Fishman (*Suppliant*) *v.* **The Queen** (*Respondent*)

Noël, J.—Montreal, March 24; Ottawa, Oct. 20, 1970.

Post Office—Suspension of mail services for alleged fraud—Prohibitory order of Postmaster General—Confirmation by Board of Review—Two members of Board officials of Post Office—Objection to Board's constitution—Acquittal of criminal charge for same offence—Whether reasonable cause to believe offence committed—"Offence," meaning of—Whether reasonableness of decision reviewable—Post Office Act, R.S.C. 1952, c. 212, s. 7.

In the course of a business which suppliant carried on in Montreal she mailed circulars to a large number of persons offering for sale films described as "Male and Female Participating, One Male Plus Two Females Participating, Two Females Participating, Two Males Participating, Female Participating". The films sent out were innocuous and several purchasers complained to the Post Office Department that they had been deceived by the advertising. The Postmaster General thereupon made an interim prohibitory order under s. 7(1) of the *Post Office Act* R.S.C. 1952, c. 212, suspending mail services to suppliant. In accordance with s. 7(2) he then appointed a Board of Review consisting of an assistant Deputy Minister of Justice and two Post Office officials. The suppliant, who was represented by counsel, testified before the Board, which wholly on the evidence of the circulars and letters from purchasers found suppliant's advertising deliberately deceptive and that there were reasonable grounds to believe she was attempting to commit and had committed offences against ss. 323 and 324 of the *Criminal Code, viz* fraud and using the mails to defraud. Upon the Board's recommendation the Postmaster General made his interim order final. Suppliant was subsequently charged in Quebec under s. 323 of the *Criminal Code*, based upon the circulars, but the Crown offered no evidence and the charge was dismissed.

Held, suppliant's petition for annulment of the interim and final prohibitory orders must be dismissed.

(1) As required by s. 7(1) of the *Post Office Act* there were reasonable grounds for the Postmaster General's belief that circumstances existed to warrant his interim prohibitory order. *Associated Provincial Picture Houses* v. *Wednesbury Corp.* [1948] 1 K.B. 223; *Carltona* v. *Com'r of Works* [1943] 2 All E.R. 560, referred to.

(2) The Board of Review was validly constituted notwithstanding that two members were subordinates of the Postmaster General. Moreover in testifying before the Board and making representations by counsel without protest, suppliant waived her objection to the Board's constitution. *Ghirardosi* v. *Minister of Highways for B.C.* [1966] S.C.R. 367, referred to.

(3) The Postmaster General had the power under s. 7 of the *Post Office Act* to determine that there were reasonable grounds to believe that a person committed or attempted to commit an "offence" (which includes an offence under the *Criminal Code*), and the court will not review the exercise of such power if there was in fact reasonable cause so to exercise it. (*Nakkude Ali* v. *M.F. de S. Jayaratne*, 66 T.L.R. 214, applied.) The documentary evidence before the Board did provide such reasonable cause. Suppliant's acquittal by a Quebec court of a charge under s. 323 of the *Criminal Code* did not invalidate the Postmaster General's decision under s. 7 of the *Post Office Act*. *Literary Recreations* v. *Sauvé and Murray*, 58 C.C.C. 385, applied.

PETITION of right.

J. P. Ste-Marie for appellant.

P. Ollivier, Q.C., for respondent.

NOËL J.—The suppliant, Mrs. Sandra Stober Fishman, operates a business of selling films, photographs, postcards and books in Montreal under her own name and under the name of S. P. Stober, at 1475 Notre-Dame Street, Chomedey, and G. H. Blanchard and B. Bernard, at 1285 Hodge Street, City of St-Laurent, which she advertises by means of letters (she alleges 1,500,000) sent out in the mail to persons in Canada and the United States, whose addresses she obtained by purchasing mailing lists. These letters are all along the lines of Exhibit E-7 and read as follows:

Dear Friend,

I have Films Photos and Books which you have been trying to obtain. I have all New Originals from Montreal, Que. All my selections are

8 M.M. 200 Ft. $35.00

MALE AND FEMALE PARTICIPATING
ONE MALE PLUS TWO FEMALES PARTICIPATING

TWO FEMALES PARTICIPATING
TWO MALES PARTICIPATING
FEMALE PARTICIPATING

16 M.M. 400 Ft. on request only. Same type as 8 M.M. ....
Coloured Films 200 Ft. $60.00 Same stories available in color as listed above.

Hard Cover Illustrated Book about 200 pages $20.00

Set of Photos 5 .....$10.00 Postcard Size Set of 5 .....$15.00

If you wish to make a choice from samples only and to obtain your order number you may do so upon the following manner. Ten Dollars gives you 3 strips of my 8 M.M. Film Black & White to make your choice plus 5 Photos of Mixed Participants. You will also receive your order number which may not be passed on to anyone. I handle all my orders from this end only. I am sure this will answer most of your Questions. I know after you read this letter you will not hesitate to send an answer.

P.S. Please keep this address at all times. For orders on Films please include another $1.00 for expressing for safe delivery.

Orders sent to the following address only.

S. P. STOBER
754 Labelle Blvd.
Apt. 106,
Chomedy, Que.
Canada.

TELEPHONE NO. 688-3450

I can also obtain Pin-up films

200 Ft. B & W $20.00

Leather Bound Books-Good Spicey Novels—$5.00

NOTICE

IF YOU WISH YOUR NAME DELETED FROM MY LIST PLEASE RETURN THE CODED ENVELOPE.

The material and evidence considered by the Minister in making the interim prohibitory order which prohibited delivery of any correspondence addressed to the suppliant or deposited by her at a post office, actually contained, in addition to the above circular, three others. Three of the circulars begin in the following manner:

> Dear Friend,
>
> I have Films, Photos and Books which you have been trying to obtain. I have all New Originals from Montreal, Que.

The fourth circular commences

> Dear Member,
>
> Now that you got your order safely we can service you as our preferred customer.

This circular would seem to precede the purchase of any complete films as it suggests "Order 1 reel first, then you can always reorder".

Subsequent to the sending of these letters, the Post Office Department received a number of protests from some of those who had received the letters, as well as a number of irate letters from some who had ordered her wares and who, upon receipt thereof, were disappointed in not finding the spicy material they claim they were given to understand or understood they would contain. They indeed contained innocuous subject matter only.

