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*

Before Board of Review Members: Fareen Jamal, Peter Loewen and Elizabeth Forster

Hearing Date: August 9 and 10, 2017

Samara Secter for Mr. James Sears and Mr. Laurence Victor St. Germaine (also known as Mr. Leroy St. Germaine) ("Affected Persons")

Michael Morris and Roger Flaim for the Attorney General of Canada ("Attorney General")

Jessica Orkin for the Canadian Civil Liberties Association ("CCLA")

Paul Fromm for Canadian Association for Free Expression ("CAFE")

Jamie Cameron for Centre for Free Expression ("CFE")

Alyssa Peeler for The League for Human Rights of B'nai Brith Canada ("BBC")

David Reiter and Jessica Millar for Friends of the Simon Wiesenthal Center ("FSWC")

Mark J. Freiman for Centre for Israel and Jewish Affairs ("CIJA")

Richard Warman (written submissions only)

RULING ON PRELIMINARY ISSUES

INTRODUCTION

This Board of Review ("Board") was appointed on December 9, 2016 pursuant to s.44 of the *Canada Post Corporation Act* ("*CPCA*") to review the decision of the Minister of Public Works and Government Services (the "Minister") to issue interim prohibitory orders dated May 26, 2016 to Mr. Laurence Victor St. Germaine (also known as "Leroy St. Germaine") and Mr. James Sears (collectively the "Affected Persons") which prohibited the delivery of mail posted by the Affected Persons and their agents.

The Board was 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, items that include hate propaganda in contravention of subsection 319(2) of the *Criminal Code* and/or that include the publication of defamatory libel in contravention of section 300 of the *Criminal Code".*

STANDING

In earlier rulings, the Board granted standing in this proceeding to the following persons and organizations:

A) James Sears, Laurence Victor St Germaine, the Minister of Public Works and Government Services

B) Those persons alleged by the Minister to have been the subject of defamatory libel, namely:

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

C) Interested persons namely:

Anna-Maria Goral
Asim Ozses
Dawn Chapman
Ian Davey
Jill Fairbrother

Joanne Ingrassia (Ms. Ingrassia has since withdrawn her request for standing)
Kelly Fairchild
Lawrence McCurry
Lisa Kinsella
Martin Gladstone
Sam Kary
Vanessa Milne
Raychyl Whyte
Christine McLean

D) Community Organizations and Public Interest Groups namely:

The League for Human Rights of B'nai Brith Canada
Canadian Association for Free Expression
Canadian Journalists for Free Expression
Canadian Race Relations Foundation
Centre for Free Expression
The Canadian Civil Liberties Association
Derek Richmond – CUPW Scarborough Local
East Enders Against Racism
Friends of Simon Wiesenthal Centre
Richard Warman
The Centre for Israel and Jewish Affairs

At the hearing on April 25, 2017, the Board was asked to give notice of the proceedings to Ms. Mary Margaret McMahon and Mr. Bernie Farber as persons who potentially might have an interest in the matter. Notice of the proceedings was given to both individuals but neither has requested standing before the Board.

NOTICE OF CONSTITUTIONAL QUESTION

The Board received a letter dated April 21, 2017 from counsel for the Attorney General 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". Counsel for the Affected Persons filed an Amended Notice of Constitutional Question with the Board on June 5, 2017 which was marked as "Exhibit 2".

PRELIMINARY ISSUES

The Board held a hearing on April 25, 2017 to deal with many of the preliminary issues which had been raised by some of those granted standing in these proceedings. It appeared to the Board

that the following four issues needed to be determined before a hearing was held on the merits:

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?
2. Does the Board have jurisdiction to deal with any or all of the issues raised in paragraphs 1-6 of the Notice of Constitutional Question?
3. If the Board does have jurisdiction to deal with any or all of the constitutional issues, what remedial options are available to it in the event that it concludes that the Minister's order is in breach of the *Charter of Rights and Freedoms*?
4. Is the mandate of the Board fact finding? Does the Board need to address any questions of law? Who bears the onus?

The Board received written submissions on these issues on behalf of the Attorney General, the Affected Persons, CCLA, CAFE, CFE, BBC, FSWC, CIJA and Richard Warman.

