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Canadian Civil Liberties Assn. v. Canada

The Corporation of the Canadian Civil Liberties Association, Applicant v. The Attorney - General of Canada, Respondent

General Division

Potts J.

Judgment: March 25, 1992
Docket: Doc. RE 1193/89

Counsel: *Edward P. Belobaba* and *Andrew Lokan* for the applicant

J.E. Thompson, Q.C. and *Donald A. McIntosh* for the respondent

Subject: Public

Police --- Particular police and security forces — Canadian Security Intelligence Service.

Test to determine if breach of freedom of expression occurring — Canadian Charter of Rights and Freedoms, ss. 2(b) - (d), 7, 8 — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21 - 26.

Canadian Security Intelligence Service (C.S.I.S) was mandated by the Act to collect information concerning activities that might on reasonable grounds be suspected of constituting threats to the security of Canada. Applicant, a non-profit corporation, argued that the Act authorized C.S.I.S. to use intrusive surveillance techniques and that these had been used against advocacy organizations, and inhibited individuals from expressing themselves freely and participating in legitimate activities. Applicant applied for a declaration that ss. 12 and 21 to 26 of the Act were unconstitutional as they violated s. 2(b) to (d) as well as ss. 7 and 8 of the Charter. Held, the application was dismissed. The test to determine if there had been a prima facie breach of freedom of expression was to determine whether plaintiff's activity fell within the sphere of conduct protected by the guarantee and, if so, to determine whether the purpose and effect of

the government action in issue was to restrict freedom of expression. Although the activities under review fell within the sphere of conduct protected by s. 2(b) to (d), the purpose and effect of the Act was not to restrict the freedoms guaranteed by each section.

Rights not restricted — Canadian Charter of Rights and Freedoms, ss. 2(b)-(d), 7, 8 — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21 - 26.

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Intrusive surveillance — Canadian Charter of Rights and Freedoms, ss. 2(b)-(d), 7, 8 — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21 - 26.

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***Potts J.*:**

1 This is an application for a declaration that ss. 12 and 21 to 26 inclusive of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (the "Act"), are unconstitutional and of no force and effect as they violate ss.2(b)(c)(d), 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The application is also for an interim and permanent injunction restraining the Canadian Security Intelligence Service ("CSIS") or its employees from acting under the terms of that Act and for further consequential relief. Specifically, the applicant makes Application for:

> (1) A declaration that section 12 of the CSIS Act is unconstitutional and of no force and effect to the extent that it authorizes CSIS to use the intrusive surveillance techniques of electronic bugging, surreptitious search, mail opening, invasion of confidential records, and the deployment of covert informants, against Canadian citizens and permanent residents, in the course of investigating "activities" that *are not unlawful but are de-*

fined as "threats to the security of Canada" in the section 2 definition.

(2) A declaration that sections 21 to 26 of the Act are unconstitutional and of no force and effect, to the extent that they provide for the issuance of warrants that may authorize the use of the foregoing intrusive surveillance techniques against Canadian citizens and permanent residents, in the course of investigating "activities" that *are not unlawful but are defined* as "threats to the security of Canada" in the section 2 definition.

(3) An interim and permanent injunction restraining CSIS or any of its employees or agents from using the foregoing intrusive surveillance techniques against Canadian citizens or permanent residents, in the course of investigating "activities" that *are not unlawful but are defined* as "threats to the security of Canada" in the section 2 definition until the constitutional validity of these statutory provisions has been fully resolved.

(4) Such other relief as to this Honourable Court may seem just and appropriate.

2 Relevant sections of the Act are appended hereto.

Facts

3 The facts may be summarized as follows. The applicant, the Corporation of the Canadian Civil Liberties Association (the "Corporation"), is a non-profit corporation established pursuant to the laws of Canada, the objects of which are identical to those of the Canadian Civil Liberties Association ("CCLA"), a national organization with more than sixty-five hundred individual members. The CCLA's major objectives are to promote the legal protection of the freedom and dignity of the individual against unreasonable invasion by public authority and to advance fair procedures for the determination of individual rights and obligations. CCLA has long been seriously concerned about the powers accorded to police and national security agencies in Canada.

4 CSIS is mandated, pursuant to ss. 12 and 21 to 26 of the Act, to collect information with respect to activities that may on reasonable grounds be suspected of constituting "threats to the security of Canada". "Threats to the security of Canada" are defined among other things to include: foreign influenced activities ... detrimental to the interests of Canada; activities directed toward or in support of ... acts of serious violence ... for the purpose of achieving a political objective within Canada or a foreign state or activities intended ultimately to lead to the ... overthrow by violence of, the constitutionally established system of government in Canada.

5 The applicant states that s. 2, when read in combination with s. 12 of the Act, authorizes CSIS to use surveillance techniques of electronic bugging, surreptitious searching, mail opening, video-taping and photographing of private activities, invasion of confidential records and the deployment of covert informants against Canadian citizens and permanent residents in the course of investigating activities that are not unlawful but are defined as "threats to the security of Canada". It is also said by the applicant that the vagueness or breadth of words such as "influenced", "detrimental", "directed toward", "in support of ", and "intended ultimately" encourages CSIS to speculate and enhances the risk of intrusion on completely lawful behaviour far beyond any clearly apparent threat to the security of Canada. This interpretation is denied by the respondent.

6 The applicant further states that CSIS has used intrusive surveillance techniques against advocacy organizations such as the nuclear disarmament movement, the labour movement, public policy groups and law reform groups which pursue legitimate political activities. The applicant's specific allegations of fact are set out below:

> (a) The Toronto Disarmament Network (TDN) has suffered intrusions on its property and it is believed that those intrusions were initiated by CSIS.
>
> (b) CSIS has been involved in the internal democratic process of a local of the British Columbia (B.C.) Provincial Council of Carpenters and William Zander is concerned that union members might become targets of CSIS surveillance.
>
> (c) CSIS has shown an interest in the internal affairs of the Coalition for a Just Refugee and Immigration Policy (the "Coalition") and Margaret Third-Tsushima is concerned that CSIS might have used or might be willing to use techniques of intrusive surveillance against the Coalition.
>
> (d) Despite a reduction in the number of approved investigations involving foreign interference in or manipulation of peace groups since the dismantling of the Counter-Subversion Branch of CSIS in 1988, information is still collected on Canadians who come into contact by accident or design with approved targets.

7 The respondent states that there is no evidence to support these allegations of fact.

8 The applicant also refers to the Annual Reports of the Security Intelligence Review Committee ("SIRC"), the watchdog created by Parliament to monitor security activities. These Reports as summarized by the applicant demonstrate that SIRC has criticized CSIS for intruding on the lives and activities of too many Canadians. The situation, according to SIRC, has apparently improved since 1988 when the CSIS's Counter-Subversion Branch was disbanded. Nevertheless, while noting a significant reduction in dubious investigations in its 1988-1989 Reports, SIRC declared that it still has "concerns" about certain CSIS practices such as those relating to the Peace Movement. In any event, the applicant concludes that the Act has not been amended to reflect any real or perceived changes in the CSIS mandate. The respondent denies this interpretation of the facts. Rather, the respondent contends that the SIRC conclusion that the Service intruded on the lives and activities of too many Canadians was made in the context of the Counter-Subversion Branch rather than CSIS as a whole. This branch has since been disbanded. Also, SIRC stated in its 1988-89 Report that CSIS management was determined to ensure that the Service operated reasonably and strictly within the limits of the Act and said it had "no criticism on that scene".

