. There are also many indirect references to Jews. The most common targets of hatred in the publication are "Zio-Marxists" and "cultural Marxists". These groups are most often identified as "the parasite", which the publication extols its readers to rid. It is clear that this is but a convenient smokescreen. The Board agrees with the submissions of FSWC, CIJA, Sam Kary and Richard Warman, that "Zio-Marxists" and similar references are referring to Jews. The totality of these examples is to *"convey the idea that members of the targeted group are devoid of any redeeming qualities and are innately evil"*, and to *"create a tone of extreme hatred and contempt,"* – two other hallmarks of hate.

Mr. Kary referred us to the Spring 2016 edition of *Your Ward News* (Tab 13, Compendium, Exhibit 9) which refers to the Puppet Prime Minister who takes most of his orders from the London-based Jewish Rothschild family and the Montreal-based Demarais family whose beliefs are based upon satanic subjugation. Mr. Kary submitted that the article warns of a Ziomarxist conspiracy to manipulate the government and urges the reader to do something about it. An example of what they might do is "Expel the Parasite". In addition, at page 10 the paper states: "*the biggest lie of the 20th century is that "6 million Jews were gassed" (there were no gas chambers. Only a few thousand Jews died due to starvation and a typhus epidemic that rapidly spread through the concentration camps at the tail end of the war, and there is ZERO DOCUMENTED EVIDENCE of a planned extermination of Jews by Adolf Hitler).*

Kelly Fairchild referred us to references in the Spring 2016 edition to the "*holohoax myth at page 10*" (pg. 10 Tab 13, Spring 2016 issue, Compendium).

In the Board's opinion, these passages and other similar passages provide compelling evidence that there were reasonable grounds to believe that the Affected Persons were by means of mail sending, or causing to be sent, items that included hate propaganda, that urged the reader to hate Jews.

3) Defamatory Libel

The AG provided the Board, the Affected Persons and the Interested Persons with a list of those persons who may have been victims of defamatory libel. Their names are listed above. The Board added Patrick Clohessy to that list after reviewing his request for status as an Interested Person. The Board gave notice of its proceedings to all those listed. However, only Warren Kinsella and Patrick Clohessy participated in the proceedings. The Board was only provided submissions with respect to defamatory libel against Patrick Clohessy and Thomas Mulcair and therefore has limited its analysis to the allegations with respect to those two individuals.

S. 300 of the *Criminal Code* provides:

> Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

The elements of defamatory libel are defined in ss. 298 to 299 of the *Criminal Code* as follows:

> **S. 298(1)** A defamatory libel is matter that is published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.
>
> **S. 298(2)** A defamatory libel may be expressed directly or by insinuation or irony
> **(a)** in words legibly marked upon any substance; or
> **(b)** by any object signifying a defamatory libel otherwise than by words.
>
> **S. 299** A person publishes defamatory libel when he
> **(a)** exhibits it in public;
> **(b)** causes it to be read or seen; or
> **(c)** shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by any other person.

In *R. v. Lucas*, [1998] 1 SCR 439 ("*Lucas*"), the Supreme Court of Canada held that defamatory libel is to be assessed on an objective standard. The Court found that ss. 298-300 of the *Criminal Code* infringed the right to freedom of expression freedom of expression under s. 2(b) of the *Charter*, but that they were saved under s. 1 of the *Charter*. The Court interpreted the phrase "likely to injure" in s. 298 to require proof of a risk of serious harm. Proof of actual harm was not required.

Mr. Clohessy provided written submissions in which he alleged that the following excerpts from *Your Ward News* contained defamatory libel:

1) In the March 2015 issue of *Your Ward News* an article by Robert James refers to Mr. Clohessy as the "Leader of a Communist Terrorist Group" and posted a picture of him in a

full-face-covering balaclava implying that he made a telephone call threatening to kill an elderly person and his children, and rape and kill his wife. The caption: *"I am going to f**ing kill you!!! Yet first I am going to kill your kids in front of you, then I am going to rape your wife and kill her, because I want you to suffer before I f""ing kill you!!!"* is below the title *"Stalinist Guerrilla in Toronto!"*

2) In the April 2015 issue of *Your Ward News* Mr. Clohessy is referred to as a *"Marxist Terrorist Fugitive"*, as an *"urban terrorist"*, and as *"Racist Patrick Clohessy"*. There is also reference to *"Clohessy's brutal VIOLENCE"* in an article on page 2 by J.J. which refers to *"Clohessy's criminal conspiracy"* and likens him to the gunmen who killed employees of the French Charlie Hebdo publication. A picture of him in a full-face-covering balaclava is posted and information about him is solicited.

3) In the November 2015 issue of *Your Ward News,* Mr. Clohessy's face is posted on the front page, with a caption that states, *"Godfather Kinsella, I posted James Sears' home address, photos of his home, his dog, his wife, her car & her license plate"*, with Kinsella's caption responding, *"Good work Clohessy! James Sears isn't afraid to be crucified for his beliefs. But we can get at him by encouraging hotheads to terrorize his family."* Mr. Clohessy's picture has the symbol of a hammer and sickle on his necklace and a "striked-out" swastika on his arm. Mr. Clohessy is referred to as *"Fraudulent Social Worker Patrick Clohessy"*.

Mr. Clohessy submitted that these statements are false, that he is not a "terrorist", and that he has not made death threats or rape threats to senior citizens. Mr. Clohessy outlined in his submissions that these statements have damaged his reputation, caused him problems at work, and were extremely stressful and traumatizing.

Mr. Clohessy advised the Board that in March 2015 he personally served St. Germaine with a letter from his lawyer, David Charney, dated March 23, 2015, which enclosed a Notice of Action for defamation regarding the material published in *Your Ward News* and advised that the content of the article was untrue and clearly defamatory. The letter asked St. Germaine to remove the article from the website, and to publish a retraction and apology. Despite the Notice of Action for defamation, *Your Ward News* continued to publish material about Mr. Clohessy, and the article remained on the website. Mr. Clohessy's submissions were not challenged.

With respect to the allegations regarding Mulcair, the Board was referred to the September 2015 edition of *Your Ward News* where it is suggested that Mulcair may have fatally poisoned Jack Layton.

For the reasons stated above the submissions of the Affected Persons to the effect that the requisite *mens rea* does not exist have no bearing in our review of whether there were reasonable grounds to believe that *Your Ward News* contained defamatory libel.

In the Board's opinion, there were reasonable grounds to believe that the statements made about Mr. Clohessy and Mulcair outlined above were likely to injure the reputation of both these individuals. In addition, or in the alternative, these provisions were designed to gravely insult them.

The Board is therefore of the view that there were reasonable grounds to believe that the Affected Persons were by means of mail sending or causing to be sent items that included the publication of defamatory libel.

4) Constitutional Issues

Background

There were two constitutional issues raised before the Board. Although the Board does not have the authority to make a binding decision on constitutional issues, the Board concluded in its decision of November 2, 2017 that it did have the jurisdiction to review them as part of its overall mandate to "review the matter" and make recommendations.

The first issue raised was whether ss. 43(1) and 45(3) of the *CPCA* violate s. 2(b) of the *Charter* and, if so, whether they can be saved under s.1 of the *Charter.* The second issue was whether the Minister sufficiently balanced *Charter* considerations when exercising her discretion to issue the IPO.

The first issue addresses whether the statute is unconstitutional, and the second issue addresses whether the *application* of the statute is unconstitutional. To address the constitutionality of the statute, the Board undertook an analysis analogous to the test outlined in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103 ("*Oakes")* (analogous as the Board is not a competent court). To address the constitutionality of the Minister's exercise of her discretion, the Board was asked to consider the principles set out in *Doré v. Barreau du Quebec* 2012 SCC 12 ("*Doré*").