The Board held hearings on August 9 and 10, 2017 and heard oral submissions on these issues from all those who had filed written submissions, except for Richard Warman. After reviewing both the written and oral submissions the Board makes the following rulings:

OBLIGATION TO PROVIDE REASONS

Subsection 43(2) of the *CPCA* provides as follows:

> Within ten days after the making or reinstating of an interim prohibitory order, the person affected shall be sent, by registered mail at his latest known address, notice
>
> (a) of the order and the reasons therefore;

The Affected Persons were sent a copy of the Interim Prohibitory Order ("IPO") together with a letter from the then Minister advising that she had reasonable grounds to believe that they were "either committing or aiding in the commission of an offence" in that "you are sending or causing to be sent, items that include hate propaganda in contravention of subsection 319(2) of the *Criminal Code* and/or that include the publication of defamatory libel in contravention of section 300 of the *Criminal Code*."

Well after the appointment of this Board, by letter dated May 1, 2017, the Affected Persons (and ultimately all those who were granted standing) were provided with material from counsel for the Attorney General described as "Material Reviewed by the Minister in Rendering her Decision to Issue a Prohibitory Order". This material included a Canada Post Agreement Activation Form regarding "The New Constitution Party of Canada", a corporate search, copies of articles from

local newspapers, and copies of pages from *Your Ward News,* with various excerpts highlighted.

The Attorney General, BBC, CIJA and FSWC take the position that this information is sufficient to comply with the requirement in the *CPCA* to provide reasons and/or that the Board has no jurisdiction to rule on whether the Minister complied with the *CPCA*. They argue that the sufficiency of these reasons is a separate matter that can be judicially reviewed at another time on that issue. The sufficiency of the reasons may be addressed as part of the recommendations from the Board to the Minister, but that the Board is not sitting in judicial review, and therefore the sufficiency of the reasons cannot undermine the validity of the Minister's Order. The Attorney General argues that the Board and the participants have a record of the material that was before the Minister when she made the IPO and while this may be inadequate or insufficient, there is no basis for the Board to find that reasons are absent. Counsel argues that this information is a sufficient record to enable the Board to conduct its review.

The Affected Persons, CCLA, and CFE submit that the IPO and covering letter do not constitute "reasons" within the meaning of the *CPCA* as they simply state the statutory requirements for the issuance of an order under subsection 43(1) and list the offences that the Minister had a reasonable belief may have been committed.

The Board is of the opinion that the Minister has not complied with the obligation under subsection 43(2) of the *CPCA* to provide reasons for the issuance of an IPO. In *N.I.N.U. v. Newfoundland & Labrador* 2011 SCR 62, the Supreme Court of Canada quoted from its decision in *Dunsmuir v. New Brunswick* 2008 SCC 9 at paragraph 48 which held that the purpose of reasons, when they are required, is to demonstrate "justification, transparency and intelligibility". At paragraph 16 the Court held that, *"if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met".*

A mere recitation of the language used in the *CPCA* without explanation does not constitute "reasons". The repetition of the statutory requirements does not inform the Affected Persons or this Board of the reasons why a decision was made. The material relied upon by the Minister, the IPO, and the covering letter accompanying the IPO lack the analysis which is vital to enable the Affected Persons to appreciate why the IPO was issued and the case they have to address before the Board. The material does not identify those who have been the subject of the alleged defamatory libel or hate speech. (Subsequently on March 31, 2017, the Attorney General provided the names of individuals who may have been the subject of defamatory libel, but has not yet identified which groups were the alleged targets of the hate speech).

As was pointed out by several counsel, this proceeding is the only opportunity the Affected Persons have to challenge the IPO. In our opinion, both the *CPCA* and common law requirements of procedural fairness require that they be given more than the applicable sections of the *Criminal Code*. The reasons should contain a line of analysis sufficient to enable them to know the particulars of the conduct which has given rise to the Minister's belief that they have committed or aided in the commission of an offence.

We do not believe that this omission is cured by the provision of the material relied upon by the Minister in issuing her IPO. Moreover, this material was not provided within the 10-day period prescribed by the *CPCA* for the delivery of reasons.

Subsection 43(2)(a) of the *CPCA* contemplates that the reasons will be something more than the order and the material relied upon by the Minister. The *CPCA* references three distinct categories: i) the order; ii) the reasons; and iii) the material and evidence the Minister considered in making her IPO. The reasons are different from the subject material that the Minister considered in making her decision. The reasons are supposed to provide the justification for the issuance of the IPO.

