Date: 20080114

Docket: T-65-06

Citation: 2008 FC 41

Ottawa, Ontario, January 14, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

THE SEX PARTY

Applicant

and

CANADA POST CORPORATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S., 1985, c. F-7. The Sex Party (the applicant) seeks to have judicially reviewed a decision by Canada Post Corporation (the respondent), refusing to distribute a leaflet of the Sex Party using the Unaddressed Admail service on the grounds that the leaflet was sexually explicit.

FACTUAL BACKGROUND

[2] The respondent is a Crown corporation, created by the *Canada Post Corporation Act*, R.S., 1985, c. C-10 (the Act). The Unaddressed Admail Program (program) is a mass direct mail service

for the delivery of flyers, printed material and product samples to households, and businesses across Canada, offered by the respondent corporation. It is different from other private distribution services because Canada Post is the only corporation with access to apartment buildings and rural mailboxes.

[3] The applicant is a registered political party in British Columbia with federal political aspirations. The applicant sought to distribute a flyer, in order to participate in the debate and discourse leading up to the 2006 federal election. On January 3, 2006, the applicant submitted a four page leaflet entitled "the Sex Party" to a senior executive at Canada Post, requesting an opinion as to whether the leaflet met the content standards of Canada Post's Unaddressed Admail program, in order to proceed with a mass distribution to the public through the program.

[4] Beyond a simple statement of the party's platform, the applicant's leaflet included a painting of two individuals engaged in oral sex, a drawing of the torsos of two nude individuals embracing, and a doorknocker in the shape of an erect penis with wings. It also contained a quiz entitled "Test Your Sexual I.Q.".

DECISION UNDER REVIEW

[5] On January 5, 2006, the director of product management of Canada Post replied to the applicant's request by email, refusing to deliver the leaflets on the grounds that they were sexually explicit (respondent's record, page 203):

> […] If you would like to choose our Unaddressed Admail service to deliver your items (noting that there are other distribution alternatives available), I would like to suggest that you remove any reference of sexually explicit nature, including graphics. For example, I would remove the section on "Test Your Sexual IQ" and the graphic pictures on the mail item. To reiterate, Canada Post will not knowingly deliver an item that contains sexually explicit content or graphics. Such material is not appropriate for Unaddressed Admail distribution. For example, an advertising message promoting your Party's platform (as provided in the attachment below) with an invitation to visit your Party's website and to attend your upcoming event would be appropriate […]

[6] The grounds for refusing sexually explicit material are found in the Unaddressed Admail Customer Guide, January 17, 2005, section 2.2.3. entitled Non-mailable Matter and Other Non-eligible Items (applicant's record, page 33):

> Canada Post will not knowingly deliver offensive articles that contain sexually explicit material, any information relating to bookmakers, pool-setting, betting or wagering or unlawful schemes, or any item related to schemes to defraud the public.

[7] Section C – Chapter 12 of the Canada Postal Guide also provides grounds for the decision (applicant's record, page 59). It states:

> Canada Post retains the right to refuse any item that it, in its sole discretion, deems unacceptable. For a detailed list of unacceptable items, go to Section B – Chapter 7, *Non-Mailable Matter*.

[8] The respondent's decision states that other distribution alternatives are available to the applicant, thereby implying that the decision did not constitute a complete prohibition to the distribution of the leaflet. In the cross-examination of the respondent's sworn evidence of

February 22, 2007, the director of product management for the respondent corporation stated that, unless it was placed in an envelope with the words “Adult Material” or a similar warning, Canada Post would decline to distribute the leaflet. The applicant accepts that the option of distributing the leaflet in an envelope with a warning constitutes a distribution alternative intended by the decision. As such, I will treat this alternative as though it forms part of the decision.

ISSUES

[9] The applicant submits that there are two questions that need to be answered by this application:

a) Is the decision of the respondent *ultra vires* of the Act?

b) Is the decision contrary to section 2(b) of the Charter and if so, is the breach saved by section 1 of the Charter?

[10] In my opinion, it is necessary to reframe the questions as follows:

a) Is the respondent’s decision compliant with the governing principles of administrative law?

b) Does the decision to refuse to distribute the applicant’s leaflets infringe section 2(b) of the Charter, and if so, does the refusal constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society?

c) Is the decision of the respondent *ultra vires* of the powers conferred on it pursuant to the Act?

RELEVANT LEGISLATION

[11] *Canadian Charter of Rights and Freedoms*

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**1.** La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes:
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

[12] *Canada Post Corporation Act*, R.S., 1985, c. C-10.

Powers of Corporation	Pouvoirs de la Société
16. (1) In carrying out its objects and duties under this Act, the Corporation has the capacity, and subject to this Act, the rights, powers and privileges of a natural person.	**16.** (1) Dans l'exécution de sa mission et l'exercice de ses fonctions, la Société a, sous réserve des autres dispositions de la présente loi, la capacité d'une personne physique.
Regulations	Règlements
19. (1) The Corporation may, with the approval of the Governor in Council, make regulations for the efficient operation of the business of the Corporation and for carrying the purposes and provisions of this Act into effect, and, without restricting the generality of the foregoing, may	**19.** (1) La Société peut par règlement, avec l'approbation du gouverneur en conseil, prendre toute mesure utile, dans le cadre de la présente loi, à l'efficacité de son exploitation et, notamment :