The first stage of the analysis considered one of three possible outcomes:

1. Ss. 43(1) and 45(3) do not infringe s. 2(b) of the *Charter*
2. Ss. 43(1) and 45(3) do infringe s. 2(b) but are justified under s. 1 of the *Charter*
3. Ss. 43(1) and 45(3) do infringe s. 2(b) and are not justified under s. 1 of the *Charter*

The Board is of the opinion that s. 43(1) and 45(3) infringe s. 2(b) but are justified under s. 1 of the *Charter*.

At the second stage of the analysis, the Board considered 1) whether the Minister was required to balance *Charter* considerations when deciding whether to issue an IPO; and 2) whether the Minister did in fact balance *Charter* considerations. Because of the absence of reasons for the issuance of the IPO it is not possible to determine the second issue.

a) Constitutionality of Subsections 43(1) and 45(3) of the *CPCA*

The Amended Notice of Constitutional Question filed by the Affected Persons alleged that ss. 43(1) and 45(3) of *the CPCA* violate s. 2(b) of the *Charter* for the following reasons:

1. They allow the Minister to restrict speech based on a reasonable and probable grounds standard;
2. They allow the Minister to restrict speech that does not constitute a crime;
3. They allow the Minister to impose a prior restraint on the Affected Persons' freedom of expression – an order prohibits expression not yet made.
4. The procedures for restricting speech are vague and insufficient.

The Affected Persons submitted that the appropriate remedy for a violation of s. 2(b) of the *Charter* is a recommendation by the Board to the Minister that the IPO be revoked. CCLA, CAFE and CFE support the position of the Affected Persons. The AG, BBC, Richard Warman, CIJA and FSWC disagree.

Ss. 43(1) and 45(3) of *the CPCA* provide as follows:

> **43(1)** Where the Minister believes on reasonable grounds that any person
> **(a)** is, by means of mail,
> **(i)** committing or attempting to commit an offence, or
> **(ii)** aiding, abetting, counselling or procuring any other person to commit an offence,
> **(b)** with intent to commit an offence, is using mail to accomplish his object, or
> **(c)** is, by means other than mail, aiding, abetting, counselling or procuring any other person to commit an offence by means of mail,
> the Minister may make an order (in this section and in sections 44 to 47 called an "interim prohibitory order") prohibiting the delivery, without the consent of the Minister, of mail addressed to or posted by that person (in this section and in sections 44 to 47 called the "person affected").
>
> **45(3)** After reviewing the matter referred to it, a Board of Review shall submit a report with its recommendations to the Minister, together with all material and evidence that was before the Board, and, on receipt of the report, the Minister shall reconsider the interim prohibitory order and either revoke it unconditionally or on such terms and conditions as he sees fit or declare it to be a final prohibitory order.

Ss. 1 and 2(b) of the *Charter* provide:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
> **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

1) Is s. 2(b) of the *Charter* Engaged?

Those challenging the constitutionality of the *CPCA* submitted that the determination of whether s. 2(b) of the *Charter* is engaged involves the three-step inquiry set out by the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 SCR 927 ("*Irwin Toy*") and *Montreal (City) v. 2952-1366 Quebec Inc.,* [2005] 3 SCR 141 ("*City of Montreal*"):

1. Is the activity within the sphere of conduct protected by s. 2(b) of the *Charter*?
2. If so, does the method or location of the expression remove the protection?
3. If the expression is protected by s. 2(b), do ss. 43(1) and/or 45(3) of the *CPCA* infringe that protection in purpose or effect?

A. Is the Activity Within the Sphere of Conduct Protected by s. 2(b) of the Charter?

The Affected Persons, supported by CCLA, CAFE, and CFE took the position that ss. 43(1) and 45(3) of the *CPCA* restrict expressive activity. They argued that using the postal service to distribute a newspaper is an attempt to convey meaning and is, therefore, expressive activity. They submitted that ss. 43(1) and 45(3) give the Minister the power to ban any person from engaging in expressive activity by communicating with others through the postal service.

The AG, supported by BBC and FSWC submitted that the provisions do not in themselves, limit expression. BBC also argued that there is no right to receive or send mail, and therefore, it is not an activity protected by the *Charter.* It also argued that all forms of hate speech are impermissible. CIJA, supported by Richard Warman, acknowledged that s. 2(b) of the *Charter* is "arguably" engaged, but that the legislation is saved under s. 1 of the *Charter.*

There is no dispute that if the delivery of mail is regarded as a form of "expression", *prima facie* protection under s. 2(b) is afforded to the Affected Persons regardless of the content of *Your Ward News*. As the Supreme Court of Canada held in *Irwin Toy* at page 969 *"…if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee"*.

The Supreme Court of Canada has held that both the wilful promotion of hatred and defamatory libel convey meaning and thus, engage s. 2(b) of the *Charter* even though the communication may be illegal and/or "invidious and obnoxious" (*R. v. Keegstra,* 3 SCR 697 ("*Keegstra"*) at pg. 730).

The issue before the Board is whether the delivery of content is "expression" and therefore engages s. 2(b) of the *Charter*.

In the *Irwin Toy* decision the Court held at paras. 41-42:

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.
>
> …
>
> Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.
>
> …
>
> The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certain violence as a form of expression receives no such protection….

Those challenging the constitutionality of *the CPCA* relied upon the Supreme Court of Canada decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students,* [2009] 2 S.C.R 295 (*"Greater Vancouver Transit Authority*"). In this case the Court upheld a decision of the British Columbia Court of Appeal which held that a policy of the Greater Vancouver Transportation Authority prohibiting political advertising on the side of buses, violated subsection 2(b) of the *Charter*. The Court held at paras. 27 and 28:

> [27] This Court has long taken a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter* (*Hunter v. Southam Inc*., [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295). It has not departed from this general principle in the context of s. 2(b): *RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573, at p. 588; *Ford v. Quebec (Attorney General),* [1988] 2 S.C.R. 712, at pp. 748-49 and 766-67; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697. An activity by which one conveys or attempts to convey meaning will *prima facie* be protected by s. 2(b) (*Irwin Toy*, at pp. 968-69). Furthermore, the Court has

> recognized that s. 2(b) protects an individual's right to express him or herself in certain public places (*Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (airports); *Ramsden v. Peterborough (City),* [1993] 2 S.C.R. 1084 (utility poles); and *City of Montréal*, at para. 61 (city streets)). Therefore, not only is expressive activity *prima facie* protected, but so too is the right to such activity in certain public locations (*City of Montréal*, at para. 61).
> [28] However, s. 2(b) of the *Charter* is not without limits and governments will not be required to justify every restriction on expression under s. 1 (*Baier*, at para. 20). The method or location of expression may exclude it from protection: for example, violent expression or threats of violence fall outside the scope of the s. 2(b) guarantee, and individuals do not have a constitutional right to express themselves on *all* government property.

In that case, as in this case, there was no restriction on the content of the communication. Political parties were free to convey their message without restriction on its content. The restriction was on the delivery of that content namely, a restriction on conveying the content on the side of a bus. In that case the court found that the advertisements had expressive content and that therefore s.2(b) of the *Charter* was engaged.

The Supreme Court of Canada's directive in *Irwin Toy* is to take a "*generous and purposive*" approach to the rights and freedoms guaranteed under the *Charter.* In *Edmonton Journal v. Alberta,* [1989] 2 SCR 1326 the Court cautioned at pg. 1336 that the "*rights enshrined in s. 2(b) should therefore only be restricted in the clearest of cases*".

In *Greater Vancouver Transit Authority* the Court noted at para. 35, "*The respondents seek the freedom to express themselves – by means of an existing platform they are entitled to use – without undue state interference with the content of their expression".* The same can be said in this case. The Canadian postal system is a service made available to Canadians as a vehicle for expression. Whether it is a statutory "right" guaranteed to all Canadians is irrelevant. The court in *Vancouver Transportation Authority* held that "*an activity by which one conveys ... meaning will prima facie be protected by s. 2(b)"*. As such, a restriction on the use of that vehicle, except under the very limited circumstances described by the Supreme Court of Canada, (which are irrelevant here), engages the provisions of s. 2(b) of the *Charter.*

Accordingly, in the Board's opinion the distribution of *Your Ward News* using the services of Canada Post is an expressive activity protected by s.2(b) of the *Charter.*

B. Does the Method or Location of the Expression Remove that Protection?

To date, the courts have only excluded the protection of s. 2(b) in instances of violent expression and in instances of expression in certain very limited locations such as airports. It was not suggested anyone in this proceeding that this case falls within one of those exceptions.