As a result thereof, the Postmaster-General made an interim prohibitory order on July 17, 1964, under the powers given him by section 7 of the *Post Office Act* 1951, c. 57, [now R.S.C. 1952, c. 212] and then pursuant to the same section, he referred the matter to a Board of Review which consisted of T. D. McDonald, J. N. Craig and R. A. Cathro. This Board sat at Ottawa on August 13 and 14, 1964, and on August 19, 1964, held, without however going into the question of whether any of the films were obscene within the meaning of the *Criminal Code,* that these films were

> ... not the kind of product which the circulars and the film samples enclosed therewith are calculated to lead the recipients to expect.
>
> In the opinion of the Board, the descriptions "Male Female Participating", etc. are clearly intended to induce the reader to believe that the films offered one of an extreme character where the "participation" referred to is that of out and out normal or abnormal intercourse or perversion. Having regard to all the material on the record the Board is of the opinion that the scheme of operation of Sandra Stober Fishman was deliberately contrived to induce such an interpretation on the part of persons to whom the circulars were sent and that it was an essential part of this scheme to obtain money by deceit.

The Board then concluded:

> ... that there are reasonable grounds for believing that Sandra Stober Fishman is, by means of the mails, attempting to commit and committing offences

against sections 323 and 324[1] of the Criminal Code and the Board recommends that the Interim Prohibitory Order under section 7 of the Post Office Act be made final.

On August 31, 1964, the Postmaster General, the Honourable John R. Nicholson, addressed a letter to the suppliant informing her that he had concurred in the decision of the Board and decided that the interim prohibitory order shall be final and informed her that

> ... Pending the outcome of the legal proceedings instituted by you on 6th July 1964, against the Post Office Department, the mail intercepted under the interim prohibitory order will be retained.

The suppliant attacks the interim and final order of the Postmaster General on the basis that:

(*a*) insufficient evidence was considered by him;

(*b*) prior to the issue of the order, no explanation was requested of suppliant;

(*c*) the sole complainant considered by the Postmaster General was not questioned and seen by anybody and the Postmaster General acted only and solely on a typewritten letter, signed by an unknown individual, whose signature was not even verified;

(*d*) the Postmaster General broke unilaterally and without prior notification or authorization, the contract of services for which suppliant had paid the Post Office of Canada.

The decision of the Board of Review should, according to the suppliant, be annulled because:

(*a*) the Board of Review was named by the Postmaster General, a third party to these proceedings[2] who voluntarily and knowingly nominated two of his subordinates;

(*b*) this method of nomination shows so much prejudice as to become *ipso facto* illegal, null and void;

(*c*) the Board of Review received illegal evidence, notwithstanding the protest of suppliant through her undersigned attorney;

(*d*) notwithstanding the request of suppliant, through her attorney, that the rules and regulations of the *Canada Evidence Act* be applied, the

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[1] **323.** (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security, is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public, is guilty of an indictable offence and is liable to imprisonment for ten years.

324. Every one who makes use of the mails for the purpose of transmitting or delivering letters or circulars concerning schemes devised or intended to deceive or defraud the public, or for the purpose of obtaining money under false pretence, is guilty of an indictable offence and is liable to imprisonment for two years.

[2] This party was struck out later, on June 15, 1965, upon an application made by the respondent.

Board of Review received, as evidence, documents unsigned, documents signed by unknown persons as well as matters of evidence, allegations of fact without suppliant having the possibility of cross-examining those who made these allegations;

(*e*) the Board of Review concluded without right, or legal evidence, that suppliant had committed a crime, such conclusions being illegal, null and void as under the laws of Canada, only proper tribunals can so condemn an individual.

The suppliant further alleges that:

(*a*) the manner in which the Board of Review received its evidence, the illegality of said evidence, the impossibility for suppliant to cross-examine the persons whose evidence was received are such as to deprive the Board of Review of all jurisdiction and to render its decision illegal, null and void;

(*b*) suppliant, through the refusal of the interested parties, has not been able to obtain a copy of the decision of the Board of Review and, therefore, retains her right to amend this petition and include herein all the objections that may issue from the wording and the allegations contained in the decision of the Board of Review when, and if, this decision is made available to suppliant;

(*c*) the Postmaster General for Canada John R. Nicholson, based his order of July 17th, 1964, on the assumption and allegation that suppliant had committed a crime under sections 323 and 324 of the Criminal Code of Canada;

(*d*) the Postmaster General of Canada knew that, at the time of his interim prohibitory order, suppliant had never been found guilty of such a crime and that, indeed, no such accusation had ever been made against her, and, therefore, the order of July 17, 1964, was illegal, null and void;

(*e*) as it appears that the Board of Review may also have decided that suppliant has been guilty of committing a criminal act forbidden by sections 323 and 324 of the Criminal Code of Canada, suppliant wishes the decision to be declared illegal, null and void, for the reason, amongst several others of fact and of law, that such a decision is without the jurisdiction of such Board of Review.

The suppliant, by her petition, requests this Court to annul the interim order of the Postmaster General, his final order and the decision of the Board of Review and order the return to the suppliant of all mail stopped, retained and withheld by, or upon the order of, or at the request of the Honourable John L. Nicholson (the Postmaster General incumbent at the time) his officers, representatives, subordinates and employees and if such mail cannot be so returned, order that respondent be condemned to pay the sum of $100,000 to her and, finally, order that respondent pay the suppliant the sum of $25,000 as liquidated damages suffered by her from the Postmaster General's orders and acts.

The respondent, on the other hand, alleges that the interim prohibitory order issued by the Postmaster General, the constitution of the Board of Review, the inquiry conducted by this Board of Review and its recommendations to the Postmaster General as well as the final prohibitory order made by the latter, were all in accordance with and in conformity to the prescriptions of the *Post Office Act,* R.S.C. 1952, c. 212, and are not subject to review by this court.

The respondent also points out the following:

(*a*) Subject to subsection (2) of section 7 of the *Post Office Act,* the appointment of the members of the Board of Review was within the sole discretion of the Postmaster General and there is nothing in the Act forbidding or preventing the appointment of postal employees as members of such Board of Review.

(*b*) At the hearing before the Board of Review, the suppliant and her counsel were given the opportunity to appear, to make representations and to present evidence, the whole in accordance with subsection (3) of section 7 of the *Post Office Act.*

(*c*) The sole function of such a Board of Review was to enquire into the facts and circumstances surrounding the interim prohibitory order and to submit a report with its recommendation to the Postmaster General.

(*d*) The Board of Review was entitled to consider any oral or written evidence it deemed advisable.

(*e*) The Board of Review did not conclude, as alleged by the suppliant, that the latter had committed a crime as appears from the conclusions actually reached by the said Board of Review, which were as follows:

> In the result the Board has come to the conclusion that there are reasonable grounds for believing that Sandra Stober Fishman is, by means of the mails attempting to commit and committing offences against sections 323 and 324 of the Criminal Code and the Board recommends that the interim prohibitory order under section 7 of the Post Office Act be made final.