make regulations

(a) prescribing, for the purposes of this Act and the regulations, what is a letter and what is non-mailable matter and undeliverable mail, other than undeliverable letters, and providing for the disposition of non-mailable matter, undeliverable mail and mail on which sufficient postage is not paid, including the disposition of anything found therein;	a) préciser, pour l'application de la présente loi et de ses règlements, ce qu'on entend par « lettre », « objet inadmissible » et, exclusion faite des lettres non distribuables, par « envoi non distribuable » ou « courrier non distribuable », et prévoir la façon dont il peut être disposé des objets inadmissibles, des envois non distribuables ou insuffisamment affranchis, ainsi que de leur contenu;
(b) classifying mailable matter, including the setting of standards for any class thereof;	b) catégoriser les objets et fixer les normes applicables à chaque catégorie;
(c) prescribing the conditions under which mailable matter may be transmitted by post;	c) fixer les conditions de transmission postale des objets;
(d) prescribing rates of postage and the terms and conditions and method of payment thereof;	d) fixer les tarifs de port et les modalités d'acquittement des frais correspondants;
(e) providing for the reduction of rates of postage on mailable matter prepared in the manner prescribed by the regulations;	e) prévoir la réduction des tarifs de port dans le cas d'objets conditionnés de la manière réglementaire;
(f) providing for the refund of postage;	f) prévoir le remboursement du port;
(g) providing for the transmission by post, free of postage, of	g) prévoir la transmission en franchise :
(i) letters, books, tapes, records and other similar material for the use of the blind, and	(i) des articles à l'usage des aveugles, tels que des lettres, livres, bandes magnétiques ou disques,

(ii) mailable matter relating solely to the business of the Corporation and addressed to or sent by a person engaged in that business;

(ii) des objets qui se rattachent exclusivement à ses activités et dont l'expéditeur ou le destinataire se livrent à celles-ci;

(h) providing for the holding of mail by the Corporation at the request of the sender or addressee thereof or in any other circumstances specified in the regulations;

h) prévoir la garde de certains envois par la Société soit à la demande de l'expéditeur ou du destinataire, soit en raison de circonstances déterminées par règlement;

(i) providing for the insurance of mail and the payment of indemnity by the Corporation in case of loss of or damage to mail;

i) prévoir l'assurabilité par elle des envois et le paiement par elle d'indemnités en cas de perte ou de détérioration;

(j) providing for the payment of interest, including the rate thereof, on funds transmitted by post;

j) prévoir le paiement d'intérêts, y compris le taux d'intérêts, sur les fonds transmis par la poste;

(k) governing the design, placement and use of any receptacle or device intended for the posting, insertion, reception, storage, transmission or delivery of mailable matter;

k) régir les caractéristiques, l'installation et l'utilisation des contenants ou dispositifs prévus pour le dépôt, la réception, l'entreposage, la transmission ou la distribution des objets;

(l) regulating or prohibiting the installation of machines for vending postage stamps, postal remittances or other products or services of the Corporation;

l) régir ou interdire l'installation de distributrices de timbres-poste, de titres de versements postaux ou d'autres produits fournis par la Société, ou de machines assurant certaines de ses prestations;

(m) regulating or prohibiting the manufacture, installation and use of postage meters;

m) régir ou interdire la fabrication, l'installation et l'utilisation de machines à affranchir;

(n) regulating or prohibiting the making or printing of postage stamps;	n) régir ou interdire tout ce qui concerne l'impression des timbres-poste;
(o) governing the preparation, design and issue of postage stamps;	o) régir la création, la fabrication et l'émission des timbres-poste;
(p) providing for the closure of post offices, the termination of rural routes and the termination of letter carrier routes;	p) prévoir la fermeture de bureaux de poste et la suppression de circuits ruraux ou de circuits urbains de livraison par facteur;
(q) carrying out any international postal agreement or international arrangement entered into pursuant to this Act;	q) mettre en oeuvre les conventions ou arrangements postaux internationaux conclus aux termes de la présente loi;
(r) dealing with any matter that any provision of this Act contemplates being the subject of regulations; and	r) prévoir toute mesure à prendre, aux termes de la présente loi, par voie réglementaire;
(s) providing for the operation of any services or systems established pursuant to this Act.	s) régir le fonctionnement des services, systèmes ou réseaux établis en application de la présente loi.

ANALYSIS

Preliminary Objections

1. Respondent's Objection to Evidence on the Record

[13] The applicant has included in its record a flyer called the "The Prophetic Word" (PW) that was distributed by Canada Post in the fall of 2006 (applicant's record, pages 87 to 101). He argues that the decision to distribute such a flyer is inconsistent with the decision at bar. The applicant

alleges that PW is hate literature or hate propaganda and takes aim at a sexual minority on the ground of orientation. It was approved by Canada Post for distribution as part of the Unaddressed Admail program, a decision, which according to the applicant, is inconsistent with the decision process undertaken by the respondent in this matter. The respondent objects to the introduction of PW as part of the record. Further, it is submitted that this flyer has no relevance to the instant case, since there was no question of sexually explicit material contained in PW.

[14] The Court is of the opinion that this document should be excluded because it concerns a decision of Canada Post taken after the contested decision in January 2006. As a matter of administrative law, one decision of a Board, which may or may not be reviewable, cannot be used to impugn another decision. The present case must be judicially reviewed on its own merits. Similarly, any review of the decision to distribute PW would have to be judicially reviewed or upheld on its own merits. Further, I agree with the respondent's submission that the lack of sexually explicit material in PW renders it irrelevant. Therefore, the objection is sustained.

2. Applicant's Objection to the Introduction of Certain Social Science Evidence

[15] The applicant objects to the respondent's filing of pages 489 to 525 (social science evidence) of its record because it was not cited by Dr. Elterman and because the Sex Party did not have the time to respond to such evidence. Contrary to the applicant's allegation, this evidence was cited as references to Dr. Elterman report dated April 14, 2006, except for pages 509 and 510 (Report of the Surgeon General's Workshop on Pornography and Public Health). Pages 489 to 525 are attached to a letter dated May 23, 2006 addressed to Dr. Michael F. Elterman Inc. and found in the

Respondent's Record, Volume III, which is dated May 31, 2007. Therefore, the objection is sustained only for pages 509 and 510. The applicant had ample time to respond to such evidence before the hearing in October 2007.