C. Do ss. 43(1) or 45(3) of the CPCA Infringe the Protection Afforded in s. 2(b) of the Charter *in Purpose or Effect?*

In *Irwin Toy* the Court noted that once it was found that the activity fell within the scope of s. 2(b) of the *Charter*, the Court must determine whether the purpose or effect of the impugned governmental action was to "control attempts to convey meaning through that activity".

The AG submitted that the purpose of the impugned sections was "*to prevent the facilities and services of Canada Post from being used as a vehicle for the commission of offences set out in the Criminal Code".* He submitted that the provisions are not aimed at expression and notes that they may apply in situations having nothing to do with expression such as using the mails for the shipment of illegal drugs. The Affected Persons did not take the position that s. 43(1) or s. 45(3) of the *CPCA* were enacted for any improper purpose.

However, even if the purpose of legislation was not to interfere with rights guaranteed under s. 2(b) of the *Charter,* it is still necessary to examine the effects of the legislation. As the Supreme Court of Canada stated in *R. Big M Drug Mart Ltd.,* [1985] 1 SCR 295 at page 334:

> … if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.

The AG submitted that the impugned sections of the *CPCA* do not on their face violate s. 2(b) of the *Charter* and therefore the proper analysis of this case is under the principles set out in *Doré* and not by examining the constitutionality of the statute itself. He further submitted that to the extent that the legislation does impose limits on expression the limits derive from the provisions of the *Criminal Code* and not from the *CPCA* itself.

The Affected Persons disagree and argue that the sections restrict a form of expression tied to content in that they "empower the Minister to stop individuals from using the mail (a limitation on a form of expression) based on her belief that the content constitutes an offence (a limit on specific content)".

The Board agrees with the submissions of the AG. If expressive activity is curtailed it is because of the provisions of the *Criminal Code* which intentionally restricts freedom of expression to ban hate speech. It is not curtailed because of the terms of ss.43(1) or 45(3).

2) Is the Legislation Saved by s.1 of the *Charter*?

If the legislative provisions infringe s. 2(b) of the *Charter*, the limits must be demonstrably justified in a free and democratic society to be saved by s. 1 of the *Charter*. In *Oakes*, the Supreme Court of Canada established two criteria to determine if a limit on a *Charter* right can be demonstrably justified in a free and democratic society:

a) a pressing and substantial objective, and
b) the means chosen are proportionate to this objective. A law is proportionate if:
    i. the means adopted are rationally connected to the objective,
    ii. it is minimally impairing of the right or freedom in question, and
    iii. there is proportionality between the deleterious effects and the salutary effects of the law.

A. The Objective to Be Served

The objective of the statute must be pressing and substantial to address a concern that is of sufficient importance to warrant overriding the constitutional guarantee of freedom of expression. It is only after the objective is defined with precision that one can engage in a proportionality analysis.

At paragraph 8 of the AG's Factum, the objective of the *CPCA* is stated to be *"to prevent the facilities and services of Canada Post from being used as a vehicle for the commission of offences set out in the Criminal Code."*[1] Paragraph 9 states, *"The provisions empower the Minister to issue an IPO to prevent the mail from being used in the commission of an offence."* The CCLA argued that the objective is not self-evident, and that the purpose articulated by the AG was a restatement of the means, rendering the s. 1 means-end analysis circular. In the Board's opinion the issuance of a prohibitory order is the means, which is separate and distinct from the objective of the statute. Ultimately, the participants conceded that preventing the use of the postal service to commit a crime was a pressing and substantial objective.

B. Are the Means Proportionate to the Objective?

i) Rational Connection to the Objective

The Affected Persons conceded that there is a rational connection between the objective of ss. 43(1) and 45(3) of the *CPCA* and the means by which Parliament chose to achieve that objective. The means of achieving the objective is by issuing an IPO to prohibit affected persons, on a temporary basis, from sending or receiving mail. Following the issuance of an IPO, the statutory regime provides for a review process that allows for evidence and submissions by interested persons, and then allows for a report and recommendations which may lead to a

[1] The Board notes that the *CPCA* provisions references "offences" and does not specifically limit the offences to those under the *Criminal Code* only.

permanent order or a revocation of the IPO. The administrative decision may then be judicially reviewed.

As the purpose of the legislative provisions is to prevent people from committing or attempting to commit offences through the mail, there is a rational connection between the purpose of the statutory provisions and the means that Parliament has chosen to achieve that purpose.

ii) Minimal Impairment

The Affected Persons argued that the impugned sections of the *CPCA* "fail" the minimal impairment criterion for the following reasons: a) they authorize prior restraints on speech on a reasonable grounds standard which is unconstitutionally low for an infringement of *Charter* rights; b) they create an absolute ban on speech, including speech that does not constitute a crime; and c) they limit speech with insufficient procedural protections.

The Affected Persons also pointed out that no evidence was adduced to show that a less intrusive measure would be less effective, and accordingly, the justification required by s. 1 to save the legislation was not established. The Affected Persons argued that if there is a less intrusive measure that substantially achieves the government's objective, the legislation must fail. CFE also noted that the onus is on the government to demonstrate that its objective could not be achieved by less restrictive means.

CIJA and BBC disagreed with this assertion and argued that in order to demonstrate "minimal impairment" it is not necessary for anyone to prove that there is an alternative solution that might impair the *Charter* right in question to a lesser extent than the one adopted by Parliament.

This issue was settled in *Whatcott*. The Supreme Court of Canada stated at para. 101:

> The second test in the proportionality analysis is whether the limit minimally impairs the right. It is the role of the legislature to choose among competing policy options. There are often different ways to deal with a particular problem, and various parties argued before this Court that civil hate prohibitions should be rejected in favour of other methods, which I will briefly summarize. However, I am mindful that while it may "be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted" there is often "no certainty as to which will be the most effective": *JTI*, at para. 43, *per* McLachlin C.J. Provided the option chosen is one within a range of reasonably supportable alternatives, the minimal impairment test will be met: *Edwards Books*, at pp. 781-83.

In the Board's opinion the legislative provisions are within a range of acceptable choices.

a) Prior Restraint on a "Reasonable Grounds" Standard

The Affected Persons argued that ss. 43(1) and 45(3) authorize prior restraints on speech on an unconstitutional "reasonable grounds" standard. The Affected Persons and the CCLA referred to the Supreme Court of Canada's decision in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 ("*Liberty Net*") at paras. 47-49 and argued that prior restraint should only be granted in the clearest of cases. CFE pointed out that the Supreme Court has found that prior restraints are "particularly severe restrictions on speech." (*Little Sisters* at para. 232) and that applications for orders seeking the prior restraint of future expression, the contents of which are obviously unknown, must be viewed with "the greatest of caution".

The AG submitted that an IPO is not a form of prior restraint on expression as the purpose is not to prohibit expression but rather to manage and safeguard the operations of Canada Post. Unlike a prior restraint or injunction on expression, the person affected is free (subject to other laws) to express, publish, and distribute the relevant materials by any other means. The IPO simply denies recourse to the facilities and services of Canada Post, which is only one of several means of distribution available to publishers. The purpose is to prevent Canada Post from playing a causal role in facilitating crime.

BBC argued that any prior restraint was not unfettered. Ministers are given discretion to make all sorts of decisions. There are checks on the exercise of their discretion. Their decisions are subject to review. In this case, the *CPCA* provides a specific means of review through a board of review process. Judicial review of the Minister's decision is also available. BBC also argued that the Affected Persons are not prevented from publishing and distributing by other means the very publications that triggered the IPO. Publications are not suppressed, withheld, delayed, or otherwise subject to approval of censors before publication.

