

BOARD OF REVIEW
(Canada Post Corporation Act)

IN THE MATTER OF A REVIEW UNDER THE CANADA POST CORPORATION ACT

**SUBMISSIONS OF THE MINISTER OF PUBLIC SERVICES IN RESPONSE TO THE
NOTICE OF CONSTITUTIONAL QUESTION**

January 12, 2018

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Ontario Regional Office
The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6
Fax: (416) 973-0809

Per: Michael H. Morris

Tel.: (416) 973-9704

Email: michael.morris@justice.gc.ca

Per: Roger Flaim

Tel.: (416) 952-6889

Email: roger.flaim@justice.gc.ca

Counsel for the Minister

TABLE OF CONTENTS

(1)	The Purpose of the Provisions.....	3
(2)	The Effects on Expression are Incidental to the Purpose of the Provisions.....	3
(3)	Application of the <i>Charter</i> To the Impugned Provisions.....	4
(4)	The Provisions Are Consistent with s. 2(b) of the <i>Charter</i>	6
	(i) The effect of an IPO is confined and not equivalent to a prior restraint or an injunction on expression.	6
	(ii) Reasonable grounds to believe is an appropriate threshold for issuing an IPO.....	8
	(iii) A multi-step procedure constrains the exercise of discretion and allows affected persons to participate in the process to obtain revisions or revocation of the IPO.....	10
	(iv) The provisions grant discretion to avoid, remove, or tailor any limit on expression on the basis of a reasonable balance of statutory objectives and <i>Charter</i> values.	12

OVERVIEW

1. The Minister of Public Services and Procurement (the “Minister”) provides this submission in response to the issues raised in the Amended Notice of Constitutional Question dated June 5, 2017 (the “NQC”) served by Messrs. Sears and St. Germaine and Your Ward News (the “Applicants”). The Minister’s submission is pursuant to the Board of Inquiry’s ruling dated November 2, 2017 in which it held that it had the jurisdiction to consider the constitutional issues raised in the NQC.

2. The Minister provides this submission on the constitutionality of the *Canada Post Corporation Act* (the “CPCA”), and in particular sections 43(1) and 45(3) of the CPCA, without prejudice to her position that the Board does not have jurisdiction to consider the issue. The Board does have the jurisdiction (and duty) to consider the impact of the Interim Prohibitory Order (the “IPO”) and any Final Prohibitory Order (“FPO”) on *Charter* values, including those relating to the Applicants, as measured against the statutory objectives and to make a recommendation as to how the Minister might balance them as required by *Doré v. Barreau du Québec* (“*Doré*”).¹ The Board’s mandate is to review this matter, facilitate the participation of interested and affected parties, and recommend whether the IPO should be revoked or made final. The Minister takes no position, and advances no submissions on the Board’s recommendation as to how the Minister might balance the *Charter* values in respect of her final decision and looks forward to the Board’s recommendations on this matter.

3. The Applicants allege sections 43(1) and 45(3) of the *CPCA* violate section 2(b) of the *Charter* insofar as they allow the Minister, by way of an IPO, to restrict speech that does not constitute a crime, which results in a prior restraint on the Applicants’ expression. The Applicants further allege that the procedures for issuing an IPO are unconstitutionally vague and insufficient.

¹ 2012 SCC 12 (“*Doré*”)

4. The impugned sections of the *CPCA* are in fact consistent with section 2(b) of the *Charter*. There is nothing on the face of sections 43(1) or 45(3) that unavoidably or inevitably impacts freedom of expression. The possibility that an IPO that failed to appropriately balance *Charter* values may have the effect of violating freedom of expression does not mean that the provisions are incapable of application in conformity with the *Charter*.

5. The effect of any IPO is narrow and not equivalent to a prior restraint on expression. The requirement for “reasonable grounds to believe” is an appropriate threshold in the circumstances, and the multi-step procedure set out in the *CPCA* both constrains the exercise of discretion and allows affected persons to participate in the final determination of the matter. Finally, 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 as required *Doré*. There is no conflict between sections 43(1) and 45(3) of the *CPCA* and the *Charter*.

6. These features of the provisions structure and direct the exercise of discretion to allow the Minister either to avoid any limit on freedom of expression or to ensure that such limits have been reasonably balanced against the statutory objectives. Any resulting violation of freedom of expression would arise in the making of a particular order rather than in the statutory provisions themselves. Therefore, the proper framework for justifying limits on freedom of expression is the administrative law framework (*Doré*) applied to particular orders, not the legislative framework (*Oakes*) applied in the abstract to the statutory provisions under s. 1 of the *Charter*.