The respondent then contends that:

(1) Upon receipt of the report of the Board of Review, the Postmaster General could, in his sole and absolute discretion, revoke or declare final the interim prohibitory order issued by him and his decision is not subject to review by this Honourable Court and in any event, suppliant has not alleged any fact which would justify this Honourable Court to set aside the final prohibitory order made by the Postmaster General.

(2) The said prohibitory order made by the Postmaster General against the suppliant fully authorized the former to detain any mail directed to the suppliant or deposited by her at a post office and the detention of such mail is lawful in every respect.

(3) There was no contract whatsoever between the suppliant and Her Majesty the Queen, and the damages claimed by the suppliant are unfounded in fact and in law.

(4) The petition of right of the suppliant is unfounded in fact and in law and the suppliant is not entitled to any of the relief prayed for in her petition of right.

The respondent then prays for the dismissal of the suppliant's petition.

According to an agreed statement of facts, the parties agree that the suppliant operates the business described in her petition, that she received notice of the interim order by letters dated July 23, 1964, that she required that the order be inquired into and that a Board of Review was appointed comprising Mr. T. D. McDonald, Q.C., Assistant Deputy Minister of the Department of Justice and Mr. G. S. McLachlan and Mr. R. A. Cathro, both employees of the Post Office Department. The parties also agree that the suppliant, through her attorney, protested the appointment of Mr. G. S. McLachlan to the Board and that Mr. J. N. Craig, an employee of the Post Office Department, was thereupon substituted for him. The Board of Review sat in Ottawa on August 11, 1964, in the presence of the suppliant and of her attorney and the evidence was transcribed. Agreement was reached on a number of Exhibits 1 to 78 and F-3 to F-14 comprising documents and films which were filed with the exception of Exhibits 58 to 78 inclusive and F-3 to F-12 inclusive which were returned to suppliant's solicitor by letter dated September 22, 1964.

On August 21, 1964, the Board of Review pursuant to subsection (6) of section 7, submitted a report with its recommendations to the Postmaster General and a copy of this report with the documents referred to therein is produced as Exhibit F.

On August 31, 1964, the Postmaster General informed the suppliant by letter that he had decided that the interim prohibitory order issued against her shall be final and a copy of this letter is produced as Exhibit G.

It was also accepted by the parties that while the above statement of facts is agreed upon, it is expressly understood and agreed between them that the filing of the statement and of the exhibits referred to therein is made under reserve of all legal objections as to the relevancy or admissibility of all or some of the said facts or exhibits. It was also understood that, while the suppliant was to be at liberty to file Exhibits 50 to 78 inclusive and F-3 to F-12 inclusive, the fact that they were not produced would not be invoked against the defendant. A supplementary statement of facts was later, in April 1970, agreed upon by the parties to the following effect:

1. Suppliant's counsel was aware at the commencement of the hearing before the Board of Review that the members thereof, with the exception of Mr. T. D. McDonald, were employees of the Post Office Department;

2. On the 21st day of January 1969, suppliant was accused of conspiracy, under sections 408-b and 323 of the Criminal Code of Canada, and copy of said indictment is filed as exhibit S-1;

3. Suppliant had been arrested on said charge, on or about November 6, 1964;

4. The time period covered by said indictment coincides approximately with that mentioned in exhibits A and G;

5. The acts for which suppliant was accused in said indictment were part of, or similar to, those covered by said exhibits A and G;

6. The documents, and/or pictures, and/or books, and/or films, and/or other things, allegedly used by suppliant for the purposes of said indictment, were the same as, or identical to, or similar to, those covered by said exhibits A and G;

7. The Crown failed to proceed with its evidence in said indictment and, consequently, on the 30th of April, 1969, by decision of Mr. Justice Albert Malouf, said indictment was dismissed, as appears from a copy of the minutes of said decision, filed herewith as exhibit S-2;

8. On the 14th of April 1965, a true bill of indictment was returned against suppliant by the Grand Jury of the United States District Court for the District of Vermont, and a copy of said true bill is joined hereto as exhibit S-3;

9. Suppliant's trial, on the charges alleged in said true bill, was held in the city of Burlington, Vermont, U.S.A.;

10. On the 19th day of March, 1970, suppliant, by the verdict of the jury, was declared not guilty of the charges alleged in said true bill, as appears from judgment order entered thereto, a copy of which is filed herewith as part of said exhibit S-3.

For the time being, the matter of damages and the value of the letters received by the suppliant and impounded are not in issue as the parties agreed that the only question to be solved at this stage is the validity of the prohibitory orders issued which prohibit delivery of any correspondence addressed to the suppliant or deposited by her at a post office. I should add that pursuant to a consent order of the court rendered on September 22, 1964, all the correspondence held under the prohibitory orders was placed under the custody of the court.

It is against the above background that the suppliant is claiming from the Crown.

I will deal in turn with the several attacks made by counsel for the suppliant, Mr. Jean-Paul Ste-Marie, on (1) the interim prohibitory order; (2) the nomination by the Minister of Cathro and Craig as members of the Board of Review; (3) the decision rendered by the Board on August 21, 1964, and, finally on (4) the final prohibitory order issued by the Postmaster General on September 2, 1964.

The interim order was rendered by the Minister pursuant to section 7(1) which reads as follows:

7. (1) Whenever the Postmaster General believes on reasonable grounds that any person

(*a*) is, by means of the mails,
  (i) committing or attempting to commit an offence, or
  (ii) aiding, counselling or procuring any person to commit an offence, or

(*b*) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,

the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

The section clearly indicates that before issuing the interim order mentioned therein, the Postmaster General must have reasonable grounds to believe that his order is well founded. The Postmaster, in a letter he addressed to the suppliant on July 22, 1964, states: "From evidence placed before me, I have reasonable grounds to believe . . . ".

Counsel for the suppliant submits that the only evidence before the Postmaster General at the time is described in a letter addressed by him to the Board of Review on August 7, 1964 (Exhibit 6), and is restricted to the following: one circular letter from S. P. Stober, one circular letter from G. H. Blanchard, one letter from Brian-Boru Havlok Kennedy (related circular letter exchanged with S. P. Stober concerning the purchase of a book and including the book in question entitled "Jane Mansfield's Wild, Wild World"). None of these documents were signed, including even the letter addressed to the Minister by one Brian-Boru Havlok Kennedy.