CIJA submitted that the entire purpose of preventing the distribution of hate propaganda implied prior restraint. The remedies in the jurisprudence under human rights legislation usually take the form of a cease and desist order. In addition, the Federal Court of Canada in *Winnicki* issued an interlocutory injunction restraining a respondent in a pending human rights proceeding from communicating messages alleged to constitute hate speech on the internet. It punished a breach of that order, with imprisonment under its contempt powers.

In the context of this case the Board is of the opinion that ss. 43(1) of the *CPCA* may authorize a prior restraint on expression. However, that finding in and of itself does not make the sections unconstitutional. Paragraph 78 of *Little Sisters* is instructive:

> If Parliament can validly prohibit obscenity, and *Butler* held that it had validly done so, the prohibition can be imposed at the border as well as within the country. The only expressive material that Parliament has authorized Customs to prohibit as obscene is material that is, by definition, the subject of criminal penalties for those who are

> engaged in its production or trafficking (or have possession of it for those purposes). The concern with prior restraint, discussed by my colleague Iacobucci J. at paras. 232 to 236, operates in such circumstances, if at all, with much reduced importance.

Although the fact that s. 43(1) may constitute a prior restraint does not in and of itself result in a finding that the section is unconstitutional the Affected Persons argued that the standard of "reasonable grounds to believe", is an unacceptably low standard that is lower than the standard that is required under the *Charter*. They rely on the decision in *Little Sisters*. At paragraph 104 of the *Little Sisters* decision the court held:

> In Glad Day (2), Hayes J. went on to rule that not only did the Crown carry the burden of proof but it must establish obscenity to the criminal standard. This goes too far.
>
> …We are dealing with the imposition in civil proceedings of a limitation on freedom of expression, and the imposition on the Crown of a civil standard of proof, is consistent with the usual *Charter* [page 1181] requirement that the Crown need only justify an infringement to the civil standard.

They also relied upon the decisions in *Canada (Human Rights Commission) v. Winnicki (F.C.),* [2006] 3 FCR 446 ("*Winnicki"*) and *Canadian Liberty Net*. Both of these cases involved applications by the Canada Human Rights Commission to the Federal Court of Canada for an injunction restraining allegedly discriminatory conduct pending a full hearing on the merits of the case by the Commission. The Court set out the test for the granting of an injunction in cases involving restraint of speech in *Winnicki* at paras. 28, 2 and 35:

> Both defamation actions and complaints of hate speech seek to limit the right to freedom of expression and therefore injunctions should only be granted in the clearest of cases. Having said that, and despite the fact that the activity described by subsection 13(1) of the CHRA is clearly protected by s.2(b) of the Charter……as an activity that conveys or attempts to convey a meaning, it must also be recognized that this type of expression lies at the outer margins of the values that are at the core of this fundamental freedom. As a result, expression of this nature can more easily be restrained by the state….
>
> As a result, I am inclined to think that a restriction on hate propaganda and hate mongering should not be assessed with the same stringent standards as limitations on defamatory speech. Even if both of these kinds of expression deserve, *prima facie*, the same kind of protection as any other message, the values underpinning hate propaganda are fundamentally inimical, even antithetical, to the rationale underlying the protection of freedom of expression, and directly contradict other values equally vindicated by the Charter. For those reasons hate propaganda and defamatory comments should not be looked at from the same perspective when it comes to

> determining the prior restraints that can legitimately be placed on these two forms of expression.
>
> …
>
> It is with all these considerations in mind that an appropriate test has to be developed. …an interim injunction should issue only where the words complained of are so manifestly contrary to s.13 of the CHRA that any finding to the contrary would be considered highly suspect by a reviewing court.

The Affected Persons argued that the reasonable grounds standard is not minimally impairing and that "manifestly obvious" should be the test for prior restraint.

BBC submitted that the Courts frequently uphold a reasonable grounds standard as an acceptable justification for a violation of a *Charter* right. The AG submitted that an interim prohibitory order under *the CPCA* is not an injunction. It does not restrain the Affected Persons from publishing or distributing their newspaper. It simply makes the facilities and services of Canada Post unavailable pending a review.

Furthermore, the AG submitted that there are situations where lower standards apply in situations in which the infringement of protected rights is more severe. For example, an individual may be detained by the police based on "reasonable grounds to suspect" that an individual is connected to a particular crime.

The AG noted that the standard of "reasonable grounds" is also used in s. 320(1) of the *Criminal Code.* The AG relies upon the decision of the Supreme Court of Canada in *R. v. Chehil,* [2013] SCC 49. In that decision that court held at paragraph 27:

> Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard as it engages the reasonable possibility, rather than probability of crime.

The CIJA argued that "reasonable" means "rational justifiable logical" and that there is no difference between "reasonable" and "reasonably probable". It requires the Minister to support her conclusion based on logical and justifiable grounds and a *prima facie* case. CIJA also pointed out that there are statutes such as the *Customs Act* and the *Canada Security Intelligence Service Act* that allow for greater intrusions than those under the *CPCA* based upon the lower threshold of "reasonable suspicion".

The *Federal Courts Act* does not set out the test to be applied in making a determination as to whether to grant an injunction. The test is a common law one. As stated in the *Winnicki* decision that test may vary depending on the type of case being heard. There is an initial test under s. 43(1) of the *CPCA* namely, "reasonable grounds to believe". This standard only applies

with respect to the issuance of an IPO. Presumably what is reasonable may differ depending on the situation before the Minister. There is nothing in the section which would compel the Minister to disregard *Charter* values when issuing an IPO.

While the standard for an IPO under the *CPCA* is not particularly high, the Minister must still apply known facts to the law when making a determination as to whether to issue an IPO.

Furthermore, in the narrow context of the postal service, and in light of the preventive objective and interim nature of an IPO, we are of the opinion that a standard of "reasonable grounds to believe" is rigorous enough to ensure that IPOs are not issued capriciously. Ultimately, any final prohibitory order will generally follow a full review of the matter by a board of review.

S. 45(3) of the *CPCA* does not mandate a "reasonable grounds to believe" standard. It is silent on the issue. At the stage of final disposition there is no reason why the more rigorous standard of "balance of probabilities" should not be applied as mandated in *Little Sisters.*

Accordingly, in the Board's opinion, ss. 43(1) and 45(3) of the *CPCA* do not "fail" the minimum impairment criterion on the basis that they authorize prior restraints on speech on an unconstitutionally low standard.

b) Absolute Ban

The Affected Persons, CCLA, CAFE and CFE argued that the *CPCA* prohibits the Affected Persons from sending anything in the mail and not just material that is alleged to include criminal content. The *CPCA* mandates an absolute ban and does not permit a partial or tailored ban and, therefore, they argued, the *CPCA* provisions fail the minimal impairment criterion because they provide for orders that are overbroad and absolute. They do not permit (let alone require) the Minister to consider any less intrusive measures or any balancing of interests. By banning the sending or receiving of all mail, irrespective of whether the mail in question is tied to the offence being targeted, the ban is necessarily overbroad. An absolute ban will inevitably capture expressive activity that is not rationally connected to the statutory objective. Accordingly, they submitted that the *CPCA* provisions are unconstitutional.

The CCLA argued that under s. 43(1) of the *CPCA* the Minister has no authority to tailor an IPO on terms that take into account *Charter* rights. The *CPCA* mandates that an IPO ban an affected person from sending and receiving all mail regardless of content, even where that mail is unrelated to any offence. Further, the legislative provisions, require an affected person to ask the Minister for permission to send or receive any mail. Such a restriction is an unjustifiable constraint on freedom of expression. The words "without the consent of the Minister", the CCLA argued, operated as a future possibility of relief from the IPO, but cannot be applied contemporaneously with the making of an IPO, in order to tailor the IPO.