9 The applicant states that the surveillance activities that CSIS can exercise and has exercised in the past inhibit individuals from expressing themselves freely and participating in legitimate activities.

10 The respondent denies this statement and says that, pursuant to s. 41 of the Act, persons who believe that CSIS has acted improperly can, and do, lodge complaints to SIRC and those complaints are investigated.

11 On a previous date, this Court addressed a preliminary issue raised by the respondent [now reported: (1990), 74 O.R. (2d) 609 (Gen. Div.)]. It was the respondent's position that the applicant lacked the standing necessary to challenge the constitutional validity of the impugned legislation because the applicant was not itself directly affected by the constitutional provisions, and it could not meet the standing requirements to meet the "public interest exception". The parties agreed to have the Court rule on the issue of standing before proceeding to argue the substantive legal challenge to the legislation. I held that the applicant should be granted public interest standing to argue the substantive merits of the application. My reasons, in part, at pp. 619-620, are set out below:

> Without ruling on the adequacy of the applicant's evidence, or on the substantive merits of the issues of law presented, the applicant has raised issues of general public importance that ought to be the subject of a full and complete judicial examination. There may well be a nexus between the impugned provisions of the *CSIS Act* and the legitimate imposition of a "chill" on a citizen's ability to express a thought, belief or opinion. It is in the public interest for a court to address the merits of this application.
>
> The respondent's last objection to the granting of standing to the applicant is that the applicant has not shown that there is no other effective manner in which this issue may be brought before the court. The respondent cites Le Dain J.'s concern in *Finlay*, at p. 633 S.C.R., that the "court should have the benefit of the contending views of the persons most directly affected by the issue". It is submitted that the applicant is not among those "most directly affected" by the legislation. Thus, the respondent argues, the court will not have the contending views of those most directly affected by the legislation. Given the scarcity of judicial resources, the court should deal with these issues when they are raised by persons whose rights have actually been infringed or are actually threatened.
>
> The applicant, on the other hand, argues that it is particularly well suited to bring an application under the circumstances of this case. It argues that unless it is allowed to challenge the constitutional validity of CSIS's intrusive surveillance powers, these powers will likely remain unchallenged. Because many of the activities of CSIS are surreptitious and are undertaken essentially to gather and analyze certain kinds of information, but not to collect evidence for prosecution in court, it is unlikely that the individuals whose rights are most seriously and directly violated will have sufficient proof that they are the subjects of unconstitutional investigation, nor would they have a real opportunity to challenge the activities in court. The applicant further submits that, even where a group or individual may be aware of an investigation, the chilling effect of the Act and CSIS's activities will certainly serve to discourage directly affected parties from initiating litigation. Lastly, the applicant submits that its expertise in matters relating to security intelligence activities and the advocacy of civil liberties in Canada strongly suggested that a grant of standing in this case is not only practical but will also put before the court the most informed and competent arguments in relation to the issues before the court.
>
> I tend to agree with the position taken by the applicant. I place little weight on the respondent's concern that, if the applicant is granted standing, the court will not have the contending views of the persons most directly affected by the issues raised. The CCLA and the Federal Department of Justice have undoubted knowledge and expertise with respect to the issues at hand, and both sides have the resources to ensure that every relevant factual and legal argument is put before the court. While it is preferable for constitutional issues to be brought before the courts by those whose rights are most directly infringed (as it is also with other issues raised under private law), under the circumstances of this case, where the "group" most directly affected could be said to be the public at large (in that,

if we accept the arguments of the applicant, the very processes of our political democracy could conceivably be threatened by a chill on s. 2 *Charter* rights), the most reasonable and effective manner in which the issues can be brought before the court is to grant the applicant standing.

Submissions and Authorities

12 It is submitted by the applicant that the impugned provisions of the Act violate the *Charter* rights and freedoms protected by s. 2(b)(c)(d), 8 and 7 of the *Charter*. The respondent submits that there is nothing in the impugned provisions of the Act which infringe ss. 2(b)(c)(d), 8 and 7 of the *Charter* or any other *Charter* right. It submits that the Act does not have the purpose *or* the effect of forcing anyone to hold or refrain from holding a thought, belief, opinion or expression, or of restricting the exercise of freedoms of peaceful assembly or association *or* of infringing any *Charter* right.

13 The relevant sections of the *Canadian Charter of Rights and Freedoms* are:

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 the law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

. . . . .

(b) freedom of thought, belief, opinion and expression, including the freedom of the press and other media communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search and seizure.

14 The respondent submits that the content of *Charter* rights is guaranteed by the underlying values of a free and democratic society and the interest of all Canadians in the maintenance of such values must be accorded great respect in determining the ambit of such rights. The applicant does not deny the need for or importance of having an effective Intelligence Service. Rather, the applicant argues that the Act, as drafted, goes too far beyond the legitimate reach — the Act strays too far from that which is constitutionally permitted.

Section 2(b) of the Charter

15 The applicant submits that the Supreme Court of Canada has made it clear that the test to determine whether there has been a *prima facie* breach of freedom of expression as set out in *Attorney General of Quebec v. Irwin Toy Ltd.*, [1989] 1 S.C.R. 927, applies to freedom of expression cases generally; see *Reference re ss. 193 and 195.1(1) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Osborne v. Canada* (1991), 125 N.R. 241 (S.C.C.).

16 The test as set out in *Irwin Toy*, *supra*, at pp. 978-979, is as follows:

> When faced with an alleged violation of the guarantee of freedom of expression, *the first step in the analysis* is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. *Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct.* If the activity falls within the protected sphere of conduct, the *second step* in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If government has aimed to control attempts to convey a meaning either by directly restricting the content of the expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. *In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.* If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing. (Emphasis added)

The First Step: Is the Activity Within The Sphere of Conduct Protected By Freedom of Expression?

17 The applicant submits that the collection, interception, disclosure and/or retention of information and intelligence authorized by the Act pursuant to s. 12 of the Act, infringe or deny the "freedom of thought, belief, opinion, and expression" as guaranteed by s. 2(b) of the *Charter*, as s. 12 of the Act allows CSIS agents to use surveillance techniques with regard to activities that may on reasonable grounds be suspected of constituting "threats to the security of Canada". The definition of "threats to the security of Canada" found in s. 2 of the Act includes legitimate activities in the form of "lawful advocacy, protest or dissent" when "carried on in conjunction with" the very broad and imprecise definitions of s. 2(a)(b)(c) and (d) of the Act.

18 It is the applicant's position that political and social debate often assumes the form of lawful advocacy, protest or dissent, and these activities are at the very core of the concept of free expression. CSIS agents are therefore entitled to intrusively investigate a wide range of lawful political activity, and have used intrusive surveillance techniques against groups that are simply exercising their right to engage in lawful advocacy, protest or dissent. In other words, activities that the average Canadian participates in, i.e., union meetings, disarmament meetings, assisting refugees, etc., are unequivocally political activities and it is the freedom to express these opinions and ideals that s. 2(b) of the

Charter is meant to protect.

19 The applicant believes that the first step in the *Irwin Toy* test is readily satisfied. By specifying that "threats to the security of Canada" extends to lawful advocacy, protest or dissent, the Act reaches far beyond those "rare cases where expression is communicated in physically violent form".