Administrative Law

[16] As a preliminary matter, in order to properly address the issues raised by the applicant, it is necessary to proceed with the analysis of the issues in two distinct steps: first, it is necessary to canvass the compliance of this decision with principles of administrative law, and second, to look at whether the decision of the respondent infringes section 2(b) of the Charter. Neither party made submissions regarding the standard of review, nor whether the decision is reviewable on administrative grounds; however, it is necessary to determine the standard of review and the compliance of that decision to the standard.

[17] The Supreme Court of Canada, in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, provided the framework and reasoning for separating the administrative law review from the Charter examination. Citing *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Justice La Forest, writing for a unanimous Court in *Ross*, found that:

> [32] […] the administrative law standard and the Charter standard are not conflated into one. When the issues involved are untouched by the Charter, the appropriate administrative law standard is properly applied as a standard of review.
>
> […]
>
> As Dickson C.J. noted, the more sophisticated and structured analysis of s. 1 is the proper framework within which to review Charter values.

[18] *Ross*, above was recently cited with approval by the Supreme Court of Canada. In *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, Justice Charron wrote at paragraph 17 that "judicial review may involve a constitutional law component and an administrative law component."

[19] I will therefore first proceed with the administrative law component of this case, followed by the constitutional component.

1. Standard of Review

[20] In order to determine the standard of review that will be applied to a discretionary decision by Canada Post, it is necessary to use the pragmatic and functional approach, and apply the four contextual factors outlined by the Supreme Court of Canada (see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). The first is the presence or absence of a privative clause or statutory right of appeal; the second is the relative expertise of the decision-maker; the third is the purpose of the legislation and the provision in particular; and the fourth is the nature of the question, that is whether it is a question of law, mixed fact and law or fact.

[21] In the case at bar, there is no privative clause, nor is there a statutory right of appeal. The Act is silent on the question of review, which is neutral; silence does not imply a high standard of

scrutiny (*Dr. Q*, above, at paragraph 27; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 30).

[22] In order to evaluate the expertise of Canada Post in making this decision relative to the expertise of this Court, it is first necessary to identify the nature of the specific issue. The decision made by Canada Post requires the decision-maker to screen the explicit nature of the material which is intended for mass distribution. It requires an understanding of community standards for tolerating sexual material delivered to the public unsolicited, and an assessment of the explicitness of the material. These are highly subjective determinations of fact, which could result in a wide variety of conclusions depending on the tastes and standards of the individual. While a senior employee of Canada Post might possess some knowledge of what kinds of material solicits complaints from the public, I cannot find that the respondent is more expert than the Court. The respondent submits that a similar decision has been made in another case. The respondent points to a flyer sent by a company called "Jolly Joker Enterprises Ltd" (respondent's record, page 487). Despite this example, there is nothing in the record to suggest that the respondent would deal with such matters frequently enough to have acquired significant institutional expertise. I therefore find that the lack of specific expertise of the respondent implies a higher standard of scrutiny.

[23] I accept the respondent's submissions regarding the intent of the Act in the context of the statutory purpose. The Act provides that Canada Post is a Crown corporation whose objective is to operate a national postal service. Further, the Act prescribes the powers and mandate of Canada Post, by means of extensive regulatory power and the rights, powers and privileges of a natural

person. A decision relating to what is mailable and what is non-mailable involves the balancing of multiple sets of interests, and the protection of the public. These facts all suggest that the functions of Canada Post can be polycentric in nature. The fact that the standards for non-mailable matter are the subject of a discretionary decision, suggests that Parliament did not intend a higher standard of scrutiny. On the whole, the purpose of the legislation militates in favour of deference.

[24] Finally, the nature of the question being reviewed is one of pure fact. The decision-maker was required to verify whether the material is sexually explicit or not. This factor would suggest a higher level of deference.

[25] Balancing the four factors, I am satisfied that the appropriate standard of review is reasonableness *simpliciter*. The question is whether Canada Post's decision to refuse to distribute the Sex Party's leaflet was unsupported by any reasons that could stand up to a somewhat probing examination (see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at paragraph 46).

2. Was Canada Post's decision reasonable?

[26] Noting that I have not yet undertaken a Charter analysis, it is my belief that it was reasonable for Canada Post to conclude that the leaflet submitted by the applicant was sexually explicit, and therefore non-mailable in accordance with the Consumer Guide. There is no doubt that the pictures at page 26 (oral sex), 28 (intimate embrace) and 29 (erect penis) associated with the words in the applicant's flyer are sexually explicit.

[27] However, the more pressing, and substantive issue is whether the decision violates the applicant's right of freedom of expression, and if it does whether the decision constitutes a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. I will therefore proceed to examine the Charter issues raised.

Constitutional Law

1. Is there a prima facie violation of section 2b)?

[28] The crux of the applicant's argument is that the Sex Party's right to freedom of expression was infringed. The respondent submits that there is no *prima facie* violation of the applicant's right under section 2(b) of the Charter, because the right is limited by the destination of the speech. The respondent cites the following passage from the recent Supreme Court decision in *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, (*City of Montreal*) in support of this argument:

> [56] Does the City's prohibition on amplified noise that can be heard from the outside infringe s. 2(b) of the Canadian Charter? Following the analytic approach of previous cases, the answer to this question depends on the answers to three other questions. First, did the noise have expressive content, thereby bringing it within s. 2(b) protection? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s. 2(b), does the By-law infringe that protection, either in purpose or effect? See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

[29] The respondent concedes that the Sex Party leaflet constitutes expressive content and that the prohibition infringes the Sex Party's right of freedom of expression, but argues that the method or location of this expression is excluded from the protection of section 2(b). Because it is sent to private places such as homes and mailboxes where anyone can pick it up, including children of all

ages, the expression is not protected by section 2(b). In other words, the protection afforded by the freedom of expression is limited by the location or destination of the expression. The respondent relies on paragraph 62 of *City of Montreal* in support of this contention:

> [62] Section 2(b) protection does not extend to all places. Private property, for example, will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the Canadian Charter. […] [Emphasis added]

[30] However, the present case is distinguishable. When Canada Post, acting as a federal board, makes the decision that material is not suitable for distribution, there clearly exists a state-imposed limit on speech. Therefore, the issue is not whether mailboxes are private spaces, but whether the decision of Canada Post infringes section 2(b).