The CCLA also argued that if Parliament intended the "without the consent of the Minister" provision to allow the Minister to make a qualified or tailored IPO, the statute would have provided that an IPO could be issued upon 'terms and conditions'. When asked if the Minister could exercise the prohibition and then immediately tailor the prohibition so that it is less restrictive, the CCLA argued that this would represent a creative interpretation of the provision so as to try to render the provision constitutional.

The CCLA and the Affected Persons argued that the language of "terms and conditions" is only used in s.45(3) and is limited to the revocation of the IPO. Accordingly, "terms and conditions" are not available under s. 43(1). The Affected Persons and the CCLA argue that nowhere in the statute is the Minister granted the discretion to attach substantive terms or conditions to the issuance of a final order.

The AG pointed out that the original version of s. 43(1) which was s. 7 of the *Post Office Act*, RSC 1952, c. 212, s. 7, stated with respect to an IPO that, "...the Postmaster General may make an interim order …prohibiting the delivery of **all mail** directed to that person...or deposited by that person in a post office." The current *CPCA* provides that an IPO prohibits "the delivery of mail addressed to or posted by" a person, and not "all mail". This change signals Parliament's intention that the scope of an IPO be a matter of discretion and implies the power to tailor the scope of an IPO.

Moreover, the AG noted that tailored IPOs have been issued under the *CPCA* in the past. As an example of tailoring, the AG directed the Board to *R. v. Benlolo* (2006), 81 OR (3d) 440 (OCA) at para. 6, where the IPO order was made only in respect of addresses associated with the defendants' business. Clearly, this IPO was not for all mail sent or received by Alan and Elliot Benlolo and Victor Serfaty.

The AG also submitted that the power to tailor an IPO is implicit in s. 43(1) as it is necessary to ensure that the mail is not used to commit offences.

The *CPCA* was enacted before the *Charter* came into effect and therefore it is not surprising that it provides no guidance to the Minister in fashioning a *Charter* compliant IPO. The Board was directed to the decision in *Bell ExpressVu Limited v. Rex,* [2002] 2 SCR 559 which held that when legislative provisions can be interpreted in two separate ways, (i.e. that a plain reading of the statute, in context, allows for an IPO to be tailored; or the IPO prohibits the sending and/or receiving of all mail), both of which are reasonably capable of being supported by the statute, then one can choose the interpretation that conforms with the *Charter* values.

This area of ambiguity under the legislation is problematic. The change in the wording from "all mail" to "mail" supports the conclusion that s. 43(1) allows the Minister to tailor an IPO and issue a partial ban if she finds it appropriate. Arguably, "the consent of the Minister" may be exercised to tailor the IPO contemporaneous with the prohibition. The timing of the consent is

not specified in the legislation. Even if the Minister cannot consent to the receipt or delivery of certain types of mail, say for example bills, seasonal cards etc., at the time she issues an IPO she could signal in her reasons that she is amenable to granting consent to the mailing of these items if requested to do so.

There is an equally compelling argument that s.43(1) does create an absolute ban, and that "the consent of the Minister" must be exercised in the future, upon request. However, such a finding does not automatically lead to the conclusion that s.43(1) is unconstitutional. IPOs should be considered in context, as a preliminary step in a more rigorous regime which provides for a full review and ultimately for tailoring if appropriate.

c) Procedural Safeguards

This issue has been addressed under the heading "Procedural Fairness". The Board was not persuaded that there exists any basis to challenge the constitutionality of ss. 43(1) and 45(3) of the CPCA because of a lack of procedural safeguards.

i) Overall Proportionality

The third step of the s.1 proportionality test is to examine whether the deleterious effects of the legislation, properly administered, exceed its salutary benefits (see *Little Sisters* at page 1201).

The Affected Persons take the position that the deleterious effects of the *CPCA* outweigh its salutary effects. CFE submitted that "*it is unnecessary and disproportionate to impose a complete ban on use of the postal services to prevent their use for alleged criminal purposes".*

The salutary benefits of preventing Canada Post from being used for criminal purposes are evident. The means adopted by the *CPCA* to address that objective have deleterious consequences for expressive freedom. In assessing the overall proportionality, the Board is cognizant of the fact that in *R. v. Keegstra,* [1990] 3 SCR 697 the Supreme Court of Canada has already ruled that s. 319(2) is an infringement on section 2(b) rights, but that this is demonstrably justifiable in a free and democratic society. Criminalizing hate speech has been found to be constitutional.

In the Board's opinion the legislative scheme regarding IPOs strikes an appropriate balance between the Affected Persons' rights to freedom of expression and the statutory objective of preventing the postal system from being used to facilitate a crime until a full review of the matter is undertaken. The salutary benefits of the scheme far outweigh its deleterious effects.

The Board is of the opinion that Parliament has chosen a statutory regime that falls within the range of reasonably supportable alternatives. Even if there is wording that might arguably

produce a less restrictive result, the regime chosen by Parliament deserves some deference, and is within the range of reasonably supportable alternatives.

Conclusion

For the reasons stated above the Board is not prepared to recommend that the Minister unconditionally revoke the IPO on the basis that ss. 43(1) and 45(3) of the *CPCA* are unconstitutional.

b) Constitutionality of the Minister's Exercise of Discretion

The Affected Persons, CCLA, and CFE also argued that the Minister's decision was unreasonable because she failed to satisfy her legal duty to proportionally balance the Affected Persons' *Charter* rights in accordance with the principles set out in *Doré*. In that decision the Supreme Court of Canada held that an administrative decision-maker must apply *Charter* values in the exercise of statutory discretion.

The Affected Persons, CCLA, CAFE and CFE all argued that s.43(1) of the *CPCA* mandates an absolute ban and does not permit a partial ban. If that is the case, the Minister has no discretion under s.43(1) and the principles in *Doré* do not apply. The AG submitted that the Minister does have discretion to tailor an IPO under s. 43(1). If that is the case the Minister must conduct a *Charter* balancing exercise.

It was the position of the Affected Persons that if s.43(1) grants the Minister discretion, the issuance of the IPO breached the Affected Persons' constitutional rights because the Minister failed to balance their rights under the *Charter.* On that basis, they urge the Board to recommend the unconditional revocation of the IPO.

The Affected Persons relied upon the following in support of their position:

i) The Minister did not give reasons for her decision. The absence of reasons means that there is no evidence that the Minister considered the Affected Persons' *Charter* rights or applied the correct *Doré* analysis before she exercised her discretion to limit their access to the mail.

ii) The IPO shows that the Minister did not properly balance the rights of the Affected Persons against the statutory objectives. The IPO cut off the Affected Persons' ability to send mail entirely and in that sense it was disproportionate and overbroad. There is no evidence that when making the IPO the Minister considered anything other than editions of *Your Ward News*, publicity about it and communications from individuals about the newspaper. As a result, there was no justification to stop all of

the Affected Persons' mail and the Minister disproportionately infringed their rights under s. 2(b) by doing so.

iii) The Minister failed to constitute the Board of Review in a timely manner. The IPO was issued on May 26, 2016. The Affected Persons requested a review on June 6 and 9, 2016. The Minister did not constitute the Board until December 2016. The Minister did not notify the Affected Persons of the Board's appointment. This delay remains unexplained. As a result, the Affected Persons argue that the only finding available is that this delay was an unnecessary and unjustified limit on their freedom of expression. Moreover, the Affected Persons were only advised after the conclusion of the evidence as to which groups were allegedly subject to hate speech.

1) Absence of Reasons

Without reasons, it is not clear whether the Minister sufficiently balanced *Charter* values as mandated by *Doré,* or even whether she was of the opinion that *Doré* applied.

The AG argued that the Minister did have discretion to impose terms and conditions under s. 43(1). If that is the case, the Minister was required to apply *Doré* and engage in a balancing exercise to strike a reasonable balance between the statutory objectives of the *CPCA* and freedom of expression.

BBC argued that even where there are no reasons the Board could infer that the Minister had conducted a balancing exercise. In the IPO the Minister did not prohibit both the sending and receiving of mail as she was permitted to do under s. 43(1) of the *CPCA* and therefore the Minister did exercise some proportionality and tailoring.