20 The respondent argues that the Act permits the surveillance of persons who are engaged in lawful advocacy, protest or dissent when that lawful advocacy, protest or dissent is carried on in conjunction with the activities defined in ss. 2(a)(b)(c)(d) of the Act. Accordingly, the Act is designed to preserve freedom rather than to restrict it.

21 In the alternative, the respondent submits that "those who may on reasonable grounds be suspected" of engaging or planning to engage in acts of violence, sedition, or sabotage, which includes advocacy, protest or dissent with respect to these actions do not qualify for *Charter* protection; see: *R. v. Keegstra*, *supra*; *Irwin Toy Limited*, *supra*; *R.W.D.S.U. Loc. 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. v. Zundel* (1987), 58 O.R. (2d) 129 (Ont. C.A.). Dickson C.J. states in *R. v. Keegstra*, *supra* [p. 731-733]:

> The proposition in *Irwin Toy* that violent expression is not afforded protection under s. 2(b) has its origin in a comment made by McIntyre J. in *Dolphin Delivery Ltd.*, in which he stated that the freedom of expression guaranteed picketers would not extend to protect violence or threats of violence (p. 588). Restricting s. 2(b) in this manner has also been mentioned in more recent Supreme Court of Canada decisions, in particular by Lamer J. in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* and by a unanimous Court in *Royal College of Dental Surgeons*. It should be emphasized, however, that no decision of this Court has rested on the notion that expressive conduct is excluded from s. 2(b) where it involves violence.
>
> Turning specifically to the proposition that hate propaganda should be excluded from the coverage of s. 2(b), I begin by stating that the communications restricted by s. 319(2) cannot be considered violence, which on a reading of *Irwin Toy* I find to refer to expression communicated directly through physical harm. Nor do I find hate propaganda to be analogous to violence, and through this route exclude it from the protection of the guarantee of freedom of expression. *As I have explained, the starting proposition of Irwin Toy is that all activities conveying or attempting to convey meaning are considered expression for the purposes of s. 2(b); the content of expression is irrelevant in determining the scope of this Charter provision. Stated at its highest, an exception has been suggested where meaning is communicated directly via physical violence, the extreme repugnance of this form to free expression values justifying such an extraordinary step.* Section 319(2) of the *Criminal Code* prohibits the communication of meaning that is repugnant, but the repugnance stems from the content of the message as opposed to its form. For this reason, *I am of the view that hate propaganda is to be categorized as expression so as to bring it within the coverage of s. 2(b).*

22 As for threats of violence, *Irwin Toy* spoke only of restricting s. 2(b) to certain *forms* of expression, stating at p. 970 that:

> *[w]hile the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a*

> *form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen.* [Emphasis in original]
>
> *While the line between form and content is not always easily drawn, in my opinion threats of violence can only be so classified by reference to the content of their meaning. As such, they do not fall within the exception spoken of in Irwin Toy*. As I do not find threats of violence to be excluded from the definition of expression envisioned by s. 2(b), it is unnecessary to determine whether the threatening aspects of hate propaganda can be seen as threats of violence, or analogous to such threats, so as to deny it protection under s. 2(b). (Emphasis added)

23 In *R. v. Zundel*, *supra* the Court states [pp. 150-1]:

> When determining the limits of freedom of expression, a distinction must be drawn at the outset between "rights" and "freedoms". A "right" is defined positively as what one can do. A "freedom", on the other hand, is defined by determining first the area which is regulated. The freedom is then what exists in the unregulated area - a sphere of activity within which all acts are permissible. It is a residual area in which all acts are free of specific regulation and the individual is free to choose. The regulated area will include restrictions for purposes of decency and public order, and specifically with respect to the freedom of expression, prohibitions concerning criminal libel and sedition.

24 The respondent says that it is a fiction to believe that the activities referred to in para. 2 of the definition of "threats to the security of Canada", which excludes lawful advocacy, protest or dissent, per se, but includes espionage, sabotage and activities which are intended to ultimately lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada, constitute expression under s. 2 of the *Charter*. Just as it is clear that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression chosen, activities which involve the use of serious violence contained in the impugned definition section are not a protected form of expression within the *Charter*.

25 This submission cannot be adopted. Advocacy, protest or dissent are not in and of themself means by which "communication is directed via physical violence". As the Court in *Keegstra*, *supra* held, threats of violence are not excluded from the definition of expression envisioned by s. 2(b), it therefore cannot be held that lawful advocacy, protest or dissent addressing acts of violence, sedition or sabotage should not be protected by s. 2(b).

26 It must be concluded that the "lawful advocacy, protest or dissent" that is referred to in s. 2 of the Act, are forms of political and social debate, and fall within the sphere of conduct protected by the freedom of expression.

The Second Step: Is the Purpose Or Effect of The Government Action to Restrict Freedom of Expression?

27 With respect to the second step, the applicant submits that *Irwin Toy*, *supra*, explained the difference between actions having the purpose of controlling expression, and those having the effect of doing so [pp. 975-976]:

> In sum, the characterization of government purpose must proceed from the standpoint of the guarantee in issue. *With regard to the freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee.* In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. (Emphasis added)

28 The applicant submits that the government, in authorizing surveillance of individuals and groups who engage in lawful advocacy, protest or dissent, deemed to be a "threat to the security of Canada" is restricting a form of expression that is "tied to content", that is, the Act is aimed at controlling attempts to convey a meaning by restricting the content of expression. Thus, there is a *prima facie* violation of s. 2(b) of the *Charter*.

29 The applicant submits that intrusive surveillance techniques have been used against members of the TDN, the B.C. Provincial Council of Carpenters, the Coalition and members of groups similar to these. More specifically, the TDN has suffered intrusions on its property and its members believe that the intrusions were initiated by CSIS. CSIS has been involved in the internal democratic process of Local 452 of the B.C. Provincial Council of Carpenters and its members are concerned that it will use intrusive surveillance techniques against them. CSIS has shown an interest in the internal affairs of the Coalition and members believe that is will use intrusive surveillance techniques against them. Further, as set out in the 1988-89 SIRC Annual Report, while SIRC has noted a significant reduction in dubious investigations by CSIS over the years, SIRC is still concerned about certain CSIS practices such as those relating to the Peace Movement.

30 The respondent argues that the government is not attempting to control or limit expression as evidenced by the fact that the Act does not create offences and, thus, there is nothing in the Act which makes it an offence to express an opinion.

31 As set out in *Irwin Toy*, *supra*, government legislation must either be aimed at controlling attempts to convey a meaning either by *restricting the content of expression* or *by restricting a form of expression tied to content*. In this case the applicant argues that the Act restricts a form of expression tied to content. But, on a reading of the legislation, this submission cannot stand. Therefore, the purpose of the Act does not restrict the freedom of expression.

32 In the alternative, the applicant submits that such surveillance has an adverse effect on expressive activity which is deserving of *Charter* protection. According to *Irwin Toy*, *supra*, government actions having an incidental effect on expressive activity are to be analyzed as follows [p. 976]:

> Even if the government's purpose was not to control or restrict attempts to convey a meaning, the court must still decide whether the effect of the government's action was to restrict the plaintiff's free expression. *Here, the burden is on the plaintiff to demonstrate* that such an effect occurred. *In order so to demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom.*

> We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in *Ford* (at pp. 765-767), and can be summarized as follows: (1) seeking and attaining truth is an inherently good activity; (2) *participation in social and political decision-making is to be fostered and encouraged*; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. *In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these three principles.* (Emphasis added)

33 The applicant submits that surveillance authorized by the Act has an adverse effect, that is, a chilling effect on "participation in ... political decision-making".