As the Postmaster General himself stated that he relied on these documents alone in deciding to issue the interim order, counsel for the suppliant raises the question as to whether such documents were sufficient to justify the decision taken. He also contends that the Minister made a hasty decision, did not act as a "prudent man" or "as" in the terms employed in the *Civil Code* a *"bon père de famille"*. He finally submits that the interim prohibitory order made against his client should be quashed as the Postmaster's decision was based on insufficient proof.

The law does not define the evidence necessary to enable the Minister to intervene by means of an interim order and in view of the provisional nature of the decision and the right of the person affected by the decision to have it examined within a few days by a Board of Review (cf. section 7(2) of the *Post Office Act* 1951, c. 212, and the necessity for the Postmaster General to take prompt action to prevent the use of the mails for the purpose of defrauding the public or other criminal activity[3], the Minister, in my view, is entitled to intervene if in good faith he believes, or has reason to believe, because of certain facts brought to his attention, either by writings or by verbal reports, that a person is committing or attempting to commit an offence. It appears to me that at this stage it is sufficient for the Minister to have reasonable grounds to believe that an attempt is being made to commit an offence and it was in this belief based on these circular letters from S. P. Stober and G. H. Blanchard, and as stated in Exhibit 6 on: "1 letter from Brian-Boru Havlok Kennedy, related circulars, and correspondence exchanged with S. P. Stober concerning the purchased [*sic*] of a book and including the book in question entitled "Jane Mansfield's Wild, Wild World", that the Minister's decision was taken. The circular letter from Stober is reproduced at the beginning of these notes and the Blanchard circular is substantially along the same lines. The letter from Brian-Boru Havlok Kennedy,

[3] Cf. *The Queen v. Randolph et al.* [1966] S.C.R. 260 per Cartwright J.

dated June 5th, 1964, which bears the above name at the bottom is, however, not signed and reads as follows:

> Postmaster General,
> Ottawa, Ontario.
>
> I received the enclosed sheet which now has my registration receipt attached from a lady ??? in Quebec as advertising.
>
> I sent for this book... for which I paid the price of twenty dollars ! ! !
> $20.00
>
> Was I more than shocked and mad when I received the enclosed book! Which proves her advertising is/was a fraud!
>
> I wrote to the company which distributes this book! And read her advertising: Originals produced in Montreal ! ! and 200 pages, ETC. !
>
> Does your department do a thing re this fraud? ? ? I have failed to receive one word from this female Quebec Crook since I have written her many times re this fraud !
>
> ---
>
> ---
>
> Brian-Boru Havlok Kennedy,
> 11831 80th avenue,
> North Surrey, B.C.
>
> June 5th, 1964.

Now, although this letter is not signed, the full address of the sender appears on it and taken with the circular letters, in my view, justifies the Postmaster General to have taken the provisional measure he did. Although the material before him was meagre, it was sufficient to allow him to believe that an offence was being committed. Furthermore it does not appear to me that his decision was made in bad faith or is so unreasonable that no reasonable authority could ever have come to it and as it is in such cases only that a court can interfere in a situation such as we have here (cf. *Associated Provincial Picture Houses v. Wednesbury Corp.*[4] and *Carltona Ltd v. Commissioners of Works and others*[5]) suppliant's first attack cannot succeed. I should also add that the order is merely provisional and was later replaced by a final prohibitory order which, as we will see, is not necessarily, and was not based on the same evidence as the interim one.

Suppliant then queries the appointment by the Minister of R. Cathro and J. N. Craig, two employees of the Postmaster's Department as members of the Board of Review. These two gentlemen were appointed pursuant to section 7(2) of the *Post Office Act* which reads as follows:

> 7. (2) Within five days after the making of an interim prohibitory order the Postmaster General shall send to the person affected a registered letter at his last known address informing him of the order and the reasons therefor and notifying him he may within ten days of the date the registered letter was sent, or such longer period as the Postmaster General may specify in the letter, request that the order be inquired into, and upon receipt within the said ten days or longer period of a written request by the person affected that the order

[4] [1948] 1 K.B. 223 per Lord Greene M.R. at p. 230.
[5] [1943] 2 All E.R. 560 at p. 546.

be inquired into, the Postmaster General shall refer the matter, together with the material and evidence considered by him in making the order, to a Board of Review consisting of three persons nominated by the Postmaster General one of whom shall be a member of the legal profession.

The Postmaster General had originally appointed as members of the Board T. D. McDonald, Q.C., and Messrs. McLachlan and Cathro. As the suppliant objected to the nomination of Mr. McLachlan who, according to information received, had participated in the Minister's decision, he was replaced by J. N. Craig.

Counsel for the suppliant points out that Messrs. Cathro and Craig are also officers of the Postal Department and that they were called upon to determine the validity of a decision taken by the Minister under whom they were serving. He also submits that, from the evidence, it appears that the Minister acted upon the representations made and the investigation conducted by members of the Department and that the two employees who were members of the Board, in addition to passing judgment on the acts of their Department, were also called upon to review the procedure and the investigation of their own Department. This, according to counsel for the suppliant, constitutes a flagrant abuse of power sufficient to entitle the suppliant to request that the nomination of these two gentlemen be annulled and that the establishment of the Board of Review be declared illegal and null.

The investigation conducted by the Board was under the direction of two employees of the Department who are by law subject to the control of the Department's Minister. It is, of course, always tempting in such cases to suspect that they will favour him, will not be without preconceptions and, therefore, be partial. When, however such as here, one member on this Board, Mr. McDonald, a member of the legal profession, was not an employee of the Department and as the Board did not limit its investigation or the evidence to the matters before the Minister when the interim decision was taken, but went into further matters, the position is somewhat different. I would not like to be taken to say that the appointment of employees of the Department involved as members reviewing the decision taken by the Department's Minister should be encouraged, if only for the simple reason, as repeatedly stated by our courts, that it is not only important that justice be done, but also that it appears to have been done. I however, fail to see here any obligation under the Act to appoint members from outside of the Department where the investigation is being conducted. If there is no such obligation, the setting up of the Board of Review as constituted cannot be considered as illegal and, therefore, must be accepted as a valid authority for the purposes of the Act. It indeed appears that section 7(2) of the Act merely says that the Postmaster General shall appoint a Board of Review "consisting of three persons nominated by the Postmaster General, one of whom shall be a member of the legal profession" and T. D. McDonald, Q.C., who at the time was a Deputy Minister of Justice, was appointed in order to conform to the latter requirement.