The Minister is required under subsection 44(1) of the *CPCA* to forward to the Board the material and evidence she considered in making her IPO. We presume that Parliament used the words "material" and "evidence" to mean something other than "reasons". A legislator is presumed to use different words to convey different meanings. If material under subsection 44(1) was to constitute "reasons" one would expect that subsection 44 (1) would simply direct the Minister to forward her reasons to the Board. Some portions of the material relied upon by the Minister were highlighted. Counsel for the Attorney General undertook to advise the Board of the significance of the highlighting. By letter dated August 15, 2017, counsel advised that the highlighting was "added by officials assisting the Minister in arriving at the Interim Order. The highlighted portions were – when taken together and in the context of the publication as a whole – considered to be the most significant passages in respect of the existence of reasonable grounds to believe the offences set out in the Interim order had been committed". This statement raises more questions than it answers. Apart from the submission by counsel for the Attorney General that the highlights were placed on the text by unnamed officials at an unknown time, we know nothing about why they were there or what they signify in relation to the Minister's reasonable belief that the elements of one of the named offences existed. Furthermore, the line of analysis undertaken to justify the Minister's decision cannot be gleaned from this response nor from the highlighted portions themselves. Accordingly, the Board is of the opinion that the highlighted portions do not constitute "reasons" as contemplated by the *CPCA*.

The issuance of an IPO leading to the withdrawal of access to the postal system is a serious matter. While the finding of the Minister is not a finding that a criminal offence has been committed, it nonetheless suggests that there has been serious misconduct on the part of the Affected Persons. The Affected Persons are not given any opportunity to address the complaint except under this review process. For the review process to be meaningful, the Affected Persons should be informed of the particulars and the details of the conduct that gave the Minister reasonable grounds to believe that a criminal offence had been committed.

Further, it is not up to the Affected Persons nor to this Board to attempt to read the mind of the Minister to glean the basis for her decision. As the Supreme Court of Canada held In *Law Society of New Brunswick v. Ryan* 2003 SCC 20 at paragraph 55, *"A decision will be unreasonable only if*

there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived."

We are of the opinion that the Minister's failure to provide reasons does not oust the jurisdiction of this Board to review this matter. The *CPCA* does not state that the issuance of reasons is a prerequisite to the appointment of a board of review. A board of review is appointed at the request of affected persons. It is not reasonable to assume that it was the intention of Parliament to deny affected persons the right to a review because the Minister omitted the reasons for her order.

The Affected Persons and the participants who have been granted standing have asked that the Board continue with its review and address the failure to provide reasons as part of its report rather than terminating the review. Counsel for the Affected Persons stated that "fairness dictates no less". The Board agrees. The IPO was made over a year ago. The participants are all anxious for a resolution and do not want the proceedings to be delayed because of this omission. Further there are many people who have asked to make submissions to the Board on the merits of the IPO. Some of the people and organizations that have been given standing before the Board have alleged that they are victims of either criminal defamation or hate propaganda, or both, as a result of comments published in *Your Ward News*. Others wish to address the issue of whether the Minister's order and/or the *CPCA* infringe upon rights guaranteed under the *Charter of Rights and Freedoms*. It would be unfortunate if they could not be heard on these issues because of an omission on the part of the Minister.

There are strong feelings on both sides of the issues. If the Board were to terminate the proceedings at this stage, participants would be denied a voice on topics about which many feel passionately. In the end, it is up to the current Minister to decide if he will revoke the IPO or make it final. He may or may not agree with the Board's recommendations on the effect of the failure to give reasons. In order to provide the Minister with a full report and recommendations on all issues the Board will proceed to hear the participants on all other issues surrounding the issuance of the IPO. The Board will address the failure to provide reasons in its final report and recommendations.

BOARD'S JURISDICTION TO DEAL WITH CONSTITUTIONAL ISSUES

The Affected Persons, the Attorney General, and all of the participants who provided submissions, agree that the Board must ensure that its recommendations properly balance the relevant *Charter* values engaged by the decision against the statutory objectives of the *CPCA* in accordance with the principles set out by the Supreme Court of Canada in *Doré v. Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 (CanLII) paragraphs 55 to 58 ["*Doré* analysis"].

The Affected Persons, CFE and CCLA also ask this Board to determine whether subsections 43(1) and 45(3) of the *CPCA* infringe subsection 2(b) of the *Charter of Rights and Freedoms.* Counsel

argues that the Board has jurisdiction to consider the constitutionality of these provisions because it has the implied jurisdiction to consider questions of law arising from them.