7. These submissions will address: (a) the purpose of the impugned sections of the *CPCA* as well as their true impact on freedom of expression; (b) the manner in which the *Charter* applies to provisions which do not, on their face or in the absence of administrative action, infringe the *Charter*; and (c) how the provisions are consistent with section 2(b) of the *Charter*.

(1) The Purpose of the Provisions

8. The legislative history of the impugned provisions indicates that their purpose is 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*.² The provisions are not aimed at expression; they neither inherently nor necessarily limit it.

9. The provisions empower the Minister to issue an IPO to prevent the mail from being used in the commission of any offence, many of which have no expressive aspect. For example, the Minister may issue an IPO to prevent the facilities and services of Canada Post from being used as a vehicle for transmitting prohibited firearms (*Criminal Code* s. 99(1)), exporting counterfeit money (*Criminal Code* s. 452(b)), sending proceeds of crime (*Criminal Code* s. 462.31(1)), and mailing dangerous substances (*CPCA* s. 51). There is nothing in the purpose of the provisions which necessarily impacts expression.

10. In some cases, criminal offences that may result in an IPO include expressive aspects that relate to the offending behavior (e.g. using the mail for the purpose of transmitting or delivering letters or circulars concerning schemes devised to defraud the public, *Criminal Code* s. 381). In other cases the content of the expression is itself an important element of the offence (e.g. hate propaganda offences, *Criminal Code* ss. 318-19). An IPO may be directed at any of these offences, but the impugned provisions themselves are not limited to targeting only these offences.

(2) The Effects on Expression are Incidental to the Purpose of the Provisions

11. To the extent that a person's activity through the mail includes some expressive content, any resulting IPO and the limits on that expression occasioned by it derives from the nature of the particular offences defined in the *Criminal Code* or elsewhere and not s. 43(1) or s. 45(3) of the *CPCA*. Whether the IPO has any other incidental effects on the affected person's other expressive activity through the mail depends on the circumstances of each case, including the terms of the IPO and the nature of the affected

² *House of Commons Debates*, 21st Parl, 4th Sess., 11 June 1951 at 3920-21, subsection entitled "On section 7 – Unlawful use of mails".

person's mailings. In general, any limit on expression is incidental to the purpose of preventing the facilities and services of Canada Post from being used as a vehicle for the commission of offences.

12. The provisions are thus distinguishable from provisions or policies that directly target particular kinds of expression for their meaning or content. This was the case, for example, with Canada Post's decision to refuse to deliver a sexually explicit leaflet on behalf of the Sex Party of Canada.³ Canada Post's decision in that case was based on a guideline that Canada Post would not knowingly deliver materials that contain, among other things, sexually explicit material.⁴ Canada Post conceded that the Sex Party leaflet constituted expressive content and that the guideline infringed the Sex Party's right to freedom of expression.⁵ The Minister makes no similar concession with respect to the impugned provisions in this case. The provisions themselves do not infringe freedom of expression, for the reasons given below.

(3) Application of the *Charter* To the Impugned Provisions

13. The provisions do not themselves limit expression but grant discretion to the Minister to issue an IPO that might, depending on the nature of what is sought to be transmitted through the mail, limit expression. The *Charter* can apply to such situations in one of two ways:

First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.⁶

³ *Sex Party v. Canada Post Corporation*, 2008 FC 41 ("Sex Party")

⁴ *Sex Party* at paras 6-7

⁵ *Sex Party* at para 29 (although Canada Post also argued (unsuccessfully) that the infringement of the freedom of expression did not go so far as to implicate the protection afforded by section 2(b) of the *Charter*.)

⁶ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 20.

14. Therefore, the question is, first, whether sections 43(1) and 45(3) are generally capable of application in conformity with the *Charter*, and second, whether the Applicants' *Charter* rights were infringed by the IPO, being a particular exercise of the discretionary power afforded to the Minister under section 43(1).⁷

15. As noted above, it remains the position of the Minister that the Board does not have jurisdiction to consider the first question. For purposes of these submissions, however, for the reasons set out below, the answer to the first question in this case is irrefutably yes. There is nothing on the face of sections 43(1) or 45(3) that unavoidably or inevitably impacts freedom of expression. It is possible for the Minister to issue an IPO (and subsequently an FPO) to deny the use of Canada Post to transmit all manner of goods that have no expressive content, as is the case, for example, with prohibited firearms or counterfeit currency. Assuming the Minister has reasonable grounds to believe such goods (possession of which is contrary to the *Criminal Code*) are being transmitted through Canada Post, this is a proper exercise of discretion under section 43(1) with no resulting impact on freedom of expression. Moreover, for any IPO that would result in a limit on expression, the CPCA structures the Minister's discretion so that the decision can reasonably balance *Charter* values against statutory objectives. This can be accomplished, for example, by allowing terms or conditions to be imposed when arriving at a final decision under s. 45(3).