The Affected Persons, CCLA, CAFE and CFE all argued that s.43(1) of the *CPCA* mandates an absolute ban and therefore there is no exercise of discretion. If that is the case, the Minister has no discretion under s.43(1) and *Doré* does not apply.

The absence of reasons is problematic. The Board is not able to determine whether the Minister turned her mind to this issue and if she did, whether she was of the view that no balancing exercise was required or whether she intended the IPO to be as a result of a balancing exercise.

Even if a balancing of *Charter* values is not required at the IPO stage, it is required under s. 45(3) as the Minister clearly has discretion in determining a final disposition of the matter. The Minister is expected, and able, to strike a reasonable balance between the statutory objectives and freedom of expression.

2) Overbreadth

The IPO bans the Affected Persons from sending all mail. In this regard, the Affected Persons argued that the IPO is overly broad in relation to the objective of preventing the postal service from being used to commit crimes because it bars the Affected Persons from using the mail for various activities that are indisputably not criminal (paying bills, personal correspondence, seasonal cards etc.). The Affected Persons also argued that even if portions of *Your Ward News* contain statements that amount to an offence (which they do not admit), these statements do not constitute the entirety of the paper. Accordingly, the Affected Persons argued that by prohibiting delivery of *Your Ward News* by mail, the Minister has prevented the Affected Persons from communicating content that does not amount to an offence and thereby disproportionately affected their rights. The Board is not persuaded by this argument. The *Your Ward News* publication as a whole constitutes hate propaganda, as outlined above, with each part contributing to its overall impact. As CIJA aptly analogized, "the honey helped the poison go down".

IPOs are by their very nature interim, and made during exigent circumstances, for the prevention of crime through the use of the mail. They are meant to be temporary and subject to a comprehensive review. The standard of review for an IPO should not be perfection. In the Board's opinion an absolute ban of the sending of all mail is not unconstitutional as an interim measure in the prevention of using the postal system to facilitate the spread of hate speech. Moreover, the regime provides for relief from the absolute ban even at the IPO stage, with "the consent of the Minister". The Affected Persons could have requested the Minister's consent for exceptions, after the issuance of the IPO but have chosen not to do so. Considering that the IPO is an interim order, considering the entire regime in context, and considering the significant damage cause by hate speech, in the Board's view the IPO is not overbroad, and the exercise of the Minister's discretion was not unconstitutional. However, a full balancing exercise should be conducted before any final order is made.

3) Delay

The Board addressed this issue under the heading "Procedural Fairness".

Conclusion

In summary, there were legitimate concerns raised at the hearing about both the absence of reasons for the issuance of the IPO and overbreadth. These concerns should be addressed in any final disposition of this matter.

5) Factors Considered in Making Final Recommendations

In making recommendations to the Minister the Board considered several factors:

a) The standard to be applied to any final order;
b) The effect of the *Charter;*

c) The Minister's remedial options under s. 45(3);
d) Policy Considerations
e) Legislative Changes

a) Standard to be Applied to the Final Order

The Board heard submissions about the standard to be applied in determining hate speech and defamatory libel in a final order versus an interim order. The *CPCA* is silent on the standard that the board of review is to apply when reviewing the matter. It is also silent on the standard to be applied by the Minister in making a final determination under s. 45(3) of the *CPCA.*

The Affected Persons urged that a standard higher than "reasonable grounds to believe" is required as this standard would give insufficient weight to the *Charter* rights at issue.

The Board recommends that the Minister adopt the civil standard of "*a balance of probabilities*" as set out in the *Little Sisters* decision for any final order. This would accord with the body of jurisprudence canvassed earlier in this report under the heading *"Prior Restraint on a Reasonable Grounds Standard"*. If the Minister is to issue an order which prevents the Affected Persons from using the postal service indefinitely and thus, limits their freedom of expression indefinitely the higher standard of proof mandated in *Little Sisters* should be applied.

b) Charter Considerations

The Minister has a duty to conduct a *Doré* balancing exercise by considering the impact of the IPO and any final prohibitory order ("FPO") on *Charter* values when making a decision on her final order. In any final order, the Minister should balance the importance of freedom of expression, with the effects of hate speech. The final order must consider the role of the postal service in today's society in assessing the severity of any infringement and apply proportionality considerations in assessing the objectives of the *CPCA* provisions. There is considerable case law available to assist the Minister in that exercise.

1. Freedom of Expression and Hate Speech

The fundamental importance of the constitutional guarantee of freedom of expression under s. 2(b) has been recognized by the Supreme Court in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326 at p. 1336, where Justice Cory articulated,

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s.

> 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the *Charter* which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

In *Keegstra,* the Supreme Court of Canada noted that the freedom to express oneself openly and freely is a necessary feature of a free and democratic society (para. 25) and that the protection that s. 2(b) of the *Charter* provides must be construed in a large and liberal manner (para. 29). Section 2(b) covers all expressive content, "however unpopular, distasteful or contrary to the mainstream"(*Irwin Toy*, para. 41), as it is *"often the unpopular statement which is most in need of protection under the guarantee of free speech"* (*R. v. Zundel*, [1992] S.C.J. No. 70 at para. 23). The public benefit of the free exchange of ideas, and the protection of controversial expression or unpopular speech is vital to growth as a society.

The fundamental importance of freedom of expression in a robust, democratic society is juxtaposed against the guidance from the Supreme Court of Canada regarding hate speech. In *Keegstra*, Justice Dickson stated at page 762-765:

> From the outset, I wish to make clear that in my opinion the expression prohibited by s. 319(2) is not closely linked to the rationale underlying s. 2(b). Examining the values identified in *Ford* and *Irwin Toy* as fundamental to the protection of free expression, arguments can be made for the proposition that each of these values is diminished by the suppression of hate propaganda. While none of these arguments is spurious, I am of the opinion that expression intended to promote the hatred of identifiable groups is of limited importance when measured against free expression values.
>
> …
>
> The suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. … Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.
>
> …
>
> I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the

> participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)" (*Royal College*, *supra* at p. 247).

In *Taylor,* the Supreme Court of Canada quoted this latest paragraph above, and stated at pp. 922 and 923:

> As I hope is evident from the above quotation, it is important to recognize that expressive activities advocating unpopular or discredited positions are not to be accorded reduced constitutional protection as a matter of routine: content-neutrality is still an influential part of free expression doctrine when weighing competing interests under s. 1 of the *Charter*. The unusually extreme extent to which the expression at stake in this appeal attacks the s. 2(b) rationale, however, requires that the proportionality analysis be carried out with the recognition that the suppression of hate propaganda does not severely abridge free expression values.

2. Role of the Postal Service

In conducting a *Doré* balancing exercise it is useful to consider the role of the postal service in Canada. Is the mail a fundamental service provided by government? What is the role of the postal service in society today? What is significant about mail delivery?

The national postal service was established in 1868. The government had no constitutional obligation to establish a postal service, but since 1868, Canada Post has been operating as a national and monopolized public service. Historically, the mail has been a universal mechanism of communication nationwide. However, in the present day there are many alternative delivery options available.

While there was some debate about whether the postal system is still a core mechanism in our society, particularly given the advent of technology and the internet, not much turns on this argument. As outlined above s. 2(b) rights are infringed, regardless of whether there are other mediums by which the Affected Persons could and continue to communicate. The availability of other mediums affects the severity of the breach.

At the same time, there is no absolute right to use the mail service. The government has regulated the service and established rules concerning what is and is not permissible to send through the mail. The mail cannot be used for the commission of an offence.

Losing the right to send and/or receive mail ever again through the Canada Post, a monopolized public service, is a serious restriction on the use of the postal service. However, it is not as

serious a restriction on one's ability to communicate. The severity of such a ban should be considered as part of the Minister's balancing exercise.

