BOARD OF REVIEW
(*Canada Post Corporation Act*)

IN THE MATTER OF A REVIEW UNDER SECTIONS 44 AND 45 OF THE *CANADA POST CORPORATION ACT*

FACTUM OF THE CENTRE FOR ISRAEL AND JEWISH AFFAIRS
(*Submissions on Constitutional Issues*)

January 12, 2018

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CONSTITUTIONAL SUBMISSIONS

INTRODUCTION

1. These submissions are a response to the constitutional submissions of the Affected Persons and other Interested Parties (the "Opponents") who have argued against the constitutionality of Section43 and 45 of the *Canada Post Corporation Act* (the "Act") and of the Minister's Order made under the Act.

2. As contemplated in the Board's directive, CIJA's submissions are limited to constitutional issues and therefore do not respond to numerous substantive factual and administrative law issues addressed by the Affected Person in their submissions. Given constraints of time, CIJA reserves its response to those arguments and submissions to its oral argument during the week of January 22, 2018.

3. Since s. 7 of the *Charter* has no application on the facts of this case, issues related to notice, timeliness and "fairness" of the procedures in s. 43 including the adequacy or even existence of reasons do not rise to the level of constitutional status. As correctly noted by counsel for one of the Opponents, the remedy for unfair process is more process. Process arguments should be dealt with during the week of January 22 and /or on judicial review.

Brief Overview

4. Sections 43 and 45 of the *Act* arguably engage s. 2(b) of the *Charter* by allowing the Minister to deny access to a means of communication, namely postal delivery. On their face they do not deal with restraint on the basis of content.

Their impact on Section 2(b) is minimal and they are demonstratively justifiable in a free and democratic society in light of their salutary benefits in preventing use of a mail to commit crime.

5. The Opponents' complaints focus not on the statute itself but rather on its *application* when the underlying offence is wilful incitement of hatred under Section 319(2) of the Criminal Code. The proper analytic approach to determining constitutionality is the one outlined in *Doré* rather then the *Oakes* test.

6. As a practical matter the two tests are similar, with the main difference being that the *Doré* approach focuses on the actual facts underlying the Order – the effect on the Affected Persons' s. 2(b) rights - rather than abstractions and theoretical possibilities. Under either approach, however, the crucial conceptual tool when dealing a constitutionality of hate speech provisions is the nature of hate speech itself.

7. The central analytic tools for determining constitutionality are concepts of proportionality and the balancing. Applying these concepts in context, the Minister's order is proportional and properly respects *Charter* values without unnecessarily limiting expressive freedom.

Does Section 43 implicate the Charter?

8. To the extent that Canada Post represents a medium of communication, s. 43 may be thought to implicate the Charter, insofar as it gives the Minister the power to issue an interim order preventing delivery of mail to or by a person the Minister

believes, on reasonable grounds, is committing or attempting to commit an offence by means of the mail. Importantly, s. 43 does not on its face authorize interference with expression on the basis of the content of an intended communication.

9. The reason for this is clear. The types of crime that can be committed by means of mail are not restricted to, nor do they even primarily consist of, crimes arising from the content of communications. They can consist of sending contraband, drugs, noxious things, dangerous items, prohibited items, hoax or true explosives or other similar things, all of which will constitute crimes but more of which will otherwise involve verbal communication or any sort of expressive activity beyond the sending of the substance itself.

10. In terms of the constitutionality of s. 43, therefore, the analysis must examine a scheme that is geared to the prevention of criminal conduct as follows:

    i. belief by the Minister on reasonable grounds that a person is committing or attempting to commit a crime using the mail;
    ii. an interim order preventing the person from sending or receiving delivery;
    iii. review of the matter by an independent Board;
    iv. a report and recommendations by the Board;
    v. a final order confirming, varying or revoking the order.

11. It is anticipated that counsel for the Minister will submit a constitutional argument, including a full s.1 justification of this statutory scheme. These submissions on

behalf of CIJA with respect to the constitutionality of this particular statutory scheme are merely supplementary to the Minister's anticipated submissions.

12. Insofar as this statutory scheme infringes s. 2(b), it is clearly justifiable in a free and democratic society.

13. The infringement of s. 2(b) rights is minimal in that the subject of the order still has access to alternative means of communication via the internet, telephone or courier. The suspension of postal service is justifiable to prevent a crime. The standard of proof, that the Minister reasonably believes that the person is committing or attempting to commit a crime, is appropriate to an early stage of investigation and to the prevention of a crime and parallels that of an early stage of the criminal process. The suspension is temporary (i.e. interim) and is subject to independent review and to modification or rescission. As an administrative process, the entire scheme is also, of course, subject to judicial oversight by way of judicial review.