16. The answer to the second question depends on an assessment of whether the decision itself has achieved an appropriate balancing of the *Charter* protections at play. This does not engage the constitutionality of the legislation itself. The possibility that an IPO that fails to appropriately balance *Charter* values may have the effect of violating freedom of expression does not mean that the provisions are incapable of application in

⁷ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 ("Little Sisters") at paras 71-73 and 82; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras 26-27; *Mulgrew v. The Law Society of British Columbia*, 2016 BCSC 1279 at paras 28 and 66-68

conformity with the *Charter* and “afford[s] no reason to declare the legislation unconstitutional.”⁸

(4) The Provisions Are Consistent with s. 2(b) of the *Charter*

17. There may be situations where an IPO has the effect of limiting expression. However, even in such situations, sections 43(1) and 45(3) are generally capable of being applied in conformity with the *Charter* by allowing decisions that achieve “a proportionate balancing of the *Charter* protections at play” as required by *Doré*.⁹ This is the case for four reasons, each of which will be addressed in detail below:

- (i) The effect of the IPO is confined and not equivalent to a prior restraint or an injunction on expression;
- (ii) *Reasonable grounds to believe* is an appropriate threshold in light of the purposes of the impugned provisions;
- (iii) A multi-step procedure constrains the exercise of discretion and allows affected persons to participate in the process in order to obtain revisions to or revocation of the IPO; and
- (iv) The provisions grant discretion to avoid, remove, and tailor any limit on expression on the basis of a balance between statutory objectives and *Charter* values.

(i) The effect of an IPO is confined and not equivalent to a prior restraint or an injunction on expression

18. A prior restraint is “a requirement that the censor, acting to enforce standards announced by statute, must approve [expressive content] before one may publish or exhibit [that content]”.¹⁰ In short, a prior restraint on expression wholly prohibits the publication or exhibition of particular expressive content without prior approval.

⁸ *Little Sisters* at paras 76-77

⁹ *Doré* at para 57

¹⁰ *Little Sisters* at para. 232, per Iacobucci J (dissenting in part), quoting AM Bickel, *The Least Dangerous Branch* (2nd ed. 1986) at 135

19. An IPO is not a form of prior restraint on expression. The purpose and effect of an IPO is not to prohibit in any wholesale way the expression of the person affected 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.

20. True cases of prior restraint of expressions, such as the prohibition on importation of publications into Canada¹¹ or the prohibition on the distribution and exhibition of films in a Province¹² are situations wholly distinguishable from the effects of an IPO issued under section 43(1) of the CPCA.¹³ These examples result in a complete prohibition on the communication of expression. The purpose and effect of the prohibition is to prevent certain publications (or other expressive content) from ever coming into existence or being communicated to others.

21. By contrast, an IPO issued under section 43(1) simply denies recourse to the facilities and services of Canada Post, being one of several means of distribution available to publishers. The purpose and effect of the IPO is the much narrower one of preventing Canada Post from playing a causal role in facilitating crime. Even after the Minister issues an IPO, an affected person is not thereby prevented from publishing and distributing by other means the very publications that triggered the IPO. Outside of Canada Post's operations, publications are not suppressed, withheld, delayed, or otherwise subject to approval of censors before publication.

22. Not only is an IPO not a prior restraint on expression, but the underlying concerns about prior restraints are not even particularly engaged. Concerns about prior restraint are based on the "inherent flaws" of "the breadth of potential censorship, delays in

¹¹ As was the case in *Little Sisters*.

¹² As was the case in *R. v. Glad Day Bookshops Inc.* (2004), 70 OR (3d) 691 (SCJ).

¹³ Similarly distinguishable are cases which enjoin persons from communicating certain kinds of messages to the public at large, owing to their meaning and content, such as the postings on the internet at issue in *Canada (Human Rights Commission) v. Winnicki*, [2006] 3 FCR 446. In the case of an IPO under the CPCA, dissemination to the public at large remains available, including on the internet.

publication of time-sensitive material, a lack of transparency, and a propensity to favour censorship over speech”.¹⁴ To the extent that any of these concerns apply, the degree to which they apply always depends on the circumstances.¹⁵ In the circumstances of sections 43(1) and 45(3), concerns about delayed publication and lack of transparency are avoided by the application of the IPO to a single and confined means of distribution, which allows the publication to be distributed by other means (especially online) in a timely fashion and within reach of a widespread readership. Concerns about the breadth of potential censorship and any propensity to favour censorship are alleviated by the Minister’s ability to tailor orders and by the open, independent, participatory process before the Board (as discussed below).