3. Objective of the CPCA Provisions

As outlined above, the objective of the *CPCA* provisions is to prevent the use of the mail as a vehicle to commit or attempt to commit offences. This is of pressing and substantial concern in a free and democratic society. The measures set out in the *CPCA* to implement the objective can be rationally connected to the objective.

The Affected Persons argued that as these offences are outlined in the *Criminal Code,* the police already have the necessary authority, resources and expertise to stop offences that have been, or are being, committed through the mail. As outlined in our decision refusing the adjournment request, and as outlined succinctly by Richard Warman, there are various complications in laying charges for hate speech, which include requiring the Attorney General's consent. We are not persuaded that this should end the inquiry. The *CPCA* legislative objective to prevent the use of the mail as a vehicle to commit offences, is a pressing and substantial objective independent of whether criminal charges are laid. Criminal charges may take years to come to trial, if charges are in fact laid. The *CPCA* provides the Minister with the ability to stop the postal system from being used to facilitate a crime quickly pending a more thorough review.

4. Minimally Impairing Recommendations

Any final order should ensure that the Affected Persons' rights to freedom of expression are minimally impaired. Any FPO, or terms and conditions, that infringe on the right, and prohibit the use of the mail for various activities, should be sufficiently tailored to address the harm targeted. An absolute ban on the sending of all mail would be overbroad, and in the Board's opinion it would not accord with the principles set out in *Doré*. There does not appear to be any reason why the Affected Persons should be prevented from using the mail for various activities that are indisputably not criminal, such as paying bills or sending personal correspondence. Furthermore, the *Criminal Code* does not criminalize private correspondence so first class mail should not be included in any final disposition.

5. Proportionality

Any final order should also balance the rights of the Affected Persons and the values that underlie freedom of expression, the harmful effects of hate speech, and the impact upon the Interested Persons and other recipients of *Your Ward News.* In the balancing exercise, the severity of the interference with expressive freedom should be considered. The Board notes that the Affected Persons still have access to the internet, private delivery services, and other means of distributing their publication.

The deleterious effects of the IPO should also be considered. The Affected Persons submitted that they have been prevented from accessing the Canada Post Community Mail Delivery rates in order to deliver copies of *Your Ward News* throughout the City of Toronto. Instead, they have contracted with private delivery services and delivered copies of *Your Ward News* by those means. However, the private couriers have no access to apartment buildings and they have therefore been denied access to these readers.

Given the purpose of preventing the services of Canada Post from being used for the commission of a crime and given that *Your Ward News* continued to contain hate propaganda content after the Minister issued the IPO, the IPO achieved its purpose. The IPO prevented and continues to prevent the dissemination of hate propaganda by use of the mail. This is a salutary benefit to be considered.

There are limited remedial responses available to the Minister. There always exists the possibility that an individual, wholly unrelated to the Affected Persons, will engage in a similar practice. Practically, there are also monitoring concerns. The special monitoring necessary to prevent the Affected Persons from mailing letters would make any such ban impossible to enforce. As a practical matter, it would be challenging, and perhaps impossible, to enforce a ban on sending all mail.

A salutary benefit of a prohibitory order is the denunciation of crime, and particularly hate speech by preventing the publishers of *Your Ward News* from putting *"Distributed to 400,000 households by Canada Post"* on the top of each and every edition and thus providing a measure of respectability to the publication, and from advising recipients that the this has been delivered by an arm of the state. The symbolic benefit of having organs of the state refuse to disseminate hate speech is a salutary benefit. To be clear, this does not stop the distribution of future editions, but it has an impact upon the mechanism of delivery and the use of the mail for these purposes. It ensures that government services are not being used to promote hatred. This has a lasting effect on the community. Given the public nature of the Board, there is the potential educational and larger preventative benefit that can be achieved by open discussion of the principles enunciated in this report.

The Board balanced these considerations to ensure that its recommendations do not infringe the rights of the Affected Persons under s. 2(b) of the *Charter* any more than necessary, and to ensure that Canada Post is not used to spread hate. The Board recommends that the Minister engage in the same balancing exercise in coming to a final determination.

c) Minister's Remedial Options under s. 45(3) of the CPCA

Following a review of this report S. 45(3) of the *CPCA* requires that the Minister reconsider the IPO and gives the Minister three remedial options following a review of this report: i) to revoke the IPO unconditionally; ii) to revoke the IPO on such terms and conditions as she sees fit; and iii) to declare the IPO to be a final order.

1. Unconditional Revocation

The Board does not recommend that the Minister revoke the IPO unconditionally. A review of editions of *Your Ward News* published after the IPO was issued indicate that the Affected Persons continue to publish material that may be considered hate speech even on a balance of probabilities standard.

Annex A of Richard Warman's submission dated January 21, 2018, notes several examples of hate speech in editions of *Your Ward News* published after the issuance of the IPO including the following:

- Page 1 of the Winter 2017 issue contains an image of George Soros, a well-known Hungarian and Jewish banker and funder of several social and political causes. Superimposed on Mr. Soros is the Star of David – making clear his identity as a Jew. He has devil horns growing from his head and is wearing robes with the number 666, a commonly-used identifier of the Christian Satan. The implication is clear: Mr. Soros is a satanic Jew. Indeed, in another issue (Summer 2016), Mr. Sears refers to Mr. Soros as a "Satantic Jewish billionaire" who funds Black Lives Matter to distract the world from his own crimes;

- Other issues similarly associate prominent figures in the Jewish community as satanic. For example, Mr. Warman notes that on at least two occasions, *Your Ward News* portrayed Bernie Farber, the former CEO of the Canadian Jewish Congress as "a monster with a red star of David on his forehead" (pg. 15, Fall 2016 and p. 7 Summer 2016);

- Page 5 of the Winter 2017 issues says that the Holocaust was "made-up". Adolph Hitler is portrayed as someone who was committed to killing doctors that perform abortions. The clear implication here is that rather than perpetrating a holocaust, Adolph Hitler intended to save lives.

- *Your Ward News* denies the Holocaust in several editions, for example on p 19 of the Summer 2016 issues, in which is it referred to as a "holocaustic joke".

- On page 6, of the Winter 2017 issue, Mr Sears tells readers that he has been told, via another-worldly experience, to "*forgive common Jews for celebrating, benefitting from,*

> *and partaking in, two millennia of evils*." The implication is clear: Jews have been in on the practice of evil for thousands of years, and they have collectively benefitted from this practice.

In their submissions, Rachyl Whyte, Lawrence McCurry and CAFE defended the contents of *Your Ward News* and suggested that it was satirical. There was no evidence before the Board that the publication was satirical. Furthermore, while a defence of satire may be relevant to criminal proceedings it is not a part of the Board's mandate to determine criminal responsibility nor to consider any potential defences to criminal behavior. In any event, as pointed out by BBC in the December 2015 edition of *Your Ward News* (Tab 9, Compendium, Exhibit 9), Sears himself stated in his letter from the editor on pg. 19, "*and <u>NO</u> the paper is <u>NOT</u> "tongue in cheek" … unless of course you are working undercover for the "Hate Crimes Unit" Then yes, totally not serious. We think Kathleen Wynne is a saint, Trudeau is Mensa material, and we admire those righteous, peaceful, God-fearing Zionist Jews!"*.

Mr. Kary in his submissions to the Board stated:

> If Sears was attempting to be satirical when alleging a Jewish conspiracy to massacre Christians and control the planet, what social ill exactly would he be attempting to ameliorate? What real situation is he attempting to exaggerate or contextualize to the point that the public can better digest and heal from it, the fact that there are Jews? Or when he asserts that gay men are pedophiles or that women should be the property of their husbands, what societal vice is Sears lampooning when he states that Jews must convert to Christianity or be consumed in some form of judgment?

In *Whatcott*, the Court defined the test for the determination of "hatred" as "*whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred".* In the Board's opinion, the effect of the passages, references, and images described above and the many others like them in the Material and in the material published after the issuance of the IPO is to promote hatred against Jews. The materials found in *Your Ward News* can reasonably be expected to cause "grave psychological and social consequence", (*Keegstra*, pg. 746), and to be a source of "humiliation and degradation", and a threat to "a person's sense of human dignity and belonging to the community that is closely linked to the concern and respect accorded the groups to which he or she belongs." (*Keegstra*, pg. 746).