Application of s. 43 to the facts of the present case

14. The Opponents' complaints do not focus on the statutory scheme as described in the section above. Their complaint focusses on the impact of the order on the *content* of expression. That is because on the *facts* of the present case, the Minister's order has the effect of preventing the Affected Persons from committing the crime of wilful promotion of hatred under s. 319(2) of the *Criminal Code*.

15. Section 319(2) of the *Criminal Code* is an infringement of s. 2(b) of the Charter since it punishes individuals for their expressive acts. S. 319(2) has been found to be constitutional as a reasonable limit demonstrably justifiable in a free and democratic society.

Reference: *R. v. Keegstra* [1990] 3 S.C.R. 697

16. Does the fact that the crime that underlies a Minister's s. 43 order may be incitement of hate under s. 319(2) render s. 43 of the *Canada Post Corporation Act* itself an infringement of s. 2(b) of the Charter? CIJA respectfully submits that what the Opponents are complaining about is not an unconstitutional *statute*, but rather an unconstitutional *application* of the statute and that therefore the constitutional analysis is not focussed on the statue but on its application and should take the form of a *Doré* analysis rather than an application of the *Oakes* test.

Reference: *Doré v. Barreau du Quebec* 2012 SCC 12

Oakes [1984] 1 S.C.R. 103

17. This matter was canvassed at length in previous constitutional submissions and CIJA does not intend to repeat those submissions here. For present purposes as will appear below, the main salient difference is that the relevant analysis concentrates on the *specifics* of the current case rather than on ethereal abstractions of rarified theory. Not only does this accord with the constitutional reality of what is being dealt with (i.e. the application of the statute, not the statute itself) but it also accords with the practicalities of the Board's mandate and expertise. While the Board certainly has jurisdiction to consider constitutional

matters by virtue of its jurisdiction to consider legal matters, it is – to use the vernacular – a bit of stretch to expect this Board to adjudicate matters of high constitutional theory, divorced from actual facts, based on learned references to US constitutional theory, dissenting judgments in the Supreme Court of Canada (in a case which, incidentally, adopts a methodological approach that has been expressly repudiated by the Supreme Court of Canada, in *Doré* itself though not on the subject raised in the dissent) all[1] against a background where counsel for some of the opponents have candidly stated an expectation that constitutional matters will be raised "in another place" in due course. The issue of whether the Affected Persons' Charter rights have been infringed in *this* case by *this* order is relevant to this Board's mandate to report and to recommend, and a constitutional analysis of the *application* of s. 43 in this case, is relevant to the Board's discharge of that mandate.

The *Doré* test: Proportionality

18. Summarized in one pithy phrase, the *Doré* test is whether the Charter infringement "achieves proportionality, or more specifically minimal limitation of the guaranteed right".

Reference: *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 19.

19. It is a test that calls for an analysis of Charter values in order to determine whether the infringement in question achieves a proper balance between salutary affects of the goal attempted to be achieved without unnecessarily limiting

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[1] Fox–Decent and Pless, The Charter and Administrative Law: Cross-Fertilization or Inconsistency? Flood and Sossin; Administrative Law in Context (2nd ed), Toronto 2012, at p. 429

Charter rights. If this sounds a good deal like the balancing to be done in the *Oakes* test that is no coincidence, since the two are remarkably similar and have been noted to be so, including in *Doré* itself:

> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.
>
> Reference: *Doré*, para. 57

20. In fact, constitutional review of the Minister's s. 43 order is facilitated by reference to Charter jurisprudence applying the *Oakes* test, because of these similarities and also because of one single overwhelming factor that has seemingly been ignored in all the Opponents' submissions, namely the distinctive nature of hate propaganda and its relationship to s. 2(b).

21. It is telling that the arguments advanced by the Opponents canvass a broad swath of law extending to obscure corners foreign jurisprudence but fail entirely to discuss the line of Canadian cases dealing directly with the topic at issue before the Board, namely the interaction of hate speech and s. 2(b) of the Charter, a topic that has occupied Canadian courts for close to two decades.

22. CIJA urges the panel to read in their entirely the Supreme Court of Canada cases of *Keegstra*, *Taylor* and *Whatcott*. These cases demonstrate a consistent

approach in the Supreme Court of Canada, at first by a majority and over vigorous dissents, but finally by a unanimous court with a concurrence of the author of the dissents in *Keegstra* and *Taylor* (McLachlin J. – later CJC) which finds suppression of non-violent "political" speech on the basis of content where that speech is hate speech-to be demonstrably justifiable in a free and democratic society.

