

BOARD OF REVIEW

**In the matter of Interim Prohibitory Orders issued against Leroy St. Germaine, Lawrence Victor St. Germaine and James Sears dated May 26, 2016 pursuant to subsection 43(1) of the *Canada Post Corporation Act* (“the *CPCA*”)
AND in the matter of a Review under subsection 44 (1) of the *CPCA***

SUBMISSIONS OF RICHARD WARMAN ON CONSTITUTIONAL ISSUES

1. I adopt the submissions of the Centre for Israel and Jewish Affairs except to any extent where they may differ from these submissions.

The manner in which legislation is administered by a government actor is irrelevant to its constitutionality in this case

2. Prohibiting the use of the mails to commit criminal offences or other unlawful activity is self-evidently a pressing and substantial objective for Parliament to regulate and the affected parties rightfully concede this to an extent in their submissions at paragraph 26.

3. The Federal Court of Appeal has previously heard and rejected the argument of other neo-Nazis and their supporters including the Canadian Civil Liberties Association that the manner in which an administrative process is administered by a government actor is relevant to determining if it is a reasonable limit on s. 2(b) Charter rights and thus saved by s. 1.

4. In the 2014 case of *Lemire v CHRC, Warman, and Canada (Attorney General)*, the Federal Court of Appeal examined whether the manner in which the Canadian Human Rights Commission processed a human rights complaint regarding Internet hate propaganda could affect the legislation’s constitutionality itself. The Federal Court of Appeal unanimously upheld the finding of the Trial Judge that it could not and that the appropriate forum for any redress of such concerns would be an application for judicial review:

[40] The Judge stated that legislation is invalid only if it infringes the Charter by virtue of either its terms or its necessary effects: the administration of a statute cannot otherwise invalidate it. An application for judicial review would be the appropriate means of challenging conduct by the Commission on the ground that it was inconsistent with Charter values or unlawful for some other reason. If such an application were successful, the Court could fashion an appropriate remedy without invalidating the statute: paras. 69-70.

...

[42] I agree with the Judge’s conclusion that the manner in which the Commission enforced section 13 is not relevant to a determination of the section’s constitutional validity. The effects of legislation may invalidate it if they flow necessarily from its terms. Infringements of Charter rights that result from administrative action that was neither statutorily mandated nor authorized do not render legislation invalid: see, for example, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 20; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 at para. 125 (*Little Sisters*); *Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256, [2004] 4 W.W.R. 535 at para. 48 (*Thomson*).

Lemire v. Canada (Human Rights Commission), 2014 FCA 18 (CanLII), <http://canlii.ca/t/g2x2d>

5. There is nothing within the actual wording or necessary effects of the prohibitory order sections of the Canada Post Act that would prima facie mandate or authorize infringement of the Charter. Indeed, the plain wording of the Act makes it clear that the focus is on barring the use of the mails for conduct that is *already unlawful*. Prohibitory orders may deal with any manner of conduct that does not involve expression such as the unlawful shipment of controlled drugs or weapons that would constitute offences.

6. The relevant terms of the prohibitory order scheme are:

Interim prohibitory order

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”).

7. If the affected parties object to the interim prohibitory order, the Canada Post Act provides that a Board of Review such as this one is appointed, hears evidence and submissions from those concerned, and then provides its findings and recommendations to the Minister for the Minister's final decision whether to maintain, vary, or rescind their order:

Report

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.

8. I have been at a disadvantage attempting to participate in the process from Ottawa, but I am not aware of any direct evidence having been submitted by the affected parties as to the impact of the prohibitory order upon them (whether by affidavit or viva voce evidence). If this is indeed the case, then there is no evidence before the Board of Review upon which to base a finding as to any negative effect the prohibitory order may have had upon the affected parties.

An interim or permanent prohibitory order may be tailored to the individual circumstances

9. Under the explicit terms of the prohibitory order provisions of the Canada Post Act, the Minister has a discretionary power to tailor any prohibitory order to the individual circumstances.

10. The prohibition on the delivery to or sending of mail by the affected parties is subject to the consent of the Minister - see:

<http://www.laws.justice.gc.ca/eng/acts/C-10/page-6.html#h-28>

43(1)

...

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").

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11. The argument that the Act requires prohibitory orders to be ‘all or nothing’ affairs is simply contrary to what the Act states on its face as can be seen above. The consent power and ability of the Minister to alter an interim prohibitory order “on such terms and conditions as he sees fit” would be meaningless if the Minister lacked the ability to do exactly that.

12. In this case, an appropriate use of the Minister’s discretionary consent power would be to restrict a permanent prohibitory order to barring the use of bulk mail (neighbourhood mail) by the affected parties unless there is evidence known to the Minister that they are also using regular mail to commit offences.

Conclusion

13. Given all of the above, it is respectfully submitted that the prohibitory order provisions of the Canada Post Act are constitutional.

Richard Warman
Barrister and Solicitor
11 January 2018