[31] The respondent contends that not all government property is a forum for free expression, and emphasize again that the method or location of the expression can remove it from the protection of 2(b). Relying on *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, the respondent argues that Canada Post did not violate 2(b) by refusing to distribute the leaflet. I do not agree. The examples of government property to which the protection of 2(b) may not apply, include locations such as air traffic control towers, prison cells and judges' chambers (see *Committee for the Commonwealth*, above, at paragraph 134). The statutory objectives of the Act suggest that Canada Post is, at least in part, a vehicle for expression. The Unaddressed Admail program holds itself out to the public as a forum for expression, and is widely used for the distribution of householders and other political information, both from political parties and third

parties. To liken the functions of the national postal service to those of an air traffic control tower, Cabinet meetings or judges' chambers would be to misconstrue the statutory scheme in place.

[32] The respondent relies on the concurring opinion of Justice Rehnquist in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), a case from the United States Supreme Court, in support of their argument that mailboxes constitute private spaces:

> […] But because the home mailbox has features which distinguish it from a public hall or public park, where it may be assumed that all who are present wish to hear the views of the particular speaker then on the rostrum, it cannot be totally assimilated for purposes of analysis with these traditional public forums. Several people within a family or living group may have free access to a mailbox, including minor children; and obviously not every piece of mail received has been either expressly or impliedly solicited. […]

[33] Further in its argument, the applicant relies on the same case under the rubric of minimal impairment, further in its argument. I would briefly recall passages from the Supreme Court of Canada, discussing the usefulness of turning to American First Amendment jurisprudence to guide the Courts' reasoning in the context of the Canadian Charter. Significant jurisprudential differences exist between the protection of the First Amendment and that offered by 2(b). These differences were canvassed extensively by Justice L'Heureux-Dubé concurring in *Committee for the Commonwealth*, above, and Chief Justice Dickson, writing for the majority in *R. v. Keegstra*, [1990] 3 S.C.R. 697, who at page 740, said:

> Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.

[34] Another important distinction exists between the Canadian and American constitutional approaches to free expression. In *Committee for the Commonwealth*, above, Justice L'Heureux-Dubé wrote at page 178:

> However, the different structures of our two constitutional documents require that the balancing test be undertaken at different stages of the analysis. In the United States any limitations on the First Amendment, to the extent that any limitation exists, must be internal to the provision itself. The U.S. Constitution does not contain a s. 1.

[35] In the United States, the fact that a mailbox is a private space could serve to limit the scope of the freedom of expression granted by the First Amendment. However, under the Canadian Charter, the right provided by section 2(b) cannot be narrowed. The right to freedom of expression provided by section 2(b) is very broad, and should be interpreted in a large and liberal manner. It is not, however, absolute, and may be limited in the manner permitted by section 1. The Supreme Court has consistently held that the appropriate analytical framework for balancing competing values is section 1. In *Ross*, above, Justice La Forest wrote:

> [73] This said, a broad interpretation of the right has been preferred, leaving competing rights to be reconciled under the s. 1 analysis elaborated in *R. v. Oakes*, [1986] 1 S.C.R. 103, decided after *Big M*. This approach was adopted by the majority in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, which refused to formulate internal limits to the scope of freedom of religion. Speaking for the majority, I there stated, at pp. 383-84:
>
> > This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*; . . .

> In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(a). As Dickson C.J. stated in *R. v. Keegstra*, supra, while it is not logically necessary to rule out internal limits within s. 2, it is analytically practical to do so. . . .
>
> [74] This mode of approach is analytically preferable because it gives the broadest possible scope to judicial review under the *Charter* (see *B.(R.)*, at p. 389), and provides a more comprehensive method of assessing the relevant conflicting values.

[36] It is therefore my opinion that the decision of Canada Post to refuse the leaflet of the Sex Party for distribution constitutes a *prima facie* infringement of section 2(b) of the *Charter*. It is now necessary to determine whether the decision is a reasonable limit prescribed by law that is demonstrably justifiable in a free and democratic society as is provided by section 1 of the Charter.

2. Is the decision a "limit prescribed by law"?

[37] The applicant submits that the Customer Guide is not a law, and therefore does not constitute a "limit prescribed by law" as required by section 1. The applicant further alleges that the terms "offensive" and "sexually explicit" are impermissibly vague, and therefore also defeat the requirement of a "limit prescribed by law". I will address each of these issues.

a) The Decision is a Limit Prescribed by Law

[38] The respondent submits that the Customer Guide is enacted pursuant to its general management powers provided in the Act, and that such a Guide is needed in order to fulfill the statutory objects of the Act. Further, the Guide does not need to be codified because it constitutes "subordinate" or "delegated" legislation.

