

BOARD OF REVIEW
(CANADA POST CORPORATION ACT)

IN THE MATTER OF MINISTER JUDY FOOTE'S INTERIM PROHIBITORY
ORDER RESPECTING JAMES SEARS, LAWRENCE ST. GERMAINE AND YOUR
WARD NEWS

**FACTUM OF THE INTERVENORS – LEAGUE FOR HUMAN RIGHTS OF B'NAI
BRITH CANADA**

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OVERVIEW¹

1. Since 2015 the Affected Parties, Dr. James Sears² and Mr. Lawrence St. Germaine, have disseminated their newspaper, Your Ward News (YWN), through Canada Post, pursuant to a commercial contract.
2. For years YWN degraded and derided and abused its relationship with Canada Post. Indeed, it made fun of Canada Post and taunted and threatened them whenever there was any discussion about Canada Post terminating the Affected Parties' privilege of using Canada Post as a way of disseminating their newspaper.³
3. Even the Canada Post carriers were appalled by the fact that they were required to deliver what they described as "racist hate material".⁴
4. In Mr. Derek Richmond's straightforward testimony – and in CUPW's eloquent submissions – Mr. Richmond makes two fundamental points which no submission by the Affected Parties can overcome:
 - a) The illegal, criminal and racist nature of the publication is patent, apparent, obvious and undeniable. And anyone who sees or reads YWN realizes that. And one does not need to be a lawyer or a Government Minister to know that.
 - b) This view of YWN is shared not only by the mail carriers, but also by the majority of the community where YWN is distributed. As stated – and never refuted by the Affected Parties – the "letter carriers are the eyes and ears of the community" and most

¹ The League for Human Rights of B'nai Brith Canada (BBC) relies upon and adopts and incorporates the submissions filed earlier to this Board by BBC, on or about June 26, 2017 [prior submissions].

² His medical licence was revoked in 1992 by the College of Physicians and Surgeons of Ontario after allegations of sexual assault.

³ See prior submissions, *supra* note 1, para 33.

⁴ See Evidence and Submissions by Derek Richmond, Vice President, Scarborough Local of the Canadian Union of Postal Workers [CUPW submissions]

of the community doesn't want YWN distributed to their houses by Canada Post, or by any other entity.

5. Ironically though, as pointed out by CUPW – Canada Post continued to “stick-up” for the Affected Parties – until even Canada Post could no longer do so because of the clarity of the illegality of the Affected Parties’ actions.
6. Finally, in May of 2016 the then Minister of Public Works and Government Services, Judy Foote, issued an Interim Prohibitory Order (IPO) preventing the continued delivery of this hate-filled publication through Canada Post, as she was authorized to do under section 43(1) of the *Canada Post Corporation Act (CPCA)*.⁵
7. The League for Human Rights of B’nai Brith Canada (BBC) supports the Minister’s decision to issue the IPO upon reasonable and probable grounds and to ensure that Canada Post was not being used to facilitate the possible commission of criminal acts, namely hate speech and defamatory libel contrary to sections 319 and 300, respectively, of the *Criminal Code*.⁶
8. What follows are BBC’s submissions in response to the Constitutional Questions advanced by the Affected Parties – namely that sections 43(1) and 45(3) of the *CPCA* do not violate the right to freedom of expression found in section 2(b) of the *Canadian Charter of Rights and Freedoms (Charter)*.⁷
9. BBC reserves the right to make further submissions regarding other grounds raised by the Affected Parties and the Intervenors who contest the issuance of the IPO, including submissions as to the merits of the IPO.

⁵ *Canada Post Corporation Act*, RSC, 1985, c. C-10, s 43(1) [*CPCA*].

⁶ *Criminal Code*, RSC, 1985, c. C-46, ss 300, 319 [*Criminal Code*].

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]

SUMMARY OF THE FACTS

10. On January 30, 2015 James Sears signed an Agreement Activation Form on behalf of the New Constitution Party of Canada (NPC) to send an annual volume of 1,000,000 pieces of “Unaddressed Admail” beginning on February 2, 2015.⁸
11. There was no mention of the YWN in the contract. And, in fact, nothing was ever delivered on behalf of NPC. Instead, only YWN, under the small fig leaf of the occasional NPC “ad” in YWN, was delivered by Canada Post – a fact proudly proclaimed on subsequent issues of YWN.⁹
12. Indeed, nowhere does YWN explicitly even call itself as “the voice of” or “the official publication of” NPC. Rather, it boasts that it is “the world’s largest anti-Marxist publication!” In short, it can certainly be inferred that the signing of the contract on behalf of the NPC was a ruse to hide the fact that YWN was the only document that the Affected Parties ever wanted distributed by Canada Post.
13. As a result of this delivery, Canada Post received numerous complainants from citizens who were upset with receiving YWN—a paper filled with anti-semitic, misogynistic, homophobic, Islamophobic, and racist material.¹⁰ Complaints were made to Canada Post and with the Canadian Human Rights Commission¹¹ and a Grievance was filled by Letter Carriers who objected to being forced to distribute the hateful material.¹²
14. YWN was also the subject of an investigation by the Toronto Police hate crimes unit.¹³

⁸ See Material that was before the Minister at the time the Order was made (Minister’s Material) at Tab 4B.