The participants agree that the test for determining whether this Board has the jurisdiction to determine the constitutionality of certain sections of the *CPCA* is the test set out in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur,* [2003] 2 SCR 504, 2003 SCC 5. ("*Martin"*). The participants disagree as to whether the test is satisfied in this case.

The test was summarized at paragraph 48 of the *Martin* decision, as follows:

> The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to *Charter* scrutiny can be summarized as follow: (1) The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. (2)(a) Explicit jurisdiction must be found in the terms of the statutory grant of authority. (b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*. (4) The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the *Charter*; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.

i) Positions Taken by the Participants

Counsel for the Affected Persons, CFE and CCLA argue that this Board has the implied jurisdiction contemplated by *Martin* and that nothing in the *CPCA* abrogates that implied jurisdiction. They rely on excerpts from the *Martin* decision which they say show that the Supreme Court of Canada in *Martin* intended broader language than just "decide". Those references were:

a) paragraph 28 which states that if a government official is "endowed with the power to **consider** questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision";

b) paragraph 34 which provides, “an administrative tribunal which has been conferred the power to **interpret** law holds a concomitant power to determine whether that law is constitutionally valid”; and

c) paragraph 36 which references “**interpret or** decide”, and states, “one must ask whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to **interpret or** decide any question of law. If it does, then the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of the *Charter*, unless the legislator has removed that power from the tribunal. Thus, an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision. In other words, the power to decide a question of law is the power to decide by applying only valid laws”.

Subsequently in *R. v. Conway*, [2010] 1 SCR 765, 2010 SCC 22, (“*Conway*”) the Supreme Court of Canada summarized the law by stating at paragraph 77:

> …[A]dministrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper v. Canada (Human Rights Commission),* [1996] 3 SCR 854, 1996 CanLII 152 (SCC):
>
> > [E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70]

The Affected Persons assert that pursuant to paragraph 48 of *Martin*, the Supreme Court held that if a tribunal can consider questions of law, it has presumed authority to consider *Charter* questions. The party contesting *Charter* jurisdiction may rebut this presumption by "(a) pointing to an explicit withdrawal of authority to consider the *Charter*; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusi on that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. "

Accordingly, the Affected Persons argue that the Minister must show that the statutory scheme clearly indicates the legislature intended to exclude consideration of *Charter* questions. There is no requirement that the Affected Persons show a legislative intent that the Board engage in constitutional deliberations. This intent is presumed because the Board has the implied authority to consider questions of law.

Furthermore, the Affected Persons argue that, "the Board is more than capable of considering the constitutional issues before it. By design, the Board has at least one member who is a practicing lawyer. In this case, all three Board members are highly educated, and two have legal training and extensive legal experience. No further expertise is required to review the relevant jurisprudence and analyze whether the legislation violates the *Charter*." (Affected Persons, Reply Factum, paragraph 10).

Counsel for the Attorney General argues that the test that should apply in respect of deciding questions of law, is the test set out in paragraph 48 of *Martin* and paragraphs 77 and 81 of *Conway.*

The Attorney General, BBC and FSWC take the position that this Board does not have jurisdiction to determine issues of the constitutionality of its enabling legislation. They argue that the Board of Review is not a specialized tribunal and does not have the authority to decide the law. Accordingly, it does not pass the test outlined in *Martin* to consider the constitutionality of the statute.

The Attorney General clarified in submissions that while the Board is "engaging in" questions of law as part of its mandate, it is not "deciding" questions of law in relation to affecting interests or rights. The Board does not have a power to decide questions of law. The Board's task is to make recommendations to the Minister on whether reasonable grounds exist, but it does not decide the matter or determine interests or rights or affect interests or rights. It is the Minister who will make the final determination following the Board's recommendations. The Board merely issues a report that is ultimately advisory in character.

The Attorney General acknowledges that the formation of a recommendation on whether there are reasonable grounds to believe a crime has been committed does, broadly speaking, engage questions of law concerning the elements of an offence, and mixed questions of fact and law regarding whether there are reasonable grounds to believe an offence was committed. However, he argues that no complex legal analysis is required and there is no express statutory grant to the Board of a power to decide questions of law.

The Attorney General relies on *Ontario (Attorney General) v. Patient*, 2005 CanLII 3982 (ON SCDC) ["Jane Patient"] where the Divisional Court held that a Tribunal which had the power to decide mixed questions of fact and law did not to have the power to determine the constitutionality of its empowering statute. Applying *Jane Patient*, the Attorney General argues that the power to consider questions of mixed fact and law is insufficient to grant the jurisdiction necessary to consider the *Charter* as requested.