[39] So long as the policy is enacted and enforces within the powers given to Canada Post in accordance with the Act, it is a limit which is lawful. The Supreme Court recently addressed this issue in *Multani*, above:

> [22] There is no question that the Canadian *Charter* applies to the decision of the council of commissioners, despite the decision's individual nature. The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the Canadian Charter, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker: see *Slaight Communications*, at pp. 1077-78. As was explained in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 20, the Canadian *Charter* can apply in 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*.
>
> Deschamps and Abella JJ. take the view that the Court must apply s. 1 of the Canadian Charter only in the first case. I myself believe that the same analysis is necessary in the second case, where the decision

> maker has acted pursuant to an enabling statute, since any infringement of a guaranteed right that results from the decision maker's actions is also a limit "prescribed by law" within the meaning of s. 1. On the other hand, as illustrated by *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 141, when the delegated power is not exercised in accordance with the enabling legislation, a decision not authorized by statute is not a limit "prescribed by law" and therefore cannot be justified under s. 1. [Emphasis added]

[40] Further, this Court has followed a principle stated by the Ontario Court of Appeal in *Ainsley Financial Corp. v. Ontario Securities Commission*, [1994] O.J. No. 2966, that a regulator may issue non-binding statements or guidelines even in the absence of specific statutory authority:

> [11] The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The jurisprudence clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: *Hopedale Developments Ltd. v. Oakville (Town)*, [1965] 1 O.R. 259 at p. 263, 47 D.L.R. (2d) 482 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7, 137 D.L.R. (3d) 558; *Capital Cities Communications Inc. v. Canadian Radio-Television & Telecommunications Commission*, [1978] 2 S.C.R. 141 at p. 170, 81 D.L.R. (3d) 609 at p. 629; *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35, 88 D.L.R. (4th) 1; *Pezim, supra*, at p. 596; Law Reform Commission of Canada, Report 26, Report on Independent Administrative Agencies: Framework for Decision Making (1985), at pp. 29-31. [Emphasis added]

[41] Because the power to issue a customer guide is within the power of Canada Post, the exercise of this right is a limit prescribed by law.

[42] Following this reasoning, I agree that the impugned decision, which infringes the applicant's guaranteed rights, constitutes a "limit prescribed by law" pursuant to section 1.

b) Is the Guide Impermissibly Vague?

[43] The applicant submits that the terms “offensive” and “sexually explicit” contained in the Customer Guide, as well as the term “unacceptable items” contained in Section C – Chapter 12 of the Canada Postal Guide, are impermissibly vague. The Supreme Court has held that a law which is too vague may not constitute a “limit prescribed by law” (see *Committee for the Commonwealth*, above, at paragraph 161; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, at paragraphs 145-146).

[44] In order to determine if a law is impermissibly vague, the language of the provision must establish an intelligible standard. According to the Supreme Court in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at paragraph 63:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

[45] It is therefore necessary to determine whether the language of the Customer Guide and of Section C – Chapter 12 of the Canada Postal Guide provides an intelligible standard. The Customer Guide states that “Canada Post will not knowingly deliver offensive articles that contain sexually explicit material, any information relating to bookmakers, pool-setting, betting or wagering or unlawful schemes, or any item related to schemes to defraud the public.” The applicant submits that

this must be read in such a manner that the pamphlet must be both offensive and sexually explicit. I do not read these as separate requirements. For this reason, I am satisfied to decide whether the term "sexually explicit" is impermissibly vague. I do not think that it is. While a certain level of judgment must be exercised by the decision-maker in determining whether an item is sexually explicit, it still constitutes an intelligible standard. It is open to the Court to rely on common sense when deciding what constitutes sexually explicit material**.**

[46] Because the decision itself constitutes a "limit prescribed by law", as seen in *Multani*, above, any vagueness contained in the language of a Guide would not be fatal to the Charter analysis. I will proceed to determine whether the limit is reasonable in a free and democratic society.

3. Is the limit reasonable in a free and democratic society?

[47] Before applying the test established in *R. v. Oakes*, [1986] 1 S.C.R. 103, it is appropriate to reaffirm the principle that four contextual factors must be considered in order to determine the nature and sufficiency of evidence required by the respondent to demonstrate that the infringement of section 2(b) is saved by section 1. These factors were set out in *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, and *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827. They were recently reaffirmed in *R. v. Bryan*, [2007] S.C.J. No. 12 (QL), 2007 SCC 12 at paragraph 10:

> […] in determining the nature and sufficiency of evidence required for the Attorney General to establish that a violation of s. 2(b) is saved by s. 1, the impugned provision must be viewed in its context: see *Harper*, at paras 75-76, and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 88. This context can be best established by reference to the four factors which this

> Court set out in *Thomson Newspapers* and *Harper*: (i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity.

[48] A brief survey of the factors is instructive in determining the nature and sufficiency of evidence required to prove that the decision is saved by section 1. The harm caused to children by being exposed to sexually explicit materials is almost impossible to measure, since a controlled study on the impacts would be ethically impossible to conduct. In any event, it is open to the Court to rely on common sense and logic, following *Harper* and *Bryan*, above. The second factor, the vulnerability of the group protected, like the first, is a factor which allows the respondent to rely on common sense arguments. I accept that children are a particularly vulnerable group. The third factor is subjective fear and apprehension of harm. The respondent submitted that its burden was not to prove that harm would be done to children, but rather to prove on the balance of probabilities that there exists an apprehension of harm. The expert opinion found that an apprehension of harm should be sufficient. I agree with this submission. The fourth factor is noteworthy, however, since it suggests a higher burden should be imposed on the respondent. The leaflet, which the Sex Party seeks to distribute, is a form of political expression, which lies at the core of the section 2(b) guarantee.

[49] The nature of the activity being infringed is one which is subject to the highest level of protection. The right to political expression has been confirmed by the Supreme Court of Canada on several occasions. Notably, Chief Justice Dickson in *Keegstra*, above, wrote at paragraph 89:

> […] The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

[50] This passage was cited with approval by Justice Bastarache writing for the majority in *Harper*, above. The principle that political expression is at the core of the guarantee:

> [84] Third party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse (Lortie Report, *supra*, at p. 340). As such, the election advertising of third parties lies at the core of the expression guaranteed by the Charter and warrants a high degree of constitutional protection.