⁹ *Ibid.*, Tab 4A.

¹⁰ *Ibid.*, Tab 4C.

¹¹ *Ibid.*

¹² CUPW submissions, *supra* note 4.

¹³ Minister’s Material, *supra* note 8, Tab 4C.

15. The Affected Parties were well aware of these complaints and community efforts to stop the paper's delivery – such activities formed the subject of many derogatory articles found within the publication.¹⁴
16. Minister Foote found, on reasonable grounds, that the Affected Parties were committing or aiding in the commission of an offence by means of mail as they were sending items that include hate propaganda and/or the publication of defamatory libel. As a result, an IPO was issued on May 26, 2016.
17. Following the issuance of the IPO, the Affected parties requested a review of this IPO and the Minister convened the Board of Review.
18. In November of 2017, James Sears and Lawrence St. Germaine were charged with two counts of hate speech against Jews and women, contrary to section 319 of the *Criminal Code*.¹⁵ The Toronto Police have indicated that the charges are related to the same publication generally of YWN as is before the Board.

ISSUES AND LAW

19. The Affected Parties contend that the sections of the *CPCA* which permit the issuance of an IPO and subsequent Final Prohibitory Order are a violation of section 2(b) of the *Charter* which is not saved by section 1.

¹⁴ For example, see the Spring 2016 edition of YWN, page 2,4&5 referencing a petition asking Canada Post to discontinue delivery of YWN in the Minister's Material, *supra* note 8, Tab 4C.

¹⁵ Criminal Information, provided as an exhibit before the Board at the November 27, 2017 hearing regarding the request to adjourn the proceedings.

20. BBC submits that these provisions do not engage section 2(b) of the *Charter* but, even if the use of mail was within the scope of freedom of expression, the limit is demonstrably justified in a free and democratic society.

Section 2(b) Freedom of Expression is not engaged

21. There is no right to receive or send mail. It is not protected by the *Charter* or any human rights legislation. There is no case that expressly states that the mailing of anything – even a newspaper – is covered by section 2(b) of the *Charter*.

22. In fact, the use of the mail is a regulated activity in the sense that no one is free to send whatever they wish via Canada Post. Otherwise – which is the essence of the submissions made by the Affected Persons – the mailing of bombs, drugs, firearms, child pornography and all manner of clearly illegal activities would be allowed through the mail – while such activities would be prohibited in any other form.¹⁶ The absurdity of the logic of the Affected Persons points to the lack of legal logic of their position.

23. What this also means is that, to a certain extent, mail can have its contents assessed – especially when delivered in an unsealed fashion, as this newspaper is.

24. Unlike the disallowance of books that cater to particular, but legal, communities;¹⁷ or the requiring that all films be subjected to prior censorship, regardless of their content,¹⁸ or restrictions upon legal picketing which is part of a lawful labour action;¹⁹ or controls placed upon the advertising of legal toys;²⁰ there is nothing lawful about hate speech – especially

¹⁶ See Canada Post website for “non-mailable” matters, and *Non-mailable Matter Regulations*, SOR/90-10 [Regulations].

¹⁷ Such as the gay and lesbian community, as set out in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69.

¹⁸ *R v Glad Day Bookshops Inc.*, [2004] O.J. No. 1766 (SCJ).

¹⁹ *RWDSU v Dolphin Delivery Ltd.*, [1986] SCJ No. 75 (SCC).

²⁰ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] SCJ No. 36 (SCC).

speech which, on reasonable and probable grounds, falls within section 319 of the *Criminal Code*, which is the issue here. Neither is it subject to the protection of the *Charter*.²¹ Nor is any “reverse onus” provision set out in section 319(3)(a) of the *Code* unconstitutional.²²

25. All forms of hate speech are impermissible. Indeed, there is no requirement that such speech even needs to fall within the *Criminal Code*. Accordingly, hate speech can also be subject to limitations under Federal,²³ or Provincial Human Rights legislation,²⁴ which are not considered criminal.