The Attorney General argues that the Board is not an expert and specialized tribunal of the kind that has been found to have jurisdiction over constitutional questions. The Board is an *ad hoc* body without consistent membership or an ongoing mandate whose jurisdiction is expressly limited to making recommendations in respect of a singular fact scenario. Combined with the fact-sensitive nature of the Board's mandate, the Board's overall statutory context does not establish a legislative intention that it should engage in constitutional deliberations even if it is found to have the jurisdiction to decide questions of law.

Counsel for CIJA submits that the Board has jurisdiction to consider, but not to determine questions of law. As the Board is a creature of statute, the CIJA argues that the powers conferred by the statute are clearly defined and limited: the Board cannot bootstrap powers it does not have. The powers are limited to those to report and recommend and investigate pursuant to the CIJA.

However, in his oral submissions counsel for the CIJA conceded that the Board had the power to consider the law and consider the *Charter*, within the context of reporting and making recommendations. As part of the recommendations, the Board can ask questions about the *Charter* and its impact, and can opine on its view of the constitutionality of the section of the Act and the application of the Act. We appreciate that the Attorney General disagrees with the CIJA on this issue.

Richard Warman submits that "the extreme rarity of Boards of Review precludes the development of specialization in any particular area outside of the limited facts of the matter before them that would assist (or attract deference) in considering questions of the constitutionality of their enabling legislation."

Counsel for the CCLA submits that the expertise of a Board is not required as part of the *Conway* test, and that the only test is whether a question of law is interpreted, not even decided, in determining whether a Tribunal has jurisdiction to address constitutional challenges. The CCLA argues that *Conway* is now the leading case and the most recent case, and that Justice Abella took some pains to make it clear that she was seeking to streamline the jurisprudence and set up the process and test to be followed going forward. The complex case law preceding *Conway* that looked at many factors, including what had been characterized as expertise when one was looking at the question of whether a tribunal had subsection 24(1) jurisdiction, was no longer part of the case law because *Conway* used *Martin* as the test for both subsections 24(1) and 52(1) jurisdiction. The CCLA argues that there are no "minor questions of law": the gradations that existed in the earlier law have since been overruled. Counsel submits that questions of law are questions of law, and if questions of law are considered, then the *Charter* is engaged. The fact that a lawyer member is required on the Board of Review suggests that the Board has the power and duty to consider questions of law.

Counsel for the FSWC pointed out that paragraph 36 of *Martin* is mistranslated from the French decision of Justice Gonthier, and the use of the word "*et*" which means "and" should be

translated to "interpret and decide" instead of "interpret or decide" as suggested in the English translations of the decision. Counsel for the FSWC submits that the Board of Review does not have the power to make a decision, only a power to make a recommendation.

Counsel for the CIJA submits that the Board is free to consider the constitutional dimensions of the matter, including the constitutionality of the *CPCA*, in the course of conducting its investigation and preparing its report and recommendations, but has no power to order a constitutional remedy as it cannot "order" the Minister or anyone else to do nor abstain from doing anything. Counsel for the Attorney General disagrees with this position.

"Recommendations" has been defined by the Supreme Court of Canada in *Thomson v Canada (Deputy Minister of Agriculture)*, 1992 CanLII 121 (SCC), [1992] 1 SCR 385 at paragraph 25:

> The Committee's recommendation constitutes a report put forward as something worthy of acceptance. It serves to ensure the accuracy of the information on which the Deputy Minister makes the decision, and it gives the Deputy Minister a second opinion to consider. It is no more than that.

"Recommendation" should receive its plain and ordinary meaning and should not be taken to mean a final or binding decision, which is left to the Minister.

ii) Ruling

In considering implied jurisdiction, the Supreme Court of Canada at paragraph 41 of *Martin* stated:

> Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. As is the case for explicit jurisdiction, if the tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision.

We have considered each of these factors:

a) Statutory Mandate

The *CPCA* does not give the Board express jurisdiction to decide issues of constitutionality. The issue is whether this Board has the implied jurisdiction to do so.