23. Contrary to the arguments set out in a number of the Opponents' submissions "content neutrality" does not prevent an evaluation of the interaction between the content of hate speech and the purposes of human rights protection (and hence of s. 2(b) of the *Charter*). To the contrary, the Supreme Court of Canada has consistently found it appropriate to note that the content of hate speech influences how one evaluates the severity of the impact on s. 2(b) rights constituted by the suppression of hate speech.

> 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. I am aware that the use of strong language in political and social debate – indeed, perhaps even language intended to promote hatred – is an unavoidable part of the democratic process. Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as "political", thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. 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 wholly inimical to the democratic aspirations of the free expression guarantee.
>
> Indeed, one might plausibly contend that it is through rejecting hate propaganda that the state can best encourage of the

protection of values central central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers. (emphasis added)

...

Reference: *Keegstra 764*

I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity, so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s. 2(b) rationale. Together with my comments as to the tenuous link between communications covered by s. 319(s) and other values at the core of the free expression guarantee, this conclusion leads me to disagree with the opinion of McLachlin J. that the expression at stake in this appeal mandates the most solicitous degree of constitutional protection. In my view, hate propaganda should not be accorded the greatest of weight in the s. 1 analysis.

...

Reference: *Keegstra 765*

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)" (emphasis added)

Reference: *Keegstra 766*

...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. (emphasis added)

Reference: *Taylor*, p. 922-923

24. This means that when analyzing hate propaganda from a s. 2(b) perspective, the point of departure for the analysis is *the nature of the expression*:

> **Nature of the Expression**
>
> Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(b) of the *Charter*: *R. v. Kahawaja*, 2012 SCC 69, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will in turn, affect its value relative to other *Charter* rights, the exercise of protection of which may infringe freedom of expression. (emphasis added)

Reference: *Saskatchewan Human Rights Commission v. William Whatcott*, para. 112

25. It is for this reason that the Supreme Court of Canada's approach makes reference to Canada's international Human Rights obligations.

Reference: *Taylor*, p. 916

Whatcott, para. 67

> **Universal Declaration of Human Rights:**
>
> Preamble
>
> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.
>
> Article 7: All are equal before the law and are entitled without an discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.
>
> **International Covenant on Civil and Political Rights**
>
> Article 20(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

26. Expressive freedom is protected in a context that assumes and protects the equal worth and dignity of all members of the human family.

Constitutional Analysis the Minister's s. 43 Order

27. Whether one applies the *Doré* analysis or even the formal *Oakes* test the operative concept is *proportionality*. Even it the formal *Oakes* test, the stage of "pressing and important objective" is seldom an issue and is certainly not raised by the Opponents here. Even under "proportionality" the issues in the *Oakes* test tend to shrink. "Rational connection" between the objective of preventing crime through the mail and cutting off access to the mail is hardly an issue in the current case. That leaves only "minimal impairment" and "excessive abridgement in light of the benefit" or "balancing" as it is more conveniently called. In other words, the balancing to be done under the *Oakes* test and under the *Doré* test seems remarkably similar and a review of the Opponents' submissions will demonstrate that most of the objections are clustered within the concept of "minimal impairment."

Minimal Impairment

28. Contrary to the submissions of the Opponents, even under the *Oakes* test, in order to demonstrate "minimal impairment" it is not necessary for anyone to prove that there is no alternative solution that might impair the *Charter* right in question less than the one adopted by Parliament:

> ...While it may "be possible to imagine a solution that impairs the right at stake less then the solution Parliament has adopted" there is often "no certainty as to which will be the most effective": JTI, at para. 43, per McLachlin CJ. Provided the option chosen is one

within a range of reasonably supportable alternatives, the minimal impairment test will be met: *Edwards Books*, at pp. 781-783.

Reference: *Whatcott*, para. 101

29. This "range of reasonable supportable alternatives" approach echoes the "margin of appreciation" referred to in the *Doré* excerpt quoted above and is consistent with the administrative law approach set out in the leading case of *Dunsmuir*. So long as the choice, administrative decision or statutory provision falls within a range of reasonable options, it will not be found to be unconstitutional just because someone is capable of positing a different choice, decision, or wording that might arguably produce a different allegedly less restrictive result.

Reference: *Dunsmuir v. New Bruinswick* [2008], S.C.R. 190

30. Having regard to the actual s. 43 order, all of the considerations set out with respect to the statute itself in the earlier analysis, also apply with respect to its application to the order.

31. Dealing specifically with the order:

(a) is the order unconstitutional because the standard is based on a reasonable belief that the Affected Parties were committing or attempting to commit an offence?