26. And, even in such non-criminal instances, “prior injunctions” are permitted in order to enjoin those behind alleged, but unproven allegations, from continuing with their actions.²⁵

27. In short, there is no absolute right of free speech. And there is certainly no absolute right to publicly express or encourage hate speech, precisely because of “the distinction between the expression of repugnant ideas and expression which exposes groups to hatred...”²⁶ Thus, while the former is protected by section 2(b) of the *Charter*, the latter is not.

28. As for YWN, its contents go far beyond “the expression of repugnant ideas.” It is, in fact, “the expression [of ideas] which exposes groups to hatred.” Thus, it is not deserving of *Charter* protection.

²¹ *R v Keegstra*, [1990] SCJ No. 131 (SCC) [*Keegstra*].

²² *Ibid.*

²³ *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892;

²⁴ *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467 [*Whatcott*].

²⁵ *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626. The fact that the *Canadian Human Rights Act* permits the Commission to apply to a court for such an injunction is irrelevant. In this instance, the legislation permits the Minister to issue the IPO. The Affected Persons can then proceed to a Board of Review – as in this case – or, they could have proceeded to Federal Court and applied to quash the decision and challenge its constitutionality. They chose to do the former.

²⁶ *Whatcott*, *supra* note 24, para 51-52.

29. The reasonable and probable belief that YWN expresses and promotes hate speech was obvious to the letter carriers. It is obvious to any impartial, knowledgeable, fair-minded reader. And it was certainly obvious to the Minister.
30. As for any suggestion that only “portions of the paper contain statements that amount to an offence”²⁷ and that the Affected Parties are thusly prevented from communicating the remaining (supposedly legal) content, such a statement in the factum is unsupported by any evidence – even assuming that there is a small, minority portion of the paper that is somehow not connected to the over-all hate-filled, racist, misogynistic, anti-semitic content of the newspaper as a whole.
31. In fact, it must be pointed out that the IPO does not unduly restrict, limit, or inhibit the Affected Persons, in that:
- a) The Affected Persons are free to continue disseminating and delivering their newspapers via couriers, commercial delivery services, the internet, store sales, giveaways and any other way that they can – which they continue to do.²⁸
 - b) They are also free to express themselves via radio, television, other newspapers and any other form of media that sees fit to invite them to do so.²⁹
 - c) There is no evidence from the Affected Persons, under oath, that they or YWN are in any way inconvenienced, badly affected, disadvantaged or in any way suffering – whether economically, socially, or otherwise – due to their inability to mail out per: the IPO. In fact, there isn’t even any evidence that they can’t pay bills.

²⁷ Factum of the Affected Parties, para 52

²⁸ Their most recent edition, “Winter 2018”, boasts that, even though banned by Canada Post, they are delivered to 305,000 premises, with a readership of over 1 million.

²⁹ Of course, depending on what the Affected Parties say, they could be liable to human rights legislation and/or civil and/or criminal litigation and liability.

d) The Affected Persons are still receiving mail.

32. To summarize, there is no sworn testimony from either of the Affected Persons that they are actually “affected,” or the manner of their being “affected.”

The postal service is not a free zone which allows for all transmissions of mail

33. To conclude, for those who postulate that the issue regarding mail delivery falls within the purview protected by section 2(b) of the *Charter* – respectfully, in these circumstances, it doesn’t.

34. As stated previously, there is no absolute right to send mail – especially when the sender’s prime purpose, upon reasonable and probable grounds, appears to be to foster hate via the print media.

If Freedom of Expression is engaged, the limit is justified under section 1

35. *Charter* rights are not absolute. Any limitation on a right is permissible if it is a reasonable limit that can be demonstrably justified in a free and democratic society.³⁰ A limit is justifiable if it is undertaken pursuant to a pressing and substantial objective and the means chosen are proportionate to this objective. The proportionality of a limit is assessed with reference to its rational connection to the objective, a minimal impairment of the right, and that the deleterious effects of the limit do not outweigh the objective.

36. When considering a section 1 analysis of a limit to freedom of expression, the nature of the expressive activity the state seeks to restrict cannot be ignored.³¹ In this case, the IPO

³⁰ *Charter*, *supra* note 7, s 1.

³¹ *Keegstra*, *supra* note 21, para 82.

provisions seek to restrict the use of the mail as a means of spreading expression that is criminal.

37. As we do not have the benefit of the Minister's submissions, BBC reserves the right to make additional submissions relating to the section 1 grounds upon review of the Minister's position.

PRESSING AND SUBSTANTIAL OBJECTIVE

38. A clear reading of the *CPCA* and its related Regulations make it clear that the impugned sections are directed at preventing the use of Canada Post whenever there are reasonable grounds to believe that such use may be for the commission or attempted commission of criminal offences.