The Board's statutory mandate requires it to review whether there are reasonable grounds to believe that the Affected Persons, by means of the mail, committed or aided the commission of a criminal offence. This determination requires finding facts (the evidence), interpreting the law (the elements of the *Criminal Code* offences), and applying the facts to the law on the low standard of 'reasonable grounds to believe'. The reasonableness of the belief depends on whether the evidence demonstrates the existence of the external (*actus reus*) and mental (*mens rea*) elements of the sections 300 and 319 of the *Criminal Code*. The fact that the standard of proof (reasonable grounds to believe) is very low does not alter the character of the assessment (commission or complicity in criminal offences). The Board must still find facts, interpret law, and apply facts to law, even if the threshold is merely 'reasonable grounds to believe' rather than the civil or criminal standard of proof. Given the history of constitutional litigation around section 300 and section 319 of the *Criminal Code*, it would seem almost impossible to determine (even on a 'reasonable grounds' standard) whether the Affected Persons potentially committed those offences without engaging in statutory interpretation.

In *Attorney General of Canada v. Telbani* 2012 FC 474, the Federal Court of Canada considered this issue in the context of the authority of the Security Intelligence Review Committee ("SIRC") to consider the *Charter* when dealing with a complaint that CSIS had violated an individual's rights. The mandate of SIRC when investigating a complaint was to investigate and provide a report with any recommendations it considered appropriate. The Court held at paragraph 93:

> The interests of the persons concerned, their rights, the legislative framework of the complaints process all require the applicable law to be taken into account. Failure to recognize that the legislative mandate carries with it an implied power to decide questions of law would effectively consign SIRC's investigative role to obsolescence. After all, if no question of law can be decided, what purpose would the complaints process serve?

The same reasoning can be applied to the jurisdiction of this Board. This Board must apply the law to appreciate the elements of the offences as part of its mandate to review whether reasonable grounds exist to believe they are being committed or that anyone was aiding in the commission of an offence. The consideration of whether the facts amount to the applicable legal standard is a question of law. In order for the Board's report and recommendations to the Minister to be meaningful, the Board must decide questions of law even if it does not have the jurisdiction to make definitive rulings that affect the legal rights of the participants or grant remedies for the violation of those rights.

b) Interaction with Other Elements of Administrative System

The Board is required to issue a report to the Minister with its recommendations as to whether

the Minister should rescind, vary or affirm the IPO. The Minister's ultimate decision is not subject to legislated procedural requirements, nor an appeal to a court. If the Board is not empowered to determine questions of law (for purposes of reporting and recommending), then the entire process will take place without any opportunity for the parties to challenge the scheme's legality on constitutional or other legal grounds. This weighs in favour of interpreting the Board's mandate as including the authority to determine questions of law. In *Telbani,* above, the Federal Court explained that the mandate of SIRC to investigate, report and recommend in respect of complaints against the Canadian Security Intelligence Service did not preclude it from determining questions of law (paras. 79-133). Interpreting questions of law *en route* to fulfilling a mandate to report and recommend seems unavoidable where the subject matter is breaches of the *Criminal Code*. The Board recognizes that the Minister is not obliged to adopt any aspect of its report or recommendations, whether those relate to the existence of 'reasonable grounds to believe', findings of fact, mixed fact and law, or law (including the *Charter*).

For these reasons, the role of the Board in the context of the administrative scheme as a whole militates in favour of an implicit authority to determine questions of law, despite the low standard of proof ('reasonable grounds to believe') required.

c) Adjudicative Function

Tribunals that adjudicate are more likely to be regarded as having the implied authority to determine questions of law. One element of adjudication is finality: adjudicators make a determinative and dispositive decision regarding a specific dispute. The Board does not have the authority to make a definitive ruling; it only reports and recommends. In that sense, it is not adjudicative.

Another facet of adjudication is the resolution of individualized disputes through hearing evidence, determining facts, and applying law to a particular case. This contrasts to broad policy decisions that engage many actors, interests and polycentric considerations. The Board's mandate concerns specific allegations of wrongdoing by named individuals. Though not binding on the Minister, the Board's findings and recommendations are highly specific, and relate to the [non]existence of reasonable grounds to believe that named individuals aided or violated particular provisions of the *Criminal Code*. The standard of proof is not the criminal standard of beyond a reasonable doubt, but the analysis required of the Board otherwise mimics a criminal law analysis. The statutory scheme does not appear to contemplate any other stage where facts and law can be addressed with the participation of the Affected Persons and other interested parties.