34 It is also the applicant's position that the use of intrusive surveillance techniques and the existence of such powers have a tendency to chill, and have in fact had a chilling effect, on the willingness of Canadian citizens or residents to express their opinions freely by participating in the work of these associations or similar groups, and by implication in the processes of Canadian political democracy. Individuals proposing to do nothing more than engage in lawful advocacy protest or dissent do not always know whether their lawful activities will be monitored. The cautious among them may choose to refrain from engaging in legitimate activities that may be characterized by CSIS as "threats to the security of Canada".

35 The applicant argues that Canadian case law recognizes that s. 2(b) of the *Charter* may wrongfully be limited by government action which has the effect of inhibiting or deterring individuals from exercising fully the fundamental freedoms enumerated in s. 2(b).

36 The applicant further argues that the threat of sanction in legislation which is potentially overbroad in its application or the threat of discipline which restricts the willingness to speak on matters of public interest, have been declared to be *prima facie* impermissible restrictions on the freedom of expression, relying on the cases: *Re Information Retailers Association* (1985), 52 O.R. (2d) 449 (C.A.) ; and *Re Klein; Re Dvorak* (1985), 16 D.L.R. (4th) 489 (Div. Ct).

37 In *Re Klein; Re Dvorak*, *supra*, Mr. Dvorak sought the right to communicate with the news media to open a discussion on the Law Society's prohibition of advertising by solicitors to the public. He took steps, which resulted in his facing disciplinary proceedings. The Court held that Dvorak, in contacting the press, was entitled to the protection of s. 2(b) [p 540]:

> The applicant, Dvorak's, contacting of the press is entitled to the protection of s. 2(b). I adopt, without repeating, my discussion of the purpose and function of s. 2(b) of the *Charter* and of the jurisprudence in both Canada and the United States respecting freedom of expression. The applicant's expression here was precisely the kind intended to be protected by the *Charter*. It serves a social purpose and provides information on a matter of potential public interest and debate, namely, the manner of fee advertising for lawyers.

Upon making this finding, the Court then proceeded with an analysis of s. 1 [p 541]:

> The effect of the Rule, in my view, is to impair the right of the lawyer, client and the public to disseminate and receive information to *an extent which greatly exceeds any legitimate legislative or regulatory purpose of the respondent Law Society. This Rule, in my view, will have an unjustifiable chilling effect on the exercise of the freedom of expression.* (Emphasis added)

38 In *Re Information Retailers Association*, *supra*, the purpose of the impugned by-law was "to restrict physical and visual access by children to certain publications, particularly what are known as 'adult' or 'skin' magazines, on sale in stores in Metropolitan Toronto". The Court held that the 2(b) freedom had been infringed, and continued with a s.1 analysis [p 469]:

> The question then becomes one of determining whether the steps taken by this municipal council have in fact been kept within the bounds required by the situation *so as not to impinge on the protected freedom to a degree greater than is necessary to achieve the legitimate governmental interest*. This by-law, in my opinion, fails that test. Rather than being narrowly tailored to further the objective legitimately sought to be advanced, *the by-law defines its coverage in terms so wide as to sweep within its ambit material which is not necessary to further the desired objective*. (Emphasis added)

39 Keeping this statement in mind, the conclusions drawn by the Court in the following passage take on a different perspective [p. 472]:

> In my opinion, these concerns are not without foundation and represent a risk which ought not to be run. Having regard to the broadly-phrased scope of the by-law, the consequences of non-compliance, the perception of at least some booksellers that a "social stigma" attaches to a licence issued pursuant to legislation designed to control "adult entertainment parlours", and the nuisance involved in satisfying the licensing and display requirements, there may be a tendency on the part of some booksellers to comply with the law by not selling books which by any stretch of the interpretive imagination can be said to fall within the ambit of the by-law. *The resulting self-censorship would limit or impede the marketing of a protected form of expression and interfere with the public's right of access to non-obscene books with erotic pictorial content. Legal over-kill is ill-suited to the delicate sphere of free expression and, here, is fatal to the by-law*. (Emphasis added)

40 In *Re Klein; Re Dvorak*, *supra* and *Re Information Retailers Association*, *supra*, the impermissible restrictions on the freedom of expression were based upon the second step in the analytical framework of a *Charter* application. That is, the Courts struck down the various pieces of legislation on applying the *Oakes* test, one of the reasons being the "unjustifiable chilling effect on the exercise of the freedom of expression".

41 The applicant also submits that the Supreme Court of Canada has recently considered the "chilling effect" doctrine in relation to freedom of expression in *R v. Keegstra*, [1990] 3 S.C.R. 697. McLachlin J., in dissent (but not on this point), set out the relevance of the "chilling effect" to the freedom of expression analysis as follows [p.850]:

> *A second characteristic peculiar to freedom of expression is that limitations on expression tend to have an effect on expression other than that which is their target. In the United States this is referred to as chilling effect. Unless*

> *the limitation is drafted with great precision, there will always be doubt about whether a particular form of expression offends the prohibition*. There will always be limitations inherent in the use of language, but that must not discourage the pursuit of the greatest drafting precision possible. The result of a failure to do may be to deter not only the expression which the prohibition was aimed at, but legitimate expression. *The law-abiding citizen who does not wish to run afoul of the law will decide not to take the chance in a doubtful case. Creativity and the beneficial exchange of ideas will be adversely affected. This chilling effect must be taken into account in performing the balancing required by the analysis under s.1*. It mandates that in weighing the intrusiveness of a limitation on freedom of expression our consideration cannot be confined to those who may ultimately be convicted under the limits, but must extend to those who may be deterred from legitimate expression by uncertainty as to whether they might be convicted. (Emphasis added)

42 The applicant further submits that Dickson C.J., writing for the majority, disagreed that the provision at issue in *R. v. Keegstra*, *supra*, should be struck down, but clearly engaged in an analysis of the provision's purported "chilling effect" in reaching his decision.

43 With respect to the "chilling effect" doctrine, Dickson C.J. in fact did not engage in an analysis of the impugned provision's purported chilling effect when determining the definition to be given to s.2(b) of the *Charter*, nor did McLachlin J.. Any discussion with respect to the chilling effect took place in the context of the s.1 analysis — minimal impairment of s.2(b) freedom. As stated by Dickson C.J. [pp.771-2]:

> The main argument of those who would strike down s.319(2) is that it creates a real possibility of punishing expression that is not hate propaganda. It is thus submitted that the legislation is overbroad, its terms so wide as to include expression which does not relate to Parliament's objective and also unduly vague, in that a lack of clarity and precision in the words prevents individuals from discerning its meaning with any accuracy. In either instance, it is said that the effect of s.319(2) is to limit expression of merely unpopular or unconventional communications. Such communications may present no risk of causing the harm which Parliament seeks to prevent, and will perhaps be closely associated with the core values of s.2(b). *This overbreadth and vagueness could consequently allow the state to employ s.319(2) to infringe excessively the freedom of expression or, what is more likely, could have a chilling effect whereby persons potentially within s.319(2) would exercise self-censorship*. Accordingly, those attacking the validity of s.319(2) contend that vigorous debate on important political and social issues, so highly valued in a society that prizes a diversity of ideas, is unacceptably suppressed by this provision. (Emphasis added)

44 Specifically, the majority declined to adopt American constitutional jurisprudence, which would include the chilling effect doctrine [pp. 740-1]:

> Equally, I am unwilling to embrace various categorizations and guiding rules generated by American law without careful consideration of their appropriateness of Canadian constitutional theory. *Though I have found the American experience tremendously helpful in coming to my own conclusions regarding this appeal, and by no means reject the whole of the First Amendment doctrine, in a number of respects I am thus dubious as to the applicability of this doctrine in the context of a challenge to hate propaganda legislation*. (Emphasis added)

45 The applicant also relies on *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232, wherein the applicant submits that the Supreme Court of Canada was unanimous in invoking "the adverse effect [the regulation] might have on legitimate speech" to strike down an overbroad restriction on advertising by dentists. In this case, the appellants were dentists who participated in an advertising campaign, and as a result were charged with violating an explicit restriction not to advertise, and with general professional misconduct. The Court held that freedom of expression protected by s.2(b) of the *Charter* includes commercial speech such as advertising. With respect to the s.1 analysis the Court held that the impugned section should be struck as it was overly broad legislation, and the means used did not impair the freedom as little as possible. The Court when addressing the issue of whether the regulation should be struck out under s.52 of the Constitution stated [pp. 251-2]:

> Dubin A.C.J.O., in the Court of Appeal would not have struck the section out merely because it might apply overbroadly to situations not at issue in this case. The remedy, in his view, was to decline to enforce the section if and when a case arises which brings its excessive ambit into question. This, as has been seen, reflects the American approach to commercial speech. Rather than striking down overbroad legislation limiting commercial speech, American courts have merely declined to enforce it to the extent that it is overbroad.
>
> *The danger of leaving legislation in force which is too broad is that it may prevent people from engaging in lawful activities by reason of the fact that the prohibition is still "on the books"*. (Emphasis added)

46 The respondent submits that were the Court to find that Canadian Courts have not to date adopted the chilling effect doctrine, this American doctrine should not be applied in interpreting s.2 of the *Charter*. When s.2 of the *Charter* is given a "purposive" interpretation and is placed in the larger philosophical and historical context appropriate to Canada, an individual's right of freedom of expression is not so frail that the chilling effect doctrine must be imported in order to give this freedom the breathing space necessary to survive. Furthermore, to the extent a chilling effect doctrine has been adopted in Canadian constitutional law analysis, it is limited to consideration under s.1 of the *Charter*. That is, the applicant must first demonstrate that a *Charter* protected right has been infringed by the purpose or the effect of the legislation without resort to a potential chilling effect. This approach is consistent with the American approach where, allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific harm. United States Supreme Court cases employing the concept of chilling effect involve situations in which the plaintiff has unquestionably suffered some concrete harm, past or immediately threatened, apart from the chill itself.

47 The Canadian authorities relied on by the applicant with respect to the application of the chilling effect in the determination of the scope of the *Charter* freedom in fact indicate that where the chilling effect is applied by the Court, it is applied in relation to the s.1 *Oakes* test, where overbroad or vague legislation has been held not to meet the first step of the proportionality test. The chilling effect to date has not been applied in Canadian constitutional cases in defining the freedom.

48 The applicant also states that the doctrine prohibiting government action which may have a chilling or inhibiting effect deterring or limiting expressive activity has been held to be *prima facie* unconstitutional in the United States. The applicant relies on: "The Chilling Effect in Constitutional Law" (1969), *Columbia Law Review* 808. (1969), *Columbia Law Review* 808; *Buckley v. Valeo*, 424 U.S. 1 (1975); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958);

Shelton v. Tucker, 364 U.S. 479 (1960); *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539 (1962); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Brown et al. v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

49 Upon review, it is my belief that these cases more correctly stand for the proposition that the U.S. Constitution protects against compelled disclosure of political associations and beliefs. A few of these cases are reviewed:

50 In *Buckley v. Valeo*, 424 U.S. 1 (1975), the issue addressed by the Court was whether disclosure requirements in campaign-related activities infringed First Amendment Rights [p. 64]:

> *But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment*. E.g., *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).
>
> We long have recognized that significant encroachments of First Amendment Rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate government interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. *We also have insisted that there be a "relevant correlation" or "substantial correlation" between the governmental interest and the information required to be disclosed*. (Emphasis added)

51 In *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), the issue addressed was whether Alabama could compel the petitioner to reveal to the State's Attorney General the names and addresses of its Alabama members and agents without regard to their positions or functions in the Association. The Court held [p. 462]:

> We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right of freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. *Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of their fear of exposure of their beliefs shown through their associations and of the consequences of this exposure*. (Emphasis added)

52 It is my view that these cases address the constitutionality of affirmative obligation legislation. These cases were not decided on the basis that government action had a deterring effect on the petitioners and was therefore *prima facie* unconstitutional. It was observed in the above noted cases, that one of the effects of the affirmative obligation legislation is that this form of legislation may prevent others from joining these various organizations. This finding could be made in Canadian Constitutional cases but, again, it would be made when the s.1 *Oakes* test was applied to the impugned legislation.

53 The applicant also refers to *Local 309, United Furniture Workers of America, C.I.O. v. Gates*, 75 F. Supp. 620 (1948); *Handschu v. Special Services Division*, 349 F. Supp 766 (1972); *American Civil Liberties Union v. City of Chicago*, 431 F. Supp. 25 (1976) and *Church of Scientology v. Director, F.B.I.*, 459 F. Supp. 748 (1979) to stand for the proposition that in the United States, the use of informants, wiretaps, the videotaping of private or public gatherings, and even the interviewing of friends or associates of an individual, has been held to have a chilling effect upon freedom of expression.

54 In *Local 309, United Furniture Workers of America, C.I.O. v. Gates*, *supra*, the action was to enjoin members of the state police from attending meetings of union members, held at a country courtroom. The Court held that where presence of members of state police at a private meeting of union members restrained and hampered union members' discussion and frustrated the meeting, the members of the state police deprived members of the union of their constitutional rights of freedom of speech and freedom of assembly.

55 This case is quite different from *Handschu v. Special Services Division*, *supra*, wherein the District Court held that the use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights, but the *Bill of Rights* protects individuals against excesses and abuses in such activities.

56 In *Alliance To End Repression v. Rochford et al.*, *supra*, the Court held:

> [T]hat complaint on claim of illegal intelligence-gathering activities of police, which centered on plaintiffs as specific objects of both overt and covert surveillance together with information dissemination, infiltration, unlawful entry and seizure, summary punishment and undue harassment, presented justiciable controversy and was not insufficient as a mere claim of a "subjective chill" from the mere existence of the system; and that none of the claims were barred by applicable state statute of limitations.

57 With respect to a claim of a subjective chill, the Court in *Alliance To End Repression v. Rochford et al.*, *supra*, refers to *Laird v. Tatum*, 408 U.S. 1 [p. 117]:

> The defendants assert in the motion to dismiss that plaintiffs have no standing to seek injunctive relief because the plaintiffs have alleged no more than a subjective "chill" of their rights and that such allegations are insufficient to sustain the complaint because they do not present a justiciable controversy under the holding of *Laird v. Tatum*. ...
>
> *In Laird, the Supreme Court held that the plaintiffs' allegations that the mere existence of the Army system of surveillance of unlawful and peaceful civilian activity chilled the exercise of their First Amendment rights did not present a justiciable controversy in the absence of a showing of objective harm or a threatened future harm. The High Court indicated that the plaintiffs in Laird did not allege that the Army took any specific action against them but only alleged that they were subjected to a "chilling" effect on the exercise of their First Amendment rights merely by the existence of the intelligence gathering and distribution system. ...*
>
> An examination of the complaint in the instant case reveals that the allegations contained therein differ greatly

> from those contained in the *Laird* and that, consequently, the decision in *Laird* is inapposite to the instant suit. The plaintiffs in the case at bar have alleged that they were the specific objects of both overt and covert surveillance on the part of the defendants. The plaintiffs' claims contain assertions that defendants specifically impinged upon their consti tutional rights through various types of activities as outlined below. (Emphasis added)

58 These cases similarly are not decided on the basis that government action had a deterring effect on the petitioners, merely by the existence of the impugned legislation. Rather it is evident that the United States Courts require that the "plaintiffs' claims contain assertions that defendants specifically impinged upon their constitutional rights ...".