39. It is exactly this issue that section 43 of *CPCA* requires the Minister to consider. Further, the *Non-mailable Matter Regulations*³² which set out what is considered "non-mailable" include "any item transmitted by post in contravention of an Act or a regulation of Canada."³³ This would include any item that would, on reasonable grounds, contravene the Criminal Code of Canada.

40. It is clear that Canada Post will not, should not, and cannot tolerate the use of the mail to support what it believes, on reasonable grounds, would be the commission of a criminal offence.

³² *Regulations*, *supra* note 16.

³³ *Ibid.*, Schedule, Item 4.

PROPORTIONALITY

Rational Connection

41. Equally as clear is the connection between the IPO provisions and the objective—by preventing those found to have been using the mail to commit or attempting to commit criminal offences from using the mail, the provisions ensure that Canada Post is not used for such purpose.

Minimal Impairment

42. As stated above, there is no absolute right to the use of the mail, and restrictions on what may be sent are a key part of the *CPCA* and its Regulations.

43. The IPO provisions do not unduly infringe upon an individual's right to freedom of expression.

44. An IPO can only be issued following a decision on the Minister made on reasonable grounds.³⁴

While Affected Parties and those contesting the constitutional validity of the IPO provisions argue this is not a high enough standard, BBC submits that this standard is sufficient and is within accepted *Charter* jurisprudence.

45. The Courts have frequently imposed and upheld the reasonable grounds standard as an acceptable justification for a violation of a *Charter* right. This is particularly common where the criminal law is engaged. Given that section 43 of the *CPCA* deals with reasonable and probable determinations of criminal or attempted criminal offences, it follows that a similar standard would apply.

³⁴ *CPCA*, *supra* note 5, s 43.

46. Reasonable grounds (or reasonable and probable grounds) is all that is required for state actors to arrest an individual, to charge them with a crime, and even to invade their privacy.
47. Reasonable grounds to believe is the legislated - and constitutionally accepted standard - that allows the State to interfere with a person's rights.
48. To say that reasonable grounds to believe is not a sufficient standard to justify an infringement of a *Charter* right regarding the Minister's administrative decision, is not consistent with the law, especially where the concern is possible criminal activity.
49. The Minister is not to make the decision to issue an IPO lightly. It cannot be made on the basis of a whim, or because the Minister is tired of hearing complaints, or because the Minister felt like it, or even where the Minister had a reasonable suspicion.
50. Further, the Minister's decision is subject to review by way of a judicial challenge or via a Board such as in this instance.
51. This Board can review the Minister's decision based, not only on the evidence the Minister reviewed, but on hearing additional evidence and submissions from the Affected Parties and any other person who has an interest in the matter.³⁵ Thus, the provisions follow the constitutionally accepted practice with regard to the interests at stake.³⁶
52. Finally, the complete ban on the delivery of mail addressed to or posted by the Affected Party is not overbroad, nor does it prevent the provision from being a minimal impairment of their freedom of expression.

³⁵ *Ibid.*, s 45(1).

³⁶ Unlike when a person faces criminal charges, in this instance there is no risk, as a result of the IPO or subsequent review, that the Affected Parties will have the stigma associated with criminal charges or end up with criminal record or be imprisoned.

53. Minimal impairment does not require that the government rely “upon only the mode of intervention least intrusive of a *Charter* right or freedom.”³⁷

54. In this case - subject to the Affected Parties applying for an easing of the IPO - a blanket prohibition on the sending of all mail, without consent of the Minister, is still proportional and is necessary to ensure the objective is met as it would be simple for the Affected Parties to disguise their newspaper as other forms of mail and continue to distribute it through the mail - thereby continuing to use the mail to commit a crime.

Overall Proportionality

55. The legislative scheme regarding IPOs strikes the appropriate balance between the Affected Parties rights under freedom of expression and the government’s objective in ensuring the mail, a regulated service, is not used to commit crimes.


³⁷ *Keegstra*, *supra* note 21, para 130.

ORDER REQUESTED

56. BBC requests this Board recommend the Minister declare the IPO to be a Final Prohibitory Order.

All of which is respectfully submitted.

DATED at Toronto, this 12th day of January, 2018



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SCHEDULE A

Canada (Human Rights Commission) v Canadian Liberty Net, [1998] 1 SCR 626

Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892

Irwin Toy Ltd. v Quebec (Attorney General), [1989] SCJ No. 36 (SCC)

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RWDSU v Dolphin Delivery Ltd., [1986] SCJ No. 75 (SCC)

Saskatchewan (Human Rights Commission) v Whatcott, [2013] 1 SCR 467

SCHEDULE B

Canada Post Corporation Act, RSC, 1985, c. C-10

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

Criminal Code, RSC, 1985, c. C-46

Non-mailable Matter Regulations, SOR/90-10