There is, however, some doubt as to whether the decision of the Board can be reviewed by this court. It may well be, although I am not deciding this here, that if the Board was exercising purely administrative functions (and each statute must be carefully examined to determine the matter) the possibility of bias (unless it is shown to have led to a clearly wrong conclusion) may not disqualify its members. The Board of Review here does not appear to be a court or a tribunal. It is not called upon to determine a dispute between parties. It does not render a decision which determines the rights of anyone although, of course, it may ultimately affect such rights. Its only purpose or object is to investigate certain facts and report to the Minister with its recommendations which, as a matter of fact, do not even bind him. If such is the situation, there may be no strict requirement (although it would be more convincing justice to do so) to adhere to the rule that courts, tribunals and arbitrators be independent of the parties. Cf. *Re Township of York By-law*[6]:

> The rule that no person who is not capable of acting judicially because of bias, financial or otherwise, shall take part in judicial proceedings, as laid down in such cases as *Frome United Breweries Co.* v. *Bath Justices* [1926] A.C. 586 and *Dimes* v. *Proprietors of the Grand Junction Canal* (1852) 3 H.L. Cas. 759 at 793, 10 E.R. 301, should not be extended to officials exercising purely administrative, as distinct from judicial, functions. A referee appointed under s. 7 of the *Township of York Act,* 1935 (Ont.), c. 100, to value and adjust rights and claims between various parts of the Municipality made into one sewer area, has no judicial functions; his duty is merely to inquire into the circumstances and to report to the Ontario Municipal Board, which makes an order, but is in no way bound by the referee's report. Such a referee is therefore not disqualified by the fact that he is a ratepayer in one of the affected parts of the municipality.

Suppliant's attack on the members of the Board on the basis that they could be biased should also be rejected in that, although employed by the Post Office Department, they have no interest whatsoever in the matter and must, therefore, be presumed to have discharged their duties in an independent manner. There is, as a matter of fact, no evidence of bias whatsoever in the conduct of the proceedings before the Board nor in the conduct of its members during the hearing.

There is, finally, another reason for rejecting suppliant's attack upon the nomination of the two employees of the Department and that is that even if she could have objected to their nomination on the Board prior to their sitting as she did to the nomination of McLachlan, knowing prior to the hearing that the two members were employees of the Department and then having attended the sittings of the Board and testified and through counsel, having made representations without protest, she should be considered as having acquiesced to their nomination and to their acting as members of the Board. Cf. *de Smith Judicial Review of Administrative Action* p. 260:

> A party may waive his objections to adjudication by persons subject to these disqualifications. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced

[6] [1942] O.R. 582.

> in the proceedings by failing to take objection at the earliest practicable opportunity.

Cf. *Ghirardosi v. Minister of Highways for B.C.*[7] per Cartwright J. at p. 372:

> ... There is no doubt that, generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection.

I now come to suppliant's third attack which is directed at the final prohibitory order of the Minister which rendered his interim order definite following the report issued by the Board of Review and which confirmed the Minister's conclusion that he had good reasons to believe that the suppliant had used the postal services to commit or attempt to commit offences against sections 323 and 324 of the *Criminal Code*.

The conclusion of the Board reads as follows:

> In the result, the Board has come to the conclusion that there are reasonable grounds for believing that Sandra Stober Fishman is, by means of the mails, attempting to commit and committing offenses against sections 323 and 324 of the Criminal Code and the Board recommends that the Interim Prohibitory Order, under section 7 of the Post Office Act, be made final.

Suppliant, through counsel requests that the final order be annulled for the following reasons:

(*a*) The *Post Office Act* does not authorize the Minister, nor the Board of Review, to verify or inquire into the question of whether the suppliant has committed or attempted to commit offenses covered by the *Criminal Code*;

(*b*) neither the Minister nor the Board of Review have the right or power to conclude that the suppliant has committed an offence under the *Criminal Code*;

(*c*) even if the Minister or the Board of Review have this right or power, the evidence discloses that the suppliant did not commit an offence under the *Criminal Code*.

Counsel for the suppliant points out that although pursuant to subsection (2), (3) and (4) of section 7 of the *Post Office Act*, the Board of Review must inquire into the facts and circumstances surrounding the interim prohibitory order and may consider such further evidence, oral or written, as it deems advisable, this Board is bound by the limits of jurisdiction conferred to the Minister. Section 7(1) of the Act sets down that the Postmaster General may make an interim prohibitory order each time he has reasonable grounds to believe that a person is, by means of the mail, committing or attempting to commit, an offence and the important thing, according to counsel for the suppliant, is the meaning of the word "offence" and whether it includes all the offences mentioned in the *Criminal Code*.

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[7] [1966] S.C.R. 367.

The *Post Office Act* does not define the word "offence". However, immediately prior to section 55 of the Act, the title "Offences and Penalties" is mentioned and counsel for the suppliant submits that it is clear that sections 55 to 72 determine the acts which are offences under the Act. He also points out that sections 55 to 66 describe those acts which are criminal acts whereas sections 66 to 72 deal with acts which are merely offences under the *Post Office Act*.

The acts for which the suppliant is blamed are not contained in the above description. The difference between a criminal act and an offence under the Act can be found in section 73 of the Act which determines the degrees of punishment. Section 7, according to Mr. Ste-Marie, authorizes the Minister to deprive a person from using the postal service who is guilty of an offence; there is, however, he says, no question of a criminal act. To justify the position taken by the Minister and the Board of Review in the present case, one would have to accept that the word "offence" has one meaning in section 7 and another meaning in sections 66 to 72 and this would, according to counsel for the suppliant, be unacceptable.

The word "offence" is not defined in the *Interpretation Act,* R.S.C. 1952, c. 158, nor in the *Criminal Code* and counsel for the suppliant submits that it is evident that the *Criminal Code* considers as an "offence" any act which contravenes one of its sections; there also such an act is considered as an offence or a criminal act according to the degree of punishment, the choice of the procedure remaining with the person prosecuting, if any.

The question is whether the word "offence" of the *Post Office Act* has the same meaning as "offence" under the *Criminal Code*. This appears impossible according to Mr. Ste-Marie, as there is no text which would allow such an interpretation. The *Criminal Code* has a section 3 subsection (5), which reads as follows:

> Where an offence that is dealt with in this Act relates to a subject that is dealt with in another Act, the words and expressions used in this Act with respect to that offence have, subject to this Act, the meaning assigned to them in that other Act.

Counsel for the suppliant submits that in order for the word "offence" in the *Post Office Act* to have the same meaning as in the *Criminal Code,* the *Post Office Act* must contain a paragraph specifically setting this down and in the absence of such a measure, the meaning of the word "offence" in the *Post Office Act* cannot be extended to include that of the *Criminal Code*. He then concludes that the Minister and the Board of Review did not have jurisdiction to enquire into whether the suppliant had committed or attempted to commit a criminal act.