- As noted in the earlier analysis the standard of a reasonable belief is appropriate at an early stage in the investigation of a crime and is appropriate to the prevention of a crime about to be committed and is an analogous to an early stage of a criminal process.

- In the current case it is possible to analyze the issues of Your Ward News and to ascertain that in fact they do on a balance of probabilities constitute hate propaganda.

- It is in any event not entirely clear what the difference might actually be between a reasonable belief and a belief on a balance of probabilities in terms of the analysis of a text alleged to be hate propaganda.

- Given the egregious harm caused by hate propaganda and the minimal impact of any miniscule difference between a reasonable belief and a belief on a balance of probabilities this factor cannot lead to a finding of unconstitutionality.

(b) Does the fact that the order constitutes a blanket ban on access to the mail render it unconstitutional?

- The scheme of the act provides for a review followed by recommendations and a possible amendment or rescission. The order is intended to be *interim* and is appropriate for the prevention of crime. As a practical matter the interference with the Affected Person's s. 2(b) communication rights is minimal since they still have access to the internet, private delivery services, the telephone, etc. As a practical matter, it is also clearly impossible to enforce on ban on sending mail and there is no evidence whatsoever that the Affected Persons have not been receiving mail.

- As for the suggestion that the order could or should specify the parts of the publication that are objectionable and ban only those, CIJA rejects the idea

that any parts of the publication are not objectionable. The publication as a whole constitutes hate propaganda with each part contributing to its overall impact.

(c) Is the order unconstitutional for failing to order a remedy short of denying access to the services of Canada Post.

- No order short of denying access to Canada Post would have been effective. The evidence discloses that after the Minister's order, the Affected Persons continued to publish Your Ward News and that the content of the publication continues to fall within the definition of hate propaganda as set out in the case law and as set out in the International Holocaust Remembrance Alliance definition and illustrations of antisemitism.

- The order is part of a scheme that allows for a review and variation and the Affected Persons also have a right of judicial review.

Prior Restraint

32. The Opponents place special emphasis in their constitutional arguments on the issue of "prior restraint". While they quote theoretical treatises, U.S. jurisprudence and cite a dissenting opinion in the Supreme Court of Canada, once again they do not refer to the body of Canadian case law that is directly on point with regard to prior restraint and hate speech, namely the jurisprudence of the Canadian Human Rights Tribunal under the former s. 13(1) of the *Canadian Human Rights Act*.

33. This jurisprudence is of particular importance, because the constitutionality of s. 13(1) was the subject matter of the *Taylor* decision in the Supreme Court of Canada, but also because like s. 43 of the *Canada Post Corporation Act* its purpose was the restraint of an offence and like the present case the offence in question was hate speech.

34. Pursuant to s. 54 of the *Canadian Human Rights Act*, the Canadian Human Rights Tribunal was given jurisdiction, by way of remedy, to issue a cease and desist order. The purpose of a cease and desist order is to restrain future conduct. An examination of cease and desist orders issued by the Tribunal demonstrates that they uniformly take the form of "prior restraints":

> ...The Tribunal orders that the Respondent, Mr. Tomasz Winnicki cease the discriminatory practice of communicating by the means described in s. 13 of the *Act*, namely the internet, material of the type that was found to violate s. 13(1) in the present case, or any other matter of a substantially similar content that is likely to expose a person or persons to hatred or contempt by reason or the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination. [Emphasis added]
>
> Reference: *Warman v. Winnicki*, 2006 CHRT 20 at para. 193
>
> ...I order Mr. Kulbashian and Mr. Richardson, as well as Affordable Space.com and the Canadian Ethnic Cleansing Team, to cease and desist from communicating or causing to be communicated by the means described in s. 13 of the *Act*, namely the Internet, any matter of the type contained in the Hate Messages that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or persons are identifiable on the basis of a prohibited ground of discrimination. [Emphasis added]
>
> Reference: *Warman v. Kulbashian*, 2006 CHRT 11

35. Nor has the use of "prior restraint" in hate propaganda cases been restricted to administrative tribunals. Not only has the Federal Court issued an interlocutory injunction restraining a respondent in a pending CHRT proceeding from

communicating messages alleged to constitute hate speech on the internet, it has punished breach of that order, with imprisonment under its contempt powers.

Reference: *Canadian Human Rights Commission v. Winnicki*, 2005 FC 1493

36. In issuing his interlocutory injunction, which he specifically described as "prior restraint", Mr. Justice de Montigny opined:

> 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 contradicts 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.

Reference: *CHRC v. Winnicki*, at para 29

37. Accordingly, Justice de Montigny granted an interlocutory injunction restraining the respondent from communicating by means of the internet, messages of the kind found in the material filed in support of the application (emphasis added).