Accordingly, we conclude that the Board's task is sufficiently adjudicative for purposes of the *Martin* test. Even if this conclusion is rejected, the Court in *Martin* emphasized that the adjudicative character of the body is not a 'necessary (or even preponderant) factor in the search for implicit jurisdiction' (paragraph 47). A non-adjudicative body may possess authority to determine questions of law.

d) Practical Considerations

If the Board is stripped of the ability to decide questions of law, it would be stripped of a fundamental task in reviewing whether there are reasonable grounds to determine that the Affected Persons committed an offence contrary to subsection 319(2) and section 300 of the *Criminal Code.* However, the pragmatic advantages of allowing the Board to consider questions of law (including constitutionality) cannot confer on the Board an authority it does not otherwise possess under the *CPCA*.

The Board's capacity to address questions of law is enhanced by the statutory requirement that at least one member of the Board be a lawyer. The presence of a legally trained member on the Board does not provide irrefutable evidence of legislative intent that the Board possess authority to determine questions of law. The intent might equally be directed to ensuring that principles of procedural fairness are respected in the pre-hearing, hearing and post-hearing process, on the assumption that lawyers will have greater familiarity with (and experience of) the requirements of procedural fairness. This is especially important in light of the fact that board of reviews are *ad hoc* and rare, so there is little direct precedent about the process. Indeed, the perception of the Board's capacity to address questions of law is diminished by the fact that this is an *ad hoc* body. The scheme does not enable members to accumulate expertise or 'field sensitivity' through prior experience in the role.

The Board is of the view that it is not a specialized tribunal but observes that according to *Conway* specialization is no longer required.

Finally, the Affected Persons argue that the Minister must show that the statutory scheme clearly indicates the legislature intended to exclude consideration of *Charter* questions. There is no requirement that the Affected Persons show a legislative intent that the Board engage in constitutional deliberations. This intent is presumed because the Board has the implied authority to consider questions of law.

The *CPCA* contains no explicit withdrawal of authority to consider the *Charter* and the Minister has pointed to no clear indication in the statute that the legislature intended to exclude *Charter* questions from the scope of the questions of law to be addressed by the Board.

Martin provides that, *"Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate."*

Further, the Board notes that *Martin* does not reference expertise as part of the test for whether there is implied jurisdiction to consider or decide questions of law. The practical considerations do not point unambiguously in one direction.

CONCLUSION

The Board has concluded that is does have the implied authority to consider the *CPCA*'s constitutionality because it has the implied authority to consider questions of law. The Supreme Court has repeatedly emphasized the importance of early and direct access to the *Charter*. Finally, there is nothing in the *CPCA* that expressly rebuts the presumption that jurisdiction to consider questions of law includes the *Charter* and a section 24 legislative validity analysis.

Even if we are wrong and the *Martin* test is not satisfied, we are of the opinion that the Board has the jurisdiction to review the constitutionality of subsections 43(1) and 45(3) of the *CPCA* as part of its overall mandate to "review" the matter. The only relief sought by the Affected Persons is a recommendation to the Minister that the IPO be revoked. This recommendation can be made by the Board if it finds it appropriate to do so, regardless of its jurisdiction to "decide" questions of law.

Therefore, the Board is persuaded that in the context of making recommendations and providing our report to the Minister, we will consider a *Charter* analysis of the provisions of the *CPCA*, and will invite evidence and submissions on this issue.

REMEDIAL OPTIONS AVAILABLE TO THE BOARD

The Board's only remedial authority is to prepare a report and make recommendations. It does not have jurisdiction to declare any portion of the *CPCA* unconstitutional nor to grant a specific remedy in the event that it finds that an interim order violates any participant's rights. However, for the reasons stated above the Board may recommend to the Minister that the IPO be rescinded if, after hearing the evidence and submission on this issue, it is of the opinion that either subsections 43(1) or 45(3) of the *CPCA* violate the *Charter.*

MANDATE OF THE BOARD

The *CPCA* provides little guidance on the Board's mandate. It simply states as follows:

> Section 45(1) A Board of Review shall review the matter referred to it and for that purpose shall give to the person affected and any other person who has an interest in the matter a reasonable opportunity, in person or by counsel, to appear before the Board and to make representations and present evidence to the Board.

The Board's role is to gather evidence, apply facts to law, and make recommendations. It has no power to render a decision and does not sit as an appellate body from the decision of the Minister. The Board's role is <u>not</u> to conduct a deferential review of the Minister's decision, but

to form its own independent view of the matter, and to recommend accordingly.

In making recommendations to the Minister, the Board must consider whether there are "reasonable grounds" to believe that the Affected Persons are by means of mail committing or aiding in the commission of an offence.