[51] For these reasons, I find that on balance, the contextual factors do not favour a deferential approach, nor do they suggest the opposite. While some deference must be shown with regard to the harm alleged by the respondent, for a limit to be demonstrably justified in a free and democratic society, any infringement must be narrowly tailored with specific regard for the importance of political speech.

[52] Before proceeding to apply the test set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, it is useful to review the steps which must be undertaken. The first step of the *Oakes* test requires the respondent to establish that the limit on the applicant's right to expression

was undertaken in furtherance of an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at page 352). The second step requires that the Court examine the proportionality between the measure taken by the respondent and the objective sought. Three questions must be examined at this stage of the inquiry: first, there must be a rational connection between the objective and the measures taken; second, the respondent must demonstrate that the measures taken minimally impair the right of the applicant, or whether less intrusive measures would meet the objective; third, the deleterious effects of the measure taken must be measured against the salutary impact of achieving the objective.

a) Pressing and substantial objective

[53] In order to determine whether the limit is reasonable in a free and democratic society, it is first necessary to identify the government objective in imposing the limit. The applicant and respondent submit two objectives which might be considered to be pressing and substantial. The first is the protection of children from harm. The respondent submits a psychological report attesting to the fact that children exposed to sexually explicit material may experience embarrassment, anxiety and guilt. The respondent relies on *R. v. Sharpe*, [2001] 1 S.C.R. 45, in support of the contention that the protection of children is a pressing and substantial objective. It is my opinion that the harm the Supreme Court sought to protect in *Sharpe* is distinguishable from the harm alleged in this case. In *Sharpe*, the harm resulted from the exploitation of children in the production of child pornography, and the exploitation that resulted from the use of the material to groom children. It also sought to protect children from the erosion of societal attitudes toward them.

In this case, the respondent seeks to protect children from seeing images which might cause embarrassment, anxiety or guilt.

[54] The respondent does not refer to the objective stated in *Irwin Toy*, above, which I find to be instructive in this case. The speech being limited in *Irwin Toy* was commercial in nature, intended to manipulate children, and is therefore also distinguishable from the facts of this case. However, it indicates that the vulnerability of children merits a heightened degree of protection.

[55] The second objective cited by the parties to this case is that of the rights of parents to control the access of their children to information. I agree with the applicant's submission that this right applies to all material which Canada Post might deliver, regardless of whether it is sexually explicit.

[56] It is my opinion that the protection of children is a sufficient objective, and that the decision passes the first step of the *Oakes* test. I adopt the arguments put forward by Mr. Hart, the senior vice president for Canada Post (respondent's record, volume II, tab 3 page 241), in a letter dated July 27, 2005, in response to a previous attempt by the applicant to distribute a flyer. The respondent must be sensitive to the concerns of the public with respect to receiving unsolicited, unaddressed advertising of a sexually explicit nature or content. According to the Mr. Hart's letter, Advertising Standards Canada (ASC) reported that sexually explicit advertising was one of the top three reasons for consumer complaints in 2004.

b) Proportionality

i) *Rational Connection*

[57] There is a rational connection between the requirement that sexually explicit information be concealed in an envelope before being distributed and the objective of protecting children.

ii) *Minimal Impairment*

[58] The requirement that sexually explicit material be concealed in an envelope constitutes a minimal impairment of the applicant's right. The applicant may still deliver the message using the Admail service, while providing the possibility for parents to shield the information from their children. The applicant suggests that parental control of the mailbox would constitute a lesser form of impairment.

[59] I see two reasons for rejecting this argument. The first is that parents have no warning that potentially objectionable information is about to be delivered to their mailbox, and do not have the opportunity to stop the children from seeing it. The second is that it is not necessary for the respondent to demonstrate that the least restrictive means have been adopted. There may be a range of limits that satisfy the requirement of minimal impairment. The Supreme Court has been consistent in asserting this principle. In *Sharpe*, above at paragraph 96, the Supreme Court wrote:

> This Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see Edwards Books and Art Ltd., supra; *Chaulk*, supra; *Committee for the*

> *Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Butler*, supra; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; M. v. H., [1999] 2 S.C.R. 3.

[60] Furthermore, the evidence reveals that the cost of 20,000 envelopes would be $1,400. This cost is sufficiently low to convince me that the burden imposed on the applicant is minimal.

[61] I therefore find reasonable that the requirement for the applicant to place sexually explicit material in an envelope meets the requirement of minimal impairment.

iii) *Proportionality and balancing*

[62] For the final step of the proportionality inquiry, it is necessary to examine whether the benefits of the respondent's decision outweigh the detrimental effects of the decision on the applicant's right to freedom of expression.

[63] In light of the contextual factors, the benefits outweigh the deleterious effects of limiting the speech of the applicant. The applicant submits that being required to place the message in an envelope forces the Sex Party to make a statement they do not want to make. The applicant argues that concealment in an envelope suggests that the content is objectionable, which is a message diametrically opposed to that espoused by the Party's platform.

[64] This constraint on the applicant's preferred manner of delivering their message is outweighed by the benefits of protecting children from unfiltered access to the information.

Was the decision *ultra vires* of the powers conferred to the respondent by the Act?

[65] The applicant submits that the respondent's decision is *ultra vires* of the powers conferred to the respondent by the Act. Because the decision was made pursuant to a corporate guideline or policy, as opposed to being made pursuant to the regulations relating to non-mailable matter, Canada Post did not have the authority to render the decision.

[66] The applicant relies on subsection 19(1) of the Act, which empowers Canada Post to regulate non-mailable matter. The Sex Party submits, because *Non-Mailable Matter Regulations*, SOR/90-10, are in force, that the only limit applicable to the present case is item 4 of the Schedule to the Regulations. According to the Schedule, "any item transmitted by post in contravention of an Act or a regulation of Canada" is non-mailable matter.