59 In addition, the respondent submits that the chilling effect doctrine has been used mainly in interpreting the First Amendment of the United States Constitution, a right which has received a very different interpretation than s.2 of the *Charter*; see "The Chilling Effect in Constitutional Law", *supra*. The doctrine of chilling effect developed in the U.S. as courts concluded that First Amendment rights: took precedence over other rights; were being threatened; and required unique protection; see *National Student Association Inc. et al. v. Hershey* 412 F 2d (1969) (U.S.C.A.): *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (U.S.S.C.); *Shelton v. Tucker*, 364 U.S. 479 (1960) (U.S.S.C.); *Baird v. State Bar Arizona*, 401 U.S. 1 (1970) (U.S.S.C.).

60 In *Shelton v. Tucker*, *supra*, an Arkansas statute required every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which the teacher belonged or regularly contributed within the preceding five years. It was held that to compel a teacher to disclose every associational tie is to impair the teacher's right of free association. With respect to the chilling effect of this legislation, the Court stated [p 486]:

> The statute does not provide that the information it requires be kept confidential. Each school board is left free to deal with the information as it wishes. The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless. *Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty*. (Emphasis added)

61 With respect to the evidence before this Court, the respondent submits that to the extent that Margaret Third-Tsushima, William Zander and members of their respective organizations are chilled by the possibility that CSIS may improperly wiretap them or members of their organizations, the chill indicates that they have no confidence in the ability of the courts or the statutory procedures established by Parliament to protect them against unauthorized wiretapping. It is submitted that this bespeaks an unreasonable fear of any security activity.

62 The respondent also submits that Wendy Wright's affidavit indicates that members of the public have told her that they will not sign TDN petitions because they are afraid of being placed on a "police list". She also states that people have told her that they will not participate in TDN demonstrations because they do not want to have their pictures taken. It is clear that such people are chilled by their subjective perception that association with the TDN may result in police surveillance and such an association may result in CSIS surveillance.

63 The respondent also suggests that the evidence of the applicant at best shows that there may be people who are unreasonably chilled by the thought of surveillance generally, whether by a security agency or by the police, or for that matter by anyone else, and whether such surveillance is of them or of others. In such circumstances, the granting of the relief requested by the applicant would not end the chill because such persons would still be worried that they were being placed under surveillance by other agencies or individuals. Such fears are, it is submitted, unreasonable, and if the CSIS legislation has such an effect, the effect is not a substantial one resulting in a *Charter* violation.

64 In addition, the respondent submits that the notion of a chilling effect resulting from the scope of CSIS investigative powers under its enabling legislation must rest on the assumption that affected individuals know the law and modify their behaviour as a result. There is no evidence that anyone claiming to be "chilled" has any knowledge of the impugned legislation or the legitimate scope of the powers vested in CSIS to gather intelligence of threats to national security. To the extent that persons may refrain from expressing themselves for fear of being placed under surveillance, the respondent says there is no evidence that anyone has suffered some concrete harm, past or in the present, apart from the chill itself.

65 It appears that the American authorities relied on by the applicant, in addition to those relied upon by the respondent, do not assist the applicant with its submission that this Court should adopt the American chilling effect doctrine in determining the scope of the s.2(b) freedom. The American Courts speak of a "subjective chill", and that such a chill is not a justiciable chill because there must be an objective harm or a threatened harm. Applying these findings in the Canadian context, the s.2(b) freedom does not include "the right not to be subjectively chilled" from the mere existence of a system, in this case the *CSIS Act*, and any application of such a doctrine should be limited to the s.1 analysis.

66 In addition, the respondent argues that if this Court accepts that the chilling effect doctrine is relevant in the Canadian context, the doctrine should be applied with the qualifications which the U.S. courts have developed. In U.S. law, where a law does not trench upon conduct which is protected under the *Bill of Rights*, it is not invalid by reason of any chilling effect which results from the good faith enforcement of the law.

67 As stated in *Cameron v. Johnson*, 390 U.S. 611 (1968) (U.S.S.C.) [p. 619]:

> Any chilling effect on the picketing as a form of protest and expression that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms.

68 In *Anderson v. Sills*, 265 A.R. 2d 678 (1970) (N.J.S.C.) at p. 687, the Court states:

> Here we are dealing with the critical power of government to gather intelligence to enable it to satisfy the very reason for its being - to protect the individual in her person and things. The question in the case is not merely whether there are some individuals who might be "chilled" in their speech or association by reason of the police activity involved. *Rather the critical question is whether that activity is legal, and although the amount of "chill" might in a given case be relevant to the issue of legality, the fact of the "chill" is not pivotal. Indeed, the very*

> *existence of this Court may "chill" some who would speak or act more freely if there were no accounting before us for trespasses against others*. But government there must be, for without it no value could be worth very much. ... If a properly drawn measure is within the power of government, it is no objection that the exercise of speech or association is thereby "chilled". ...
>
> *The power to investigate is basic*. So the cases recognize a vast power to investigate in the legislative branch so long as the inquiry is relevant to the legislative function. ... An administrative agency may on its own initiative investigate to see that there is compliance with law within the ambit of its responsibility. ... So, too, a grand jury may inquire as to whether a crime occurred and who was the culprit, and its power to compel testimony does not depend upon the existence of "probable cause" either as to the fact of a crime of the culpability of the suspect. ...
>
> The investigatory obligation of the police is surely no less extensive than the grand jury's. Indeed, the preventive role of the police necessarily implies a duty to gather data along a still wider range. (Emphasis added)

69 If this Court were to accept that the chilling effect doctrine is relevant in the Canadian context, this Court would apply the doctrine with the qualifications which the U.S. Courts have developed.

70 Although I would find that the Act does not restrict the freedom of expression by its purpose or effect, I will canvass the remaining submissions made by the parties with respect to this freedom. The respondent submits that in order to show a breach of s.2(b) of the Charter, the applicant must demonstrate that there is some nexus between the Act and one's ability to freely hold a thought, belief or express an opinion, or exercise freedom of expression. The respondent says the Act, either by its purpose or effect does not prevent anyone from holding a thought or opinion, or expressing a thought or opinion. Thus, the applicant has not shown a nexus between the Act and one's ability to hold or express an opinion. Furthermore, the respondent submits that this Court should not engage in hypothetical speculation as to whether those who enforce the Act may construe the definition of "threats to the security of Canada" in s.2 of the Act as embracing all "lawful advocacy, protest or dissent". The respondent relies on *R. v. Edward's Books and Art Limited* (1986), 35 D.L.R. (4th) 1 (S.C.C.); *MacKay et al. v. The Government of Manitoba et al.*, [1989] 6 W.W.R. 351 (S.C.C.); and *Re MacKay et al. v. The Government of Manitoba et al.* (1985), 24 D.L.R. (4th) 587 (Man. C.A.); *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.); *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; and *United Presbyterian Church In the U.S.A. v. Reagan*, 783 F. 2d 1375 (1984) (U.S.C.A.).