The Board therefore recommends that the Minister take steps to ensure that the Affected Persons continue to be banned from using the postal service to deliver material that includes hate speech.

2. Revocation on Terms and Conditions

It is open to the Minister to revoke the IPO upon terms and conditions. If the Minister sees fit to take this approach we recommend that the IPO be revoked on the condition that the Affected Persons be prohibited on their own or acting through an agent or acting under any other personal or firm name and/or style from using unaddressed bulk mail (Canada Post Neighbourhood Mail) to distribute *Your Ward News* or any other material of substantially similar content that is likely to expose a person(s) to hatred or contempt by reason of the fact that the person(s) is/are members of an identifiable group as defined in s. 318(4) of the *Criminal Code.*

The disadvantage of this approach is that the enforcement of the terms and conditions is more cumbersome than with an FPO. If the Affected Persons breach the terms and conditions charges cannot be laid under s.59 of the *CPCA.* Rather, the Minister must reinstate the IPO before enforcement proceedings may be initiated. This may trigger entitlement to the appointment of another board of review.

3. Final Prohibitory Order

The Board does not recommend that the existing IPO be made final. For the reasons stated above, a permanent ban on the sending of all mail would be overly broad and subject to constitutional challenge.

Therefore, if the Minister sees fit to make an order, in the Board's opinion the preferred response is to issue an FPO on terms and conditions that differ from the IPO. The Board recommends that the terms be the same as suggested above should the Minister choose to revoke the IPO on terms and conditions. The advantage of issuing an FPO with terms and conditions is that it is more easily enforced under s. 59(a) of the *CPCA.*

S. 45(3) of the *CPCA* is ambiguous as to whether the Minister has authority to issue an FPO on terms and conditions or whether the Minister may only issue an FPO on exactly the same terms as the IPO. The AG, BBC and CIJA submitted that the *CPCA* grants discretion to avoid, remove or tailor any limit on expression in order to achieve a balance between statutory objectives and *Charter* values and therefore there is no conflict between ss. 43(1) and 45(3) of the *CPCA* and the *Charter*.

CCLA and the Affected Persons submitted that to conclude that the Minister has the implied authority to attach terms and conditions to final prohibitory orders would render the words "terms and conditions" unnecessary in relation to the revocation of interim orders. In the Board's opinion this would put too narrow an interpretation on the language in s. 45(3) and cannot be what was intended by Parliament. The Minister's authority under s. 45(3) can only be exercised after a full review of the matter by a board of review mandated to consider all evidence and submissions from interested persons including the Affected Persons. A Minister must be able to tailor her final response after this review. It may very well be the case that it is

appropriate to revoke the IPO. It may also not be appropriate to impose the same conditions in a final order after a review of the submissions. Parliament cannot have intended that the Minister lack the ability to provide a tailored response after a full review of the matter.

d) Policy Considerations

In reviewing the matter, the Board has also considered the evidence and submissions we received on two issues related to the reception of unwanted mail:

1. Many recipients of *Your Ward News* did not wish to receive it and were unaware of the process required to stop its receipt.
2. Many postal workers were upset that they had to deliver *Your Ward News* and were concerned for their safety.

Derek Richmond, a letter carrier and CUPW representative, gave evidence that letter carriers are often put in a position of being required to deliver unaddressed mail to individuals who do not wish to receive it. On occasion, this leads to difficult encounters between letter carriers and recipients as the latter do not understand that the letter carriers are legally required to deliver unaddressed mail to every household which has not opted out under Canada Post's procedures. As a result, letter carriers may be put in a difficult position which in the extreme may lead to an unsafe work place, due to confrontations between carriers and recipients.

The problem of people not wishing to receive *Your Ward News* is two-fold. First, it is apparently unclear to many recipients how to stop receiving unaddressed mail. Some submissions noted that people would place indicators on their mailbox that they did not wish to receive this publication. However, under Canada Post regulations, this is not sufficient to prevent delivery. Second, in order to prevent the delivery of *Your Ward News* Canada Post requires that people opt out of receiving **all** bulk mail and not just *Your Ward News.*

We note that Canada Post currently has regulations on what mail is "unmailable". While most of these regulations are related to the format of the mail or the mailing of banned substances, some do deal explicitly with content. In particular, sexually explicit materials are not allowed to be sent either as addressed or unaddressed admail. There are no equivalent regulations with regard to materials which may cause the wilful promotion of hatred.

In reviewing the matter, the Board notes a possible policy recommendation to be considered in light of the *CPCA.* A publicly accessible registry of all companies and individuals who contract with Canada Post to send addressed or unaddressed mail could be created. Registering – either as an individual or a corporate entity – could be made a requirement for the sending of bulk mail. A registry system could further require mailings to clearly indicate who sent the mailing. Individuals who did not wish to receive mailings from certain organizations could then access the online registry and, noting their address, indicate the organizations from whom they do not wish to receive mail. There are three benefits to such a system. First, such a system still puts

substantial onus on individuals to opt out of receiving mail. The general benefits of mass mailings will still be realized for most citizens and most organizations. Nonetheless, individuals can opt out of receiving mailings they do not like. Second, such a system will provide relief to letter carriers confronted with residents who do not wish to receive a particular mailing. Third, requiring individuals to register to send mail will make it easier to enforce prohibitory orders against those who have had mailing privileges revoked. An alternative to allowing individuals to opt out of individual mailings would be to allow them to select out of broad classes of mailings, for example, commercial, charitable, and political mailings.

e) Legislative Changes

The lack of procedural guidelines in the *CPCA* and its regulations has led to considerable delay both in the appointment of this board of review and in establishing a proper mandate and procedures for the Board. As important *Charter* rights may be engaged with the issuance of an IPO, the Board is of the opinion that it would be beneficial to amend the statute or enact regulations to clarify the time limits under which a board of review must be appointed and the procedure to be followed by a board of review once appointed. This would be particularly beneficial given that boards of review are rarely appointed and there is therefore a dearth of historical precedent to follow.

There is also a lack of clarity under ss. 43(1) and 45(3) as to the remedial authority of the Minister. It would be helpful to clarify whether the Minister has the jurisdiction to tailor an IPO or whether she only has jurisdiction to ban affected persons from sending or receiving all mail. Similarly, it would be helpful to clarify whether the Minister can impose terms and conditions in an FPO that differ from those contained in the IPO.

RECOMMENDATIONS

Bearing in mind the purpose of the statute, and *Charter* values, and applying the *Doré* analysis in reviewing the matter, the Board makes the following recommendations:

1. The Minister revoke the IPO dated May 26, 2016 and issue an FPO pursuant to s. 45(3) of the *CPCA* directed to the Affected Persons prohibiting either of them on their own or acting through an agent or acting under any other personal or firm name and/or style from using unaddressed bulk mail (Canada Post Neighbourhood Mail) to distribute *Your Ward News* or any other material of a substantially similar content that is likely to expose a person(s) to hatred or contempt by reason of the fact that the person(s) is/are members of an identifiable group as defined in s. 318(4) of the *Criminal Code*.

2. Consideration be given to improving the methods by which people may "opt out" of unaddressed bulk mail both by simplifying the procedure for opting out and by improving the communication of the procedure to the customers of Canada Post.

3. The *CPCA* be amended and/or Regulations be prepared to clarify the procedure before boards of review including time limits for the appointment of such boards, standards of proof, and the remedial powers of the Minister under ss. 43(1) and 45(3).

4. That the Minister issue her final decision in a timely fashion setting out her reasons and demonstrating a balancing of *Charter* considerations.

Respectfully Submitted this 29th day of August, 2018.

Board of Review

Fareen Jamal **Peter Loewen** **Elizabeth Forster**