[67] The applicant therefore submits that the test to determine if the leaflet is mailable or non-mailable, is whether it contravenes an Act or a regulation. In other words, the test is illegality. The applicant alleges that for the objectionable material in their leaflet to meet the threshold test of illegality, it would have to fall under the provisions of the *Criminal Code of Canada*, R.S., 1985, c. C-46, governing obscenity.

[68] The applicant cites *Fred Steiner v. The Queen, the Postmaster General, Lawrence F. Reid, A.E. Green and Marc Savoie*, [1982] 2 F.C. 231, in support of the contention that the Post Office does not have the discretion required to refuse to distribute their leaflet on the grounds that the content is objectionable.

[69] In *Steiner*, above, the Postmaster General, superintendent and manager of the Post Office under the version of the Act in force at the time, refused to distribute a flyer which called for his resignation, despite the fact that it complied with the Act in all respects. Justice Decary interpreted the statutory scheme, and decided that the presence of a regulation dealing with non-mailable matter fettered the discretion of the Postmaster General, and imposed upon him an obligation to comply with the requirements of the regulation.

[70] The applicant cites the following passage of *Steiner*, above, in support of the Sex Party's submission:

> Had Parliament intended for the Postmaster General to have an absolute unfettered discretion to interrupt the mails or to refuse to accept mail because he did not agree with the contents of the mail there would have been provided specific legislation permitting such actions. This is what Parliament did with respect to the use of the mails for unlawful purposes, and the same could easily have been provided had Parliament wanted the Postmaster General to review the contents of flyers to ensure that they met the Postmaster General's standard of approval. […]

[71] The respondent contends that the discretion and power to render a negative decision in the present case is a necessary incident to the Corporation's objective of operating a national postal service, and followed from Canada Post's powers as a natural person. In essence, the respondent submits that the decision was made validly pursuant to subsection 16(1) of the Act.

[72] The respondent takes the applicant's submissions to stand for the proposition that Canada Post cannot refuse to deliver any type or class of mail without express statutory authority. The

respondent submits that this argument is inconsistent with the scheme of the Act. The respondent argues that the permissive language of the regulatory provision is consistent with the intent of Parliament, which was to facilitate the efficient operation of the business.

[73] The respondent overlooks the fact that a regulation dealing with non-mailable matter is in force. There is significant case law permitting Canada Post Corporation to make rules using the general powers of management, even when dealing with matters that, according to subsection 19(1) of the Act, could be the subject of a regulation; however, an important distinction exists. Use of the general management powers is only possibly in cases where no regulation covering a substantially similar matter is in force.

[74] In *French v. Canada Post Corp.*, [1988] 2 F.C. 389, affirmed by the Federal Court of Appeal, [1988] F.C.J. No. 531 (QL), Justice Addy wrote:

> [13] Pursuant to subsection 16(1) Canada Post not only has the capacity of a natural person but it also enjoys the same rights, powers and privileges. The mere fact that the rights, powers and privileges are expressed to be "subject to this Act" does not, where there is no clear prohibition or limitation to the contrary, detract from the general principle that a statutory body, in the absence of regulations pertaining to any matter within the legitimate scope of operations, is not precluded from acting, where the action is deemed necessary or desirable for the proper furtherance of its objects, merely because it has also been given the power to make regulations pertaining thereto. Where regulations are in effect, it must of course conform to them but, until then, it remains free to take administrative actions in pursuance of those objects (*Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn*, [1978] 2 S.C.R. 141; *CRTC v. CTV Television Network Ltd. et al., supra*). The Chief Justice in the Capital Cities case stated the issue as follows, at page 170:

> The issue that arises therefore is whether the Commission or its Executive Committee acting under its licensing authority, is entitled to exercise that authority by reference to policy statements or whether it is limited in the way it deals with licence applications or with applications to amend licenses to conformity with regulations. I have no doubt that if regulations are in force which relate to the licensing function they would have to be followed even if there were policy statements that were at odds with the regulations. The regulations would prevail against any policy statements. However, absent any regulations, is the Commission obliged to act only ad hoc in respect of any application for a licence or an amendment thereto, and is it precluded from announcing policies upon which it may act when considering any such applications? [Emphasis added]

[75] Writing for the Federal Court of Appeal in the same matter, Justice Hugessen wrote:

> We are all in general agreement with the reasons and with the conclusion of the learned Trial Judge. For the appeal to succeed, it would be necessary to read the words of subsection 17(1) and particularly paragraph 17(1)(p) [paragraph 19(1)(p) of the current Act] of the *Canada Post Corporation Act* S.C. 1980-81-82-83, c. 54, as amended, as constituting a limitation on the general grant of power contained in subsection 16(1). We are unable to do so. The words do not take the form of a limitation; on the contrary, they read as a grant of power and employ the permissive and enabling word "may". A power to make regulations in respect of a matter is not, in the absence of specific words, to be read as subtracting from or cutting down on an otherwise general power to act in the same area. See *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 S.C.R. 2; *Capital Cities Communications Inc. v. CRTC*, [1978] 2 S.C.R. 141; *CRTC v. CTV Television Network Limited*, [1982] 1 S.C.R. 530; *Ex parte Forster; Re University of Sydney*, (1963) 48 S.R. (N.S.W.) 723.]. That being so, and in the absence of any regulation adopted under paragraph 17(1)(p), the Corporation is free to act to close its post offices. [Emphasis added]

[76] This is in line with the conclusion of Justice Decary in *Steiner*, above, who wrote :

> [25] Has the Postmaster General, once he has defined what is non-mailable matter, the right to decide other matters which are enunciated in the Prohibited Mail Regulations? Nowhere in the Act or Regulations is there the authority to refuse to accept mail because the Postmaster General or his designate does not approve of the purport of the mailing.
>
> […]
>
> [39] It is my considered opinion that the power to decide what is a letter given the Postmaster General at paragraph 5(1)(p) is only one of making a regulation as to what is the very same subject-matter as in paragraph 6(a), to wit: what is a letter, a mailable matter and a non-mailable matter, and cannot be exercised unless through the medium of regulations, not by a decision without regard to regulations. Further, in my opinion, there is no discretion that the Postmaster General could exercise in the case at bar because if there had been a discretion, it would have to be by way of a regulation covering the purport or nature of the text of the flyers. There is nowhere in the Act nor in the Regulations any authority for refusing mail on account of its contents except if it falls within the ambit of section 7 dealing with the use of the mails for unlawful purposes. There was nothing shown to be unlawful in the flyers as no action was ever taken and decided upon by the Courts that could make the tenor of the flyers an offence falling under section 7 of the Act.