23. The Board should not accept alleged “leading authorities” from the US on the doctrine of prior restraint, where relatively recent Canadian caselaw clearly establishes the parameters of the doctrine in Canada. In particular, Thomas Emerson’s “The Doctrine of Prior Restraint” is unhelpful since it was published in 1955 in a U.S. context, at a time when, by the author’s own admission, “the doctrine...remains curiously confused and unformed” and, importantly, the mail was the predominant, if not only, means through which to widely disseminate personal expression.¹⁶

(ii) Reasonable grounds to believe is an appropriate threshold for issuing an IPO

24. The IPO is not a prior restraint or an injunction but rather a refusal to make available the facilities and services of Canada Post. The purpose of this refusal is to prevent the commission of crime by means of the mail. For this purpose, the standard of *reasonable grounds to believe* that an offence is being committed, set out in section 43(1), is an appropriate threshold for issuing an IPO even if expression is limited. In s. 43(1),

¹⁴ *Little Sisters* at para 236, per Iacobucci J. (dissenting in part).

¹⁵ *Little Sisters* at para 78 per Binnie J.

¹⁶ Emerson, Thomas I, “The Doctrine of Prior Restraint” (1955) Yale Law School, Faculty Scholarship Series, Paper 2804 at p 649

“believes on reasonable grounds” means – unlike the lower threshold of “reasonable suspicion” – a belief that it is *probable* and not merely possible.¹⁷

25. First, the limitation is temporary, pending a review of the IPO pursuant to section 45 of the CPCA. Second, this standard provides a strong, objective constraint on the exercise of discretion that is consistent with the standard generally used “for the institution of prosecutions for blameworthy acts and for the exercise of preventive or investigative powers.”¹⁸

26. In particular, with respect to the investigation of hate speech, the *Criminal Code* applies the very same standard. Section 320(1) empowers a judge to authorize the seizure of materials based on “reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda.”¹⁹

27. In fact, standards lower than *reasonable grounds to believe* apply in situations in which the infringement of protected rights is arguably more severe. For example, police officers may detain an individual based on *reasonable grounds to suspect* - a lower standard - that the individual is connected to a particular crime if the detention is reasonably necessary on an objective view of the circumstances, without violating the *Charter* right not to be arbitrarily detained.²⁰

28. A higher threshold than *reasonable grounds to believe* (for example, *believes beyond a reasonable doubt*) would necessarily increase the opportunity for persons to use Canada Post as a vehicle for the commission of offences. That increased opportunity would impair the legislative goal of safeguarding the services and facilities of Canada

¹⁷ *R. v. Chehil*, 2013 SCC 49 at paras 27 and 32. Note that “reasonable grounds” and “reasonable and probable grounds” are equivalent: see e.g. *R. v. Loewen*, 2011 SCC 21 at para 5

¹⁸ *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 421 at para 102, rev’d on other grounds 2007 SCC 9

¹⁹ *Criminal Code*, section 320(1)

²⁰ *R. v. Mann*, 2004 SCC 52

Post. Compromising the legislative goal is not required to achieve minimal impairment of *Charter* rights.²¹

29. Furthermore, in the narrow context of the postal service, and in light of the preventive objective and interim nature of an IPO, affected persons' interests may be "heavily outweighed by the public's interest in a Minister with the discretion to make decisions swiftly, instead of one who is paralyzed by procedure".²² Ultimately, any final prohibitory order will generally follow a fulsome review of the matter by a Board of Review, including the more complete evidentiary record that the Board's process allows it to gather.

30. To the extent that an IPO limits expression, it is not unreasonable or contrary to the *Charter* merely because the affected person has not been convicted of an offence in relation to that expression. There is no principle according to which expression must be unimpeded in the absence of criminal conviction. On the contrary, human rights legislation, for example, may prohibit hate propaganda based on its likely effects and without regard to the criminal nature of the speaker's activity, since "the aim of human rights legislation is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment".²³ The same is true of the IPO authorized by section 43(1).

(iii) A multi-step procedure constrains the exercise of discretion and allows affected persons to participate in the process to obtain revisions or revocation of the IPO.