71 In *Danson v. Ontario (Attorney General)*, *supra*, the Court stated that the application could not proceed without a factual foundation. The applicant sought to attack the Law Society Rules on the basis of their alleged affects upon the legal profession in Ontario. Sopinka J., for the Court, held that it would be difficult, if not impossible, for a motions court judge to assess the merits of the appellant's application under rule 14.05(3)(h) without evidence to that effect:

> ...*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 [is] a case concerning an action for a declaration that certain provisions of *The Elections Finances Act*, S.M. 1982-83-84, c. 45, violated the guarantee of freedom of expression contained in s.2(b) of the *Charter*. Cory, J., speaking for a unanimous court, stated at pp. 361-2:
>
> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize

> the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. ... *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

Later, Cory, J., stated at p. 366:

> A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. *Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.*

This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack thereof). As Beetz, J., pointed out in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at p. 113:

> There may be cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s.2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s.1 of the *Charter*, and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. *It is trite to say that these cases are exceptional*. [Emphasis in the original]

The unconstitutional purpose of Beetz, J.'s hypothetical law is found on the face of the legislation, and requires no extraneous evidence to flesh it out. It is obvious that this is not one of those exceptional cases. *In general, any Charter challenge based upon allegations of unconstitutional effect of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.* (Emphasis added)

72 In *Moysa v. Alberta (Labour Relations Board)*, *supra*, the issue addressed was whether requiring a journalist witness (the appellant) to disclose communications to some other person violated s.2(b). Sopinka J., stated [p. 1581]:

> Even if I assume for the moment that the right to gather the news is constitutionally enshrined in s.2(b) the appellant has not demonstrated that compelling journalists to testify before bodies such as the Labour Relations Board would detrimentally affect journalists' ability to gather information. No evidence was placed before the Court suggesting that such a direct link exists. While judicial notice may be taken of self-evident facts, I am not convinced that it is indisputable that there is a direct relationship between testimonial compulsion and a "drying out" of news sources as alleged by the appellant. *The burden of proof that there has been a violation of s.2(b) rests on the appellant. Absent any evidence that there is a tie between the impairment of the alleged right to gather information and the requirement that journalists testify before the Labour Relations Board, I cannot find that there has been a breach of s. 2(b) in this case.* (Emphasis added)

73 In *United Presbyterian Church In the U.S.A. v. Reagan*, *supra*, the Court held that religious and political organizations, journalists, and politically active individuals who alleged "fear" and "concern" that they may be "targeted" for intelligence-gathering activities pursuant to an Executive Order establishing a framework for governmental and military intelligence gathering functions, but who introduced no evidence to support their claim beyond allegations that some of them had been subject to possibly illegal surveillance before the Order was promulgated, failed to allege any redressable concrete injury attributable to Executive Order and thus lacked standing to challenge it [p. 1380]:

> It must be borne in mind that this order does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely authorizes them. Also, the appellants allege that some of them have been or are currently subjected to unlawful surveillance. Most, if not all, of the allegations on that score are in any event too generalized and nonspecific to support a complaint. ... There is no allegation or even suggestion that any unlawful action to which the appellants have been subjected in the past was the consequence of the presidential action they seek to challenge here. Without such connection, standing to pursue the present action does not exist.

74 Although the factual foundation for the present application may be scant and contentious, there is nonetheless a factual foundation. Moreover, the respondent had the opportunity to cross-examine on the affidavits, and appears to have decided not to exercise that right. It would be inappropriate to now hold that there was an insufficient factual foundation for the application to be heard.

75 The respondent also submits that not every effect on a person's freedom of expression offends this s. 2 *Charter* guarantee. Legislative and administrative action which has a trivial or insubstantial effect on s. 2(a) of the *Charter* has been found not to violate the guarantee. It is submitted that the applicant has at best only alleged that the CSIS legislation and its application may have trivial effects; see *R. v. Edward's Books and Art Limited*, *supra*; *Jones v. The Queen*, [1986] 2 S.C.R. 284; and *United States v. O'Brien*, 391 U.S. 367 (1968) (U.S.S.C.).

76 In *R. v. Edward's Books and Art Limited*, *supra*, Dickson C.J.C. states at p. 35:

> Religious freedom is inevitably abridged by legislation which has the effect of impeding conduct integral to the practice of a person's religion. But it is not necessarily impaired by legislation which requires conduct consistent with the religious beliefs of another person. One is not being compelled to engage in religious practices merely because a statutory obligation coincides with the dictates of a particular religion. I cannot accept, for example, that a legislative prohibition of criminal conduct such as theft and murder is a state enforced compulsion to conform to religious practices, merely because some religions enjoin their members not to steal or kill. Reasonable citizens do not perceive the legislation as requiring them to pay homage to religious doctrine.

77 In *Jones v. The Queen*, *supra*, the Court states at p. 314:

> Although I do not adopt the U.S. Supreme Court's test of "indirect burden", I share the concern motivated by the test. To state that any legislation which has an effect on religion, no matter how minimal, violates the religious guarantee "would radically restrict the operating latitude of the legislature" (*Braunfeld v. Brown*, at p. 606).

78 I agree with this submission. If the Act affects freedom of expression, it would do so only in a minimal manner. Any other finding would "radically restrict the operating latitude of the legislature"; see *Edward's Books and Art Limited*, *supra*.

79 It must be concluded that the Act does not have the purpose or the effect of infringing freedom of expression.

Section 2(c) of the Charter

The First Step: Is the Activity Within The Sphere of Conduct Protected By Freedom of Peaceful Assembly?

80 The applicant submits that the impugned sections of the Act infringe constitutional rights to peaceful assembly and are *prima facie* a violation of s. 2(c). The applicant submits s. 2(c) of the *Charter* guarantees to everyone the freedom of peaceful assembly which includes the freedom to participate in peaceful demonstrations, as determined by the Court in *R. v. Collins* (1983), 4 C.R.R. 78 (Ont. Co. Ct.). I would agree that the activities under review fall within the sphere of the conduct protected by Freedom of Assembly.

The Second Step: Is the Purpose or Effect of the Government Action to Restrict Freedom of Peaceful Assembly?

81 Applying *Irwin Toy*, *supra*, the applicant submits that where the effect of government action is to infringe the freedom of peaceful assembly, that government action is *prima facie* unconstitutional. TDN and similar groups have organized peaceful marches and demonstrations as part of their efforts to advocate certain kinds of social or political reform. Surveillance of TDN members has created a perception that CSIS has an interest in the members of the TDN and directly deterred a number of individuals who would have otherwise joined those marches from doing so. The applicant submits further that such activities and the scope of CSIS's powers have created a perception in the eyes of many members of the public that attendance at peace movement events may result in being subjected to surveillance.

82 The applicant submits that the freedom of peaceful assembly should be protected from indirect chilling effects of government action as adopted in current Canadian law and as adopted in U.S. Courts. The applicant submits that U.S. Courts have held that the right of peaceful assembly, like other First Amendment rights and freedoms such as the freedom of speech and the right to association implied therein, is protected against the indirect chilling effects of government action; see: *Wolff v. Selective Service Local Board No. 16*, 372 F. 2d 817 (1967); *Local 309 United Furniture Workers of America CIO v. Gates*, *supra*.