Reference: *CHRC v. Winnicki*, at para. 44

38. The respondent *Winnicki* continued to publish material on the internet. In an application before Mr. Justice von Finckenstein he was found to be in contempt of Mr. Justice de Montigny's injunction and sentenced to a nine-month term of imprisonment. Von Finckenstein J. found that *Winnicki's* postings violated de Montigny J's order in that they "are likely to expose persons to hatred or contempt by reason of race, national or ethnic origin, colour or religion contrary to ss. 13(1) of the *Canadian Human Rights Act*".

Reference: *CHRC v. Winnicki*, 2006 FC 873, at para. 50

39. In Appendix A appended to von Finckenstein J.'s Reasons for Order there is attached a chart comparing materials from the complaint before the Canadian Human Rights Tribunal against *Winnicki* that was before de Montigny J. in issuing his injunction, and the postings by *Winnicki* found to be in contempt of the injunction. The commonality is in their intemperate language, the identity of their targets and their racist and hateful themes. Otherwise, they are not similar in wording

Reference: *CHRC v. Winnicki*, 2006 FC 873

The Actual Constitutional Balance

40. The Affected Parties and a number of the Opponents complain that the Minister's order unjustifiably impairs their inherent s. 2(b) rights. This is an entirely theoretical argument of the sort that the Supreme Court of Canada has rejected in the case of hate propaganda:

> ...In balancing interests within s. 1, one cannot ignore the setting in which the s. 2(b) freedom is raised. It is not enough to simply balance or reconcile those interests promoted by a government objective with abstract panegyrics to the value of open expression. Rather, a contextual approach to s. 1 demands an appreciation of the extent to which a restriction of the activity at issue on the facts of the particular case debilitates or compromises the principles underlying the broad guarantee of freedom of expression.

41. Thus in the present case, applying the *Doré* test to the actual order one can ask a number of questions based on the actual facts of the case in order to arrive at conclusions as to whether there has been any undue interference with s. 2(b) rights.

42. First, applying the Doré test to the actual facts of a case, what has been the actual impact of the actual order on actual s. 2(b) rights? The evidence discloses that the Affected Parties 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. The actual impact on the Affected Parties has been purely financial.

43. There is no evidence that the Affected Parties understood the Minister's order as preventing them from mailing letters nor that Canada Post ceased delivering mail to them. Indeed, common sense suggests that the special monitoring necessary to prevent persons in the position of the Affected Parties from mailing letters would make any such purpose impossible to carry out.

44. The impact on s. 2(b) on the other hand has been a positive one. The Minister's decision to issue her order constitutes an act of denunciation against hate propaganda. As will be demonstrated in oral submissions Your Ward News both before and after the Minister's order is replete with messages that constitute hate propaganda as defined by the Supreme Court of Canada, as elaborated by the Canadian Human Rights Tribunal and, in the case of the attacks on Jews, as defined and illustrated by the International Holocaust Remembrance Alliance, of which Canada is a party.

45. In standing up against this hate speech, the Minister was standing up for human rights since "hate speech always denies fundamental rights".

Reference: *Mugesera v. Canada*, 2005 SCC 40 at para. 147

46. In that sense the *Doré* balance is entirely in favour of the Minister's action.

47. Furthermore, the Minister's action was proportionate to the risk. Once again, there is specific evidence in support of this proposition since the Affected Persons continued to publish and distribute copies of Your Ward News after the Minister's order and these copies exhibit the same hate propaganda content as the copies that were before the Minister when she made her order. Given the purpose of preventing the services of Canada Post being used for the commission of a crime, the order achieved its purpose. The Minister's order has prevented and continues to prevent the commission of a crime by use of the mail.

48. Applying the *Doré* analysis to the Minister's order, it is submitted that the decision to issue the order was clearly a proportional response that is well within a range of appropriate decisions bearing in mind, the purpose of the statute and bearing in mind Charter values.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2018.

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APPENDIX

Additional Facts

49. CIJA submits that the following additional facts in addition to those set out in various parties are relevant to the constitutional argument.

(i) The Affected Persons continued to publish Your Ward News after the Minister's order.

(ii) The Affected Persons distributed Your Ward News by private distribution following the Minister's order.

(iii) The Affected Persons have been charged under s.319(2) of the *Criminal Code* in connection with publication of Your Ward News.

(iv) As a condition of interim release, the Affected Persons have been prohibited from distributing copies of Your Ward News published up to the date of their arrest.

(v) The Affected Persons have published a Winter 2017 edition of Your Ward News.