31. The CPCA sets out a multi-step procedure that assists in ensuring a careful balancing of the effects on freedom of expression of an IPO, including:

- (i) The Minister's belief must be reasonable (section 43(1));

²¹ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 59-60

²² *Canadian Arab Federation v. Canada (Citizenship and Immigration)*, 2015 FCA 168 at para. 14

²³ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892 at 917; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at paras 105-06

- (ii) The affected person must be sent within 10 days of the IPO (a) notice of the IPO, (b) reasons for it, (c) notice of their right to have a Board of Review review the matter; and (d) a statement that if a Board is not requested, the order may become final and that it is an offence to do anything prohibited by an IPO (section 43(2));
- (iii) The non-discretionary requirement to appoint of Board of Review consisting of three members, one of whom must be a lawyer, if the request is made (sections 44(1) and (2));
- (iv) The granting of various powers to the Board to effectively conduct its review, including powers under Part 1 of the *Inquiries Act* (section 44(4)) and control over its procedure (section 45(2));
- (v) The requirement that the Board give the affected party a reasonable opportunity, in person or by counsel, to appear before the Board and to make representations and present evidence (section 45(1));
- (vi) The requirement for the Board to submit a report with its recommendations to the Minister, and the corresponding requirement on the Minister to reconsider the IPO (section 45(3));
- (vii) The power of the Minister to apply terms and conditions when making a final prohibitory order in order to tailor it to the circumstances of the case (section 45(3); and
- (viii) A further discretion in the Minister to revoke an interim or final order if the Minister is satisfied that an affected party will not use the mail for any purpose which resulted in the IPO (section 47(1)).

32. This multi-step procedure does not “reverse the burden of proof” or require the affected persons to refute the IPO. The Board’s mandate is: i) to assess the matter *de novo*, not review the IPO; and ii) to assist the Minister in making a final determination as to whether reasonable grounds exist to believe the postal system is being used to commit or attempt to commit a crime and, if so, what the terms of an FPO should be.

33. To the extent freedom of expression might be impacted by an interim or final prohibitory order, this impact is the result of a statutory scheme that ensures any such impact is both limited and subject to careful review.

(iv) The provisions grant discretion to avoid, remove, or tailor any limit on expression on the basis of a reasonable balance of statutory objectives and Charter values.

34. As demonstrated by the foregoing examination of the statutory scheme, the Minister may exercise his or her discretion at multiple points to avoid, remove, or tailor any limit on expression.

35. In the first exercise of discretion, pursuant to s. 43(1), the Minister may decide to make or not to make an IPO and may tailor its scope.

36. The power to tailor the scope of the IPO is implicit in s. 43(1) as a power that is practically necessary to accomplish the aim of ensuring the mail is not used to commit offences under the *Criminal Code*.²⁴ Interpreting the section as granting this implied power accords with the modern rule that legislation be interpreted in light of the ordinary and grammatical meaning of its words, the surrounding statutory context, and the legislative purposes underlying the particular provision.²⁵ In contrast to s. 42 of the current CPCA and the original version of s. 43(1),²⁶ an IPO prohibits “the delivery of *mail* addressed to or posted” by a person, not “all mail” sent or received by that individual, signalling Parliament’s intention that the scope of an IPO be a matter of discretion.

²⁴ As to the doctrine of necessary implication, see: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 51. As an example of tailoring, see: *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.

²⁵ *R. Sullivan, Sullivan on the Construction of Statutes (5th ed. 2008)*, at p. 1, citing *E. A. Driedger, The Construction of Statutes (1974)*, at p. 67

²⁶ *Post Office Act*, RSC 1952, c. 212, s. 7, which, with respect to an IPO stated, “...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.” [emphasis added]

37. In the second exercise of discretion, pursuant to s. 45(3), following the Board's recommendations, the Minister may revoke the IPO unconditionally, revoke the IPO with conditions, or declare the order to be final. At any time in the process, pursuant to s. 47(1), the Minister may revoke an IPO or FPO, unconditionally or with conditions, if he or she is satisfied that the affected person will not commit crime through the mail. Finally, pursuant to s. 47(2), the Minister may reinstate an IPO or FPO if the affected person has not complied with conditions in the order. In all of these discretionary decisions, the Minister is expected and able to strike a reasonable balance between the statutory objectives and freedom of expression.²⁷

38. The existence of discretion that may be exercised to avoid, remove, or tailor limits on *Charter* rights should shift the Board's focus from the constitutionality of the provisions to the exercise of discretion in the particular case.²⁸ The provisions themselves do not conflict with the *Charter*.

January 12, 2018



ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Ontario Regional Office
The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6
Fax: (416) 973-0809

Per: Michael H. Morris
Tel.: (416) 973-9704
Email: michael.morris@justice.gc.ca

Per: Roger Flaim
Tel.: (416) 952-6889
Email: roger.flaim@justice.gc.ca

Counsel for the Minister

²⁷ *Doré* at paras. 35 and 55-56

²⁸ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras 112-14