If, on the other hand, the court rejects the preceding argument and holds that the word "offence" mentioned in section 7 of the *Post Office Act* covers the offences mentioned in the *Criminal Code,* the final prohibitory order of the Minister should, again according to Mr. Ste-Marie, be annulled because the Minister had no authority or jurisdiction to render such a decision.

After going through the procedure followed by the Minister in the present case, *i.e.*, the reception by the Minister of a complaint and the evidence that the suppliant was guilty of an offence covered by section 323 of the *Criminal Code;* the acceptance by the Minister of the evidence and his declaration that he has reasonable grounds to believe that the offence was committed; the refusal of the suppliant to admit the validity of the Minister's decision and her request that the decision be reviewed by a Board; the establishment of a Board of Review to study the evidence on which the Minister based his decision and all other supplementary evidence which the Board deems necessary; the decision of the Board maintaining the Minister's decision; the Minister's right to confirm the Board's decision or to quash it even if it may result in annulling his own interim prohibitory order, counsel for the suppliant concludes that we have here a mockery of a trial, heard by a Board of Review and decided by an officer of the State rather than by a common law court.

If the word "offence" he says has the restricted meaning mentioned in his first proposal, such a procedure cannot be objected to. However, if the word "offence" in the *Post Office Act* comprises the "offences" contained in the *Criminal Code,* the procedure is illegal as *ultra vires* of the powers of a Minister or a Board of Review.

He then refers to section 28 of the *Interpretation Act,* R.S.C. 1952, c. 158,[8] which reads as follows:

> **28.** (1) Every Act shall be read and construed as if any offence for which the offender may be
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> (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;
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> (*b*) punishable on summary conviction, were described or referred to as an offence; and
>
> all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.
>
> (2) Every commission, proclamation, warrant or other document relating to criminal procedure, in which offences that are indictable offences, or offences, as the case may be, are described or referred to by any names whatsoever, shall be read and construed as if such offences were therein described and referred to as indictable offences, or offences, as the case may be.

Suppliant's submission is that when it is held that the offence for which she is blamed is to have committed or attempted to commit a fraud defined in section 323 of the *Criminal Code* we are dealing with an offence described and mentioned as being "a criminal act or an offence" and, therefore, all the provisions of the *Criminal Code* must apply to such an offence. Counsel for the suppliant then concludes that, in such a case, a common law court only had the right to hear the evidence and to decide that the suppliant had committed or attempted to commit a criminal fraud. It therefore follows, says Mr. Ste-Marie, that neither the Minister nor the Board of Review had the

[8] Chapter 158 has now been replaced by chapter 7 of the Statutes of Canada 1967 and section 28 has been changed and is now section 27 of the new Act.

authority or the necessary jurisdiction to decide that the suppliant had been guilty of such an offence. In order to substantiate his position, counsel points out that for the Postmaster General to decide that the suppliant was guilty of an offence covered by the *Criminal Code,* he had the right to rely merely on reasonable belief whereas, under the *Criminal Code,* the accused must be found guilty without any reasonable doubt. Such a difference, he says, should be sufficient to sustain his interpretation of the Act.

He further submits that a person must not be punished more than once for the same offence and even contends that the decision of the Minister to deprive her of the postal service, would enable her to obtain a dismissal of the criminal charge laid against her for the same offence. He then concludes that it is inadmissible and illegal to give section 7 of the *Post Office Act* a meaning that would entitle the Minister to determine the guilt of the suppliant under the *Criminal Code.*

He then takes the position that if, on the other hand, the word "offence" in the Act does include the offences covered by the *Criminal Code* and if the Minister and the Board of Review have the right to declare that the suppliant for the purposes of the Act is guilty of an offence covered by the *Criminal Code,* there must be, he says, sufficient evidence to justify such a decision and, according to Mr. Ste-Marie, there is not sufficient evidence in the present case. He submits that the Minister issued the interim prohibitory order on the basis of three documents only, two circular letters and one unsigned typed letter, which letter was received from one of the Minister's constituents and such evidence, according to Mr. Ste-Marie, is not sufficient to justify the issuance of an order which carries with it such serious consequences for the suppliant. Additional evidence was, as we have seen, produced before the Board of Review and comprised a number of letters and documents taken at random in the numerous letters seized by the postal service after the issuance of the interim order. His client, counsel for the suppliant points out, never denied being the author or being responsible for the documents that came from her organization. She did, however, through counsel, object before the Board of Review to the production of a number of documents, some of which contained accusations from third parties whom she did not have the right or the opportunity to cross-examine.

Subsection (4) of section 7 of the *Post Office Act* gives the Board of Review all the powers of a commissioner under Part I of the *Inquiries Act,* and section 4 of *The Inquiries Act* R.S.C. 1952, c.154 provides that commissioners have power to summon before them any witnesses and to require them to give evidence on oath or solemn affirmation and to produce documents and things deemed requisite to the full investigation of the matters into which they are appointed to examine.

Although the Board of Review had the power to convene witnesses, counsel for the suppliant points out that none were called before the Board and none, therefore, stated that they had been defrauded or that they had paid money because of the fraudulent representations made by the suppliant.

According to the suppliant, the evidence before the Board is to the following effect:

a) a number of persons complained that the articles offered for sale by the suppliant are not worth the price asked for, and

b) other persons complained that in the belief that they had been solicited to purchase pornographic objects, they were disappointed and claim they were defrauded in receiving objects that were not pornographic.

The first complaint, according to Mr. Ste-Marie, disappears immediately if one considers that the suppliant offered her merchandise through samples or by giving a description sufficiently clear to enable the prospective buyer to appreciate what he was buying. For instance, in the case of Jane Mansfield's biography, the prospective purchaser knew or should have known that the same book by the same author was available for a small price as a paperback; however, in the present case, although the price was high, the same book was offered for sale bound with a hard cover. Counsel for the suppliant points out also that the same applies in respect of books imported from Europe. There is, he says, no legislation which establishes what the margin of profit should be or which holds that beyond a certain margin, an exhorbitant profit becomes a fraud. He also submits that those who complain that they did not receive the pornographic material they expected or they ordered, are in no position to say that they have been defrauded. In the belief that they were negotiating for pornographic material, they are themselves committing a criminal offence. As they are relying on their own illegal act, they cannot appeal to justice unless they have clean hands under the principle of *ex turpi causa non oritur actio.*

Counsel for the suppliant finally submits that there is not sufficient evidence before the Minister nor before the Board even if one gives to the word "evidence" the meaning of "reasonable grounds" to hold that the suppliant had been guilty of committing or attempting to commit a criminal fraud. He submits that two charges laid against her, one in Canada and the other in the United States, supports this proposition. On November 6, 1964, suppliant was indeed arrested with her husband, her sister-in-law and brother-in-law, and accused of having committed a fraud against the public in general of a value of $75,000. Counsel submits that as appears in the "supplementary statement of facts" this alleged fraud would have been committed during the period covered by the decision rendered in the present case; the acts complained of were also those or similar to those examined by the Minister and the Board of Review and the documents also were the same. In short, an accusation of fraud was made against the suppliant under the *Criminal Code* for the purpose of finding her guilty of the same criminal acts as those examined by the Minister. This charge was laid in the Court of Sessions, in Montreal, and was the subject of a rather long preliminary enquiry (approximately 30 days). At the trial, however, the Crown declared that it had no proof to offer and as a result, the suppliant was acquitted of this charge.