The *CPCA* does not provide that any party bears the burden of proof.

Counsel for the Affected Persons submit that as it is the Minister who is seeking to limit a right, it is the Minister who must prove that there is reason to do so. She further submits that it is unfair to have the Affected Persons make a case that they are *not* using the mail to commit a crime. Such a position undermines the presumption of innocence. Counsel for the Affected Persons argue that it is the Minister's counsel who carries the evidentiary burden since the Board is reviewing evidence from the Minister that the Minister believes support reasonable grounds. The Affected Persons would carry the practical burden of adducing evidence to establish any defences or an argument under section 47(1). She is concerned about "coopering up the evidence" after the decision has been made.

Counsel for the Affected Persons argues that the mandate of the Board is not merely fact-finding, or judicial review, but pursuant to section 43 of the *CPCA* to "review the matter" which she suggests is the Minister's decision. She acknowledges the Board's powers to adduce other relevant evidence under section 44 but submits that using the powers under section 44 are not a necessity. She submits that the recommendations are independent advice to the Minister in making her final decision. The recommendations however are more than a recitation of the facts. They are a suggestion regarding the best course of action in these circumstances. A finding of facts alone would not be sufficient for a recommendation.

Counsel for CFE aptly states that care should be taken not to overstate the Board's mandate or to understate the Board's mandate. The Board is not judicial or quasi-judicial, but neither is it an investigative board. The Board was tasked with "reviewing" the matter, not "investigating" the matter nor simply making findings of fact. The Board largely agrees with this submission.

There is nothing in the *CPCA* which provides that the Minister bears the onus of proof in supporting the IPO. The mandate of this Board is to consider the evidence presented to it, apply the law and make recommendations. The Board has heard various submissions about how it might gather facts, including appointing a joint counsel for interested parties. The Board instead intends to hear any relevant evidence and submissions directly from anyone given standing in this matter. Following the hearing the Board will provide its recommendations to the Minister.

FURTHER HEARING

The Board invited the participants to provide input on how the hearing should proceed in light of

the fact that no reasons were given and counsel for the Attorney General has indicated that he will not be participating in the hearing except on the jurisdictional issues.

We received several submissions regarding this issue. Among the options, it was suggested that the Board could retain independent board counsel with a referee type role, the Board could review the material and direct the participants to where the Board believed there was a possibility of criminal behavior, the Board could request submissions on criminal offences, or other issues, or the Board could propose specific questions and invite the participants to call evidence on these issues.

The Board does not consider it within its mandate to speculate on what portions of the material led the Minister to a reasonable belief that a criminal offence was being committed.

However, the Board will conduct a hearing. Counsel for the Attorney General submits that this is a hearing *de novo,* as section 45 of the *CPCA* contemplates the Board hearing other relevant evidence at the hearing, and the participation of interested and affected persons. As stated, the Board wishes to give the participants who believe that they have been the victims of hate propaganda and/or criminal defamation an opportunity to be heard. The Board also wishes to give participants who believe that the Minister's order and/or the *CPCA* infringe upon *Charter* rights an opportunity to be heard. Accordingly, anyone with standing before this Board who wishes to call evidence relevant to the issues will be permitted to do so. Following the tendering of evidence, anyone with standing before this Board who wishes to provide submissions and make arguments relevant to the issues will be permitted to do so. Parties who wish to tender evidence that contradicts other tabled evidence will be invited to do so. Procedural fairness would demand no less in our broad mandate to review the matter.

The Board encourages the Attorney General to reconsider his position not to participate in the review except with respect to jurisdictional issues. The input of the Attorney General in assisting the participants and the Board in understanding how the Minister arrived at her decision would be beneficial.

We appreciate that the Affected Persons have not received details of the impugned conduct. They may hear details of it for the first time at the hearing. If the Affected Persons require additional time to prepare a response to the evidence on this issue, the Board is prepared to entertain any reasonable request for an adjournment.

In conclusion, the Board believes that the failure to provide reasons is a serious matter and it will address this failure in its report to the Minister. Nevertheless, the Board will proceed with a hearing of the issues.

Hearing dates will be published shortly.

Finally, the Board would like to thank all the parties that participated in the Preliminary Hearing on August 9 and 10, 2017, for their excellent written and oral submissions which assisted the

Board in these determinations.

Dated at Toronto this 2nd day of November 2017.

Board of Review

Fareen L. Jamal **Elizabeth Forster** **Peter Loewen**