83 In *Wolff v. Selective Service Local Board No. 16*, *supra*, the plaintiffs had been reclassified as 'available for military duty' from 'student-deferred' because of participation in demonstrations protesting United States involvement in Vietnam. The Court held the plaintiff's case was justiciable at [p. 823]:

> *The effect of the reclassification itself is immediately to curtail the exercise of First Amendment right, for there can be no doubt that the threat of receiving a I-A classification upon voicing dissent from our national policies has an immediate impact on the behaviour of appellants and others similarly situated.* (Emphasis added)

84 As previously determined with respect to s. 2(b) of the *Charter*, current Canadian law has not adopted the chilling effect doctrine in determining the sphere of conduct to be protected under s. 2 of the *Charter*, nor will this Court adopt the American chilling effect doctrine in determining the scope of the s. 2(c) freedom. Therefore, the applicant has not established that the purpose or the effect of the Act restricts the freedom of peaceful assembly.

Section 2(d) of the Charter

The First Step: Is the Activity Within The Sphere of Conduct Protected By Freedom of Association?

85 It is the applicant's submission that s. 2(d) of the *Charter* guarantees the right to join with others in lawful, common pursuits which can only be exercised by a number of individuals carrying out common causes for a common end. The applicant relies on *Reference re Public Service Employees Relations Act, and Police Officers Collective Bargaining Act* (1987), 38 D.L.R. (4th) 161 (S.C.C.); *Lavigne v. OPSEU* (1989), 56 D.L.R. (4th) 474 (Ont. C.A.). I have no hesitation in agreeing with the applicant that the activities under review fall within the sphere of the conduct protected by freedom of association.

The Second Step: Is the Purpose Or Effect of The Government Action to Restrict Freedom of Association?

86 The applicant submits that the impugned provisions of the Act have the effect of infringing the freedom of association and are thus *prima facie* in violation of s. 2(d). The surveillance by CSIS, or threat of surveillance by CSIS, has an inhibiting effect both on the activities of the members of the TDN, the B.C. Council of Carpenters, the Coalition and members of groups similar to these associations, and on the willingness of persons to join or participate in the activities of these associations.

87 It is submitted that in the U.S. the right of association, like freedom of speech, is also protected against the chilling effect of government action. The constitutional right to associate is grounded in the protection of freedom of speech and assembly. Participation in an association can be inhibited by government action whether such government action is direct or indirect, that is, covert; see: *Socialist Workers Party*, *supra*; *N.A.A.C.P. v. Alabama*, *supra*; *Gibson v. Florida State Legislative Investigation Committee*, *supra*; *Handschu v. Special Services Division*, *supra*; and *Alliance to End Repression v. Rochford*, *supra*.

88 In conclusion, as previously determined with respect to s. 2(b) of the *Charter*, current Canadian law has not adopted the chilling effect doctrine in determining the sphere of conduct to be protected under s. 2 of the *Charter*, nor will this Court adopt the American chilling effect doctrine in determining the scope of the s. 2(d) freedom. Therefore the applicant has not established that the purpose or the effect of the Act restricts the freedom of association.

Section 8 of the Charter of Rights

89 The applicant submits that the provisions of the Act which authorize CSIS agents to use intrusive surveillance techniques, even when they provide for the issuance of warrants in aid of investigations, infringe the right to be free

from unreasonable search and seizure as provided for in s. 8 of the *Charter*. The respondent submits that the Act complies with s. 8 of the *Charter*, and effective measures exist to ensure that CSIS does not use its powers improperly.

90 The applicant states that s. 12 in combination with s. 2 of the Act authorizes CSIS agents to use intrusive surveillance techniques without prior authorization. CSIS agents may employ at their discretion surveillance techniques against a wide and ambiguous range of subjects without any limit as to place or duration. These searches are in violation of s. 8 of the *Charter*.

91 The respondent submits that s. 12 of the Act provides that the Service shall collect, to the extent that it is strictly necessary, information and intelligence respecting activities that may on reasonable grounds be suspected of constituting "threats to the security of Canada". Furthermore, the Solicitor General issues ministerial directives which CSIS must adhere to in using its powers under s. 12 of the Act. It is submitted that CSIS agents are subject to reasonable restraints as to the use of their powers. The revised CSIS Operations manual directs investigators to make sure that the use of intrusive techniques is balanced against possible damage to constitutional rights and freedoms.

92 Sections 21-26 of the Act allow for the issuance of warrants, where on reasonable grounds it is believed that a warrant is required to enable CSIS to investigate "threats to the security of Canada". The applicant submits that the definition of "threats to the security of Canada" is so wide and vague that it allows searches and seizure against Canadian citizens and permanent residents in the course of investigating activities that are not unlawful. Those searches and seizures are unjustified and represent a *prima facie* breach of s. 8 of the *Charter*.

93 As set out in *Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641 (S.C.C.); *R. v. O'Flaherty* (1987), 35 C.C.C. (3d) 33 (Nfld. C.A.); and *R. v. Dyment* (1989), 45 C.C.C. (3d) 244 (S.C.C.), the purpose of s. 8 of the *Charter* is to guarantee a broad and general right to be secure from unreasonable search and seizure which at the very least protects a person's entitlement to a reasonable expectation of privacy.

94 Dickson J. in *Hunter v. Southam Inc.*, *supra*, set out the nature of the interests s. 8 is meant to protect [pp. 652-3]:

> Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for purposes of the present appeal I am satisfied that its protection go at least that far. *The guarantee of security from unreasonable search and seizure only protects a reasonable expectation.* This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. (Emphasis added)

95 In *R. v. O'Flaherty*, *supra*, the question before the Court was whether or not the action of the police officer in looking over the wall of the toilet cubicle constituted a search, and whether, if it was a search, it was unreasonable. Marshall J.A. held that the actions of the police officer did not violate the accused's right to protection against un-

reasonable search and seizure and stated [p. 44-5]:

> *Whatever meaning one may attach to the word "search" contained in s. 8 of the Charter the clear meaning and intent of that section as a whole is to afford protection from governmental intrusion on the individual's privacy.* In determining the extent to which that right is protected it is essential that an assessment be made as to whether, in particular circumstances, an individual's right to privacy is superseded by the practicalities of proper law enforcement. While the Charter requires utmost vigilance in protection of individual liberties, it does not confer upon those liberties absolute paramountcy over the right of the community as a whole. The respondent's claim must be viewed in relation to society's need for practical enforcement of its validly enacted laws.
>
> It is common ground that Constable Gauthier was lawfully in the wash-room. *While there he saw what any other occupant of the wash-room could see, namely: a man standing in a cubicle in a position indicating that he was not using the facilities. As I stated earlier, Constable Gauthier recognized the occupant of that cubicle and suspected that it was being used for an unlawful purpose. He, accordingly, looked over the door, as any other person could have done, to see if his suspicions were well founded. That was the extent of the intrusion into the occupant's privacy.* (Emphasis added)

96 In *Regina v. Dyment*, *supra*, the Court held that taking a sample of blood before suturing the wound, and turning the sample over to the police constituted an unlawful and unreasonable seizure of the blood by the police. LaForest J., set out those situations where the Court should be most alert to privacy considerations: claims to privacy involving territorial or spatial aspects; claims to privacy related to the person; and claims to privacy that arise in the information