Counsel for the suppliant, therefore, says that one must conclude that although the Crown believed that it could not prove that she was guilty, the Minister and the Board of Review concluded that she was.

On April 14, 1965, a grand jury in the United States, sitting in a district of the State of Vermont, charged the suppliant, as appears in Exhibit S-3, with using the Canadian and American post office services for the purpose of selling pornographic material. She was also acquitted of this accusation on March 17, 1970, as appears from paragraph 10 of the agreed amended statement of facts. The period under review in the above case also includes the one examined by the Minister and the Board of Review in the present case and the documents produced or used are identical to those examined by the Minister or the Board.

Counsel's submission is that if the Minister or the Board of Review had had before them all the elements of proof obtained by the various police corps and offered to the Court of Sessions in Montreal, they also would have rendered a decision favourable to the suppliant and these two acquittals constitute, in his view, irrefutable proof that the Minister and the Board erred in their evaluation of the guilt of the suppliant. Furthermore, he suggests that the only reasonable and just conclusion that one can draw here is that having regard to the similarity of the situation and the fact that the same persons are involved, the acquittal by the Court of Sessions of the suppliant necessarily indicates the nullity *ab initio* of the interim and final orders issued.

Counsel then suggests that if the court holds that suppliant's petition is well founded, the court is requested to refer the matter of establishing her damages to a proper officer of the court.

I will deal first with suppliant's submission that the *Post Office Act* does not authorize the Minister or the Board of Review to enquire into and decide that she has committed or attempted to commit offences under the *Criminal Code*. There is no definition in the *Post Office Act* of the word "offence" mentioned in section 7 of the Act. We must then give this word its ordinary popular and natural sense, having regard to the spirit of the enactment and the object Parliament had in view and it does appear from a reading of the section involved that it is directed at preventing the use of mails for unlawful purposes. This, of course, is a very broad objective and in my view the word "offence" must comprise any violation of the law which, of course, covers offences under the *Criminal Code* punishable by summary conviction or by indictment. As a matter of fact, sections 55 to 66 of the *Post Office Act* indicates clearly that the word "offence" has been used in that sense, as all those who commit the offences mentioned in those sections, are said to be guilty of an indictable offence and those who commit the offences mentioned in sections 67 to 72 are guilty of an offence only.

Jowitt in *The Dictionary of English Law,* p. 1260, indicates that the word "offence" is a most comprehensive term and covers anything for

which a court can inflict punishment. It therefore covers also offences under the *Criminal Code*. The word "offence" may, in certain cases, have a particular restrictive meaning in view of section 27(1)(*b*)[9] of the *Interpretation Act*, S.C. 1967, c. 7, but this occurs only when an offence is being created. In any other case, the word "offence" must be given its ordinary meaning.

If any doubt should subsist as to the broad sense of the word "offence" in section 7 of the *Post Office Act*, it should be dispelled when one considers that the word "offence" in section 7 of the *Post Office Act* is used in a general manner as the words "under this Act" are not present whereas they are contained in sections 68, 69, 70, 71 and 72 which create "offences" and they are therefore limited to whatever language is used in the sections. There is also section 73(2) of the *Post Office Act* which establishes that only those "offences *under this Act*" are punishable on summary conviction. In section 7, however, we are dealing with all types of "offences". It therefore follows that counsel for the suppliant's restrictive interpretation of the word "offence" cannot be accepted. As a matter of fact, if the offences of section 7 were restricted to those offences only covered by the *Post Office Act*, the section would become ineffective as an examination of these offences discloses that it is impossible to use the mails to commit any of the offences covered by sections 67 to 72 of the Act. It would also mean that Parliament has authorized the Minister to take action against those who are using the mails to commit minor offences but would not have allowed him to prevent those who are using them for the purpose of committing fraud or criminal acts. Such a result, in my view, was not and could not be intended as the object of section 7 of the Act is to prevent the use of the mails for the purpose of defrauding the public or other criminal activity. Cf *The Queen v. Randolph*[10].

Counsel for the suppliant's second submission that the Postmaster General and the Board of Review have no right or power to decide that the suppliant has committed an offence under the *Criminal Code* also, in my view, has no substance. The procedure whereby the Minister, after the Board of Review had investigated the matter, decided to concur in the Board's finding that it had good reason to believe that the suppliant had been committing or had attempted to commit offences against sections 323 and 324 of the *Criminal Code* is not for the purpose of finding the suppliant guilty of the offence but for the purpose of discharging a public duty under section 7 of the *Post Office Act* in preventing the use of the mails for an unlawful purpose. In other words, this is not an assumption by the Minister of duties which are the exclusive domain of our common

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[9] **27.** (1) Where an enactment creates an offence

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(*b*) the offence shall be deemed to be one for which the offender is punishable on summary conviction if there is nothing in the content to indicate that the offence is an indictable offence; and

* * *

[10] [1966] S.C.R. 260.

law courts in criminal matters, but the mere carrying out of a statutory duty for a particular public purpose if the Minister "believes on reasonable grounds" that a person is "by means of the mails committing or attempting to commit an offence". Counsel for the suppliant here confounds, as submitted by counsel for the respondent, a criminal charge with an administrative decision which does not lead to imprisonment or the payment of a fine but to depriving her of the services of the mails and the possible impounding of all her correspondence or mail and their contents.

I shall now deal with suppliant's submission that even if the Postmaster General and the Board of Review have the power and right to determine whether the suppliant has committed an offence under the *Criminal Code*, the evidence shows that she has not committed any offence under the *Criminal Code*. Counsel for the respondent takes the position here that the court should not here inquire as to whether the evidence is sufficient to establish that the suppliant has committed the offences and cannot hear an appeal from the decision rendered by the Minister and whether he was right in rendering it or not as the only matter to be determined is not whether the suppliant has committed an offence or not, but whether the Postmaster General's decision was legally rendered. This would follow from a reading of section 7(6) of the *Post Office Act* which sets down that upon receipt of the Board of Review's report, the Postmaster General "may revoke" his interim order "or declare it to be a final prohibitory order, *as he sees fit*".