[77] In light of *French*, above (F.C.), and the powers conferred upon Canada Post by the current statute, the discretion of the post office could be exercised in the absence of a regulation. In the present case, however, a regulation exists, dealing with non-mailable matter, which ousts the general power of management over that subject matter. It is my opinion that the decision of the respondent corporation was made beyond the powers permitted by the Regulation.

[78] The Customer Guide, impugned by the present application, goes beyond the Non-mailable Matter Regulations, because it attempts to impose further restrictions on what is mailable matter

than those imposed by the Regulations. I agree with the applicant's submission, that the threshold for excluding material from distribution is illegality under the Regulations. Because the respondent conceded at the hearing that the images were not illegal, it is not necessary to examine the matter. If the test under the Regulations is illegality, and the images at issue are not in violation of any law, it appears to me that the policy seeks to impose a stricter standard for screening material than the obligation imposed by the Regulations; the limits prescribed by the Regulations cannot be superseded by a mere policy without creating a contradiction.

[79] Had Canada Post decided not to pass a regulation prescribing mailable and non-mailable matter, and the subject matter was left un-regulated, it would be open to Canada Post Corporation to do so by means of a policy or guideline. However, the fact that the subject matter has been contemplated by regulation, suggests that Canada Post, with the approval of the Governor in Council, turned its mind to this question. The omission of sexually explicit material from the list of non-mailable items is not an oversight, and primacy must be given to the Regulations over a policy.

[80] Although the guide in question goes beyond the Regulations, it is my opinion that it is not *ultra vires* of the Act. The power to enact a regulation restricting the distribution of sexually explicit material is within the power of Canada Post under the Act. In the instant case, though the guide is not *ultra vires* of the Act, it is also not in conformity with the Regulations.

CONCLUSION

[81] For the reasons above, I would answer the questions raised by this judicial review as follows:

a) Is the respondent's decision compliant with the governing principles of administrative law?

   Yes.

b) Does the decision to refuse to distribute the applicant's leaflets infringe section 2(b) of the Charter?

   Yes.

c) If so, does the refusal constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society?

   Yes.

d) Is the decision of the respondent *ultra vires* of the powers conferred on it pursuant to the Act?

   No.

[82] Though the decision of Canada Post is not *ultra vires* of the Act, it was not made in conformity with the regulation enacted by the corporation. It is my opinion that it is inconsistent with the regulation in place.

[83] This does not, however, end the matter. The regulatory power provided in the Act allows Canada Post to pass regulations. Stated plainly, it is up to Canada Post to promulgate a regulation that will render the impugned guide enforceable.

[84] Further, it is my opinion that a regulation by Canada Post imposing certain conditions on the distribution of sexually explicit material is demonstrably justifiable in a free and democratic society.

[85] On the last day of the hearing, the respondent submitted a definition of what it considers "sexually explicit" material (exhibit 3). This is reproduced as an annex to the judgment. At the hearing, counsel for the applicant conceded that this definition has much more clarity than the existing guideline but rejected it as a reasonable definition of what should be prohibited or not.

[86] In my view, if this definition had been included in the regulation as a prohibition with the requirement of an envelope, I would have dismissed the application for judicial review because it would have constituted a reasonable limit that can be justified in a free and democratic society as explained at paragraphs 47 to 64 above.

[87] In light of this, I choose to exercise the discretion of the Court under section 18.1 (3) of the *Federal Courts Act*, and suspend my order of quashing the decision of Canada Post for a period of six months, for the purpose of providing the respondent with the opportunity to enact a regulation, or amend the current Regulations.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, and the decision of Canada Post is quashed. The matter is remitted back to the respondent for redetermination. This order is suspended for a period of six months, for the purpose of providing the respondent with the opportunity to enact a regulation, or amend the current Regulations.

No costs are awarded to either party.

"Michel Beaudry"
Judge

ANNEX "A"
(Exhibit No. 3 filed on October 17, 2007 in Vancouver, BC)

COURT FILE NO. T-65-06

FEDERAL COURT

BETWEEN :

THE SEX PARTY

APPLICANT

AND :

CANADA POST CORPORATION

RESPONDENT

DEFINITION

The term "sexually explicit" includes:

a) images or representations of nudity that are suggestive of sexual activity (e.g., a nude man with an erection; a nude woman with her legs spread in a suggestive manner)

b) images or representation of sexual intercourse (a close-up photograph of the genitals of a man and woman engaged in sexual intercourse with no context suggesting violence or degradation)

c) written text that describes sexual acts in a way that is more than purely technical, again with no suggestion of violence or degradation

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-65-06
STYLE OF CAUSE:	**THE SEX PARTY and CANADA POST CORPORATION**
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 15, 16 and 17, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Beaudry J.
DATED:	January 14, 2008

APPEARANCES:

John Ince (representative)	FOR APPLICANT
Neal Steinman Nicholas Preovolos	FOR RESPONDENT

SOLICITORS OF RECORD:

Not applicable	FOR APPLICANT
Steinman Preovolos Vancouver, British Columbia	FOR RESPONDENT