The Minister, therefore, has a discretionary power to deal with the matter "as he sees fit" and unless the suppliant can establish that the Minister, in rendering his decision, acted in bad faith or that in so acting, he did not have before him sufficient evidence to enable him to believe that the suppliant was using the mails to commit or attempt to commit an offence or that he considered matters which were in no way related to the decision he had to take or that he neglected to consider certain essential elements of proof or because of some other important defect or omission in the procedure leading to the decision, the latter should not be set aside. The cases in which courts may interfere in the exercise of discretionary powers are well known and unless a case falls within any one of the above conditions where the courts should never be deprived of their historic power to make authorities approach matters they are called upon to decide in a fair minded way and with a fair procedure, a court should not intervene. Our courts have indeed always rejected the idea that they review the "reasonableness" of the exercise by a Minister of his discretion, if he had, in fact, reasonable cause to so exercise it.

In *Nakkuda Ali v. M. F. de S. Jayaratne*[11] Lord Radcliffe, at p. 218, dealt with the meaning of the words "has reasonable grounds to believe"

[11] 66 T.L.R. 214.

similar to the words which govern the action taken by the Postmaster General under section 7(1) of the *Post Office Act*. He stated:

> It would be impossible to consider the significance of such words as "Where the Controller has reasonable grounds to believe..." without taking account of the decision of the House of Lords in *Liversidge v. Anderson* (58 The Times 35; [1942] A.C. 206). That decision related to a claim for damages for false imprisonment, the imprisonment having been brought about by an order made by the Home Secretary under the Defence (General) Regulations, 1939, regulation 18B, of the United Kingdom. It was not a case that had any direct bearing on the Court's power to issue a writ of *certiorari* to the Home Secretary in respect of action taken under that regulation; but it did directly involve a question as to the meaning of the words "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations..." which appeared at the opening of the regulation in question. And the decision of the majority of the House did lay down that those words in that context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appears to be the only possible judge of the conditions of his own jurisdiction.

and then later at p. 219 added:

> . . . It is an authority for the proposition that the words "if A. B. has reasonable cause to believe" are capable of meaning "if A. B. honestly thinks that he has reasonable cause to believe" and that in the context and surrounding circumstances of Defence Regulations 18B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning "if there is in fact reasonable cause for A. B. so to believe".

After going over the evidence of the Board of Review and the various exhibits and documents and letters of complaint and other correspondence produced, I cannot say that there was not before the Postmaster General, even if no complainant was called before the Board, in fact reasonable cause for him to believe that the suppliant was committing or attempting to commit offences against sections 323 and 324 of the *Criminal Code*. There was certainly material on which a reasonable man might conclude that the suppliant was using the mails to commit or attempt to commit offences even if these offences were committed or attempted in a subtle manner. Indeed, although no pornographic material was involved, suppliant's circulars were worded in such a manner as to give the impression that such material would be available and that was sufficient to cause a number of people in Canada, and in the United States of America, to write back and order the subject matter advertised enclosing, in many cases, money orders or cheques. I believe that during the hearing, counsel for the parties appeared to agree that there may be in the correspondence seized by the postal authorities between $100,000 and $200,000 in cheques and money orders. Now,

although I do not have any sympathy for those people who answer such circulars and who are interested in pornographic material (although the distribution of such trash today has become commonplace and books of this nature can be found in most corner stores) there is no substance to the suppliant's argument that the complainants are in no position to accuse the suppliant herein of having defrauded them because they do not come before this court with clean hands. The answer, of course, to this submission is simply that all that was involved was an inquiry concerning the nature of the suppliant's use of the mails and there was neither before the Postmaster nor this court any cause between the suppliant and the complainants. The complainants are not claiming from the postal authorities the amounts expended and forwarded by mail to the suppliant, but are complaining of the fact that they were taken in by her scheme. They are not, therefore, in the position of a litigant asking the court for reimbursement and the saying *ex turpi causa non oritur actio* has no application.

Counsel for the suppliant finally relies on the fact that a judgment was rendered by Judge Malouf of the Court of Sessions in Montreal on January 21, 1969, and another by a Vermont court in the United States of America whereby in the Canadian court, the Crown, after the preliminary enquiry withdrew the charges of fraud laid against the suppliant and the American court acquitted the suppliant of attempting to use the Canadian and American mails to sell pornographic material.

The American case, of course, can have no bearing on the matter as it dealt with a different offence than the one on which the Minister based his decision. The Canadian case, of course, dealt with the same subject matter. Notwithstanding that it did however, acquittal of a person does not have the same relevance as a conviction. As a matter of fact, acquittal determines only that the tribunal was not satisfied beyond reasonable doubt that the accused had committed an offence. It is not even evidence *prima facie* (*cf* [1943] L.Q.R. 299) that he did not in fact do certain acts, but only that it has not been proved that he did (*cf Schinder v. Royal Insurance Co.*[12]). One must also consider that since the civil standards of proof are lower than those required by the criminal law, acquittal would not, and could not, determine the issues. This, of course, would apply to the present case where the standard of proof required is that the Minister merely believes on reasonable grounds that a person is committing or attempting to commit an offence. There may, however, be exceptional cases where, if evidence of acquittal can be demonstrated to be relevant in a particular case, there would be no reason in principle to prevent its admission. The present instance, however, cannot be such a case when one considers that the dismissal of the charge or charges before the Canadian court resulted not from a judgment of the court on the merits of the case but on the fact that the Crown declared that it did not have sufficient evidence to pursue the matter.

[12] 258 N.Y. 310 (1932).

In *Literary Recreations Ltd v. Sauvé and Murray*[13] the Court of Appeal of British Columbia rejected the same argument, per Macdonald J. A. at p. 394:

> Appellant during the course of the correspondence between the parties, was prosecuted in the Police Court at Vancouver for "unlawfully advertising an offer to the public to foretell the result of a contest". The charge was dismissed on the ground that the problem involved skill and by diligence a correct solution was possible. I refer to this only to say that it has not, as submitted, any bearing on the point in issue. Authority may be given by statute to prohibit the use of the mails in connection with a business held by the Courts to be legal. It is solely a question of statutory authority.

It therefore follows that suppliant's petition is dismissed with costs.

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[13] 58 C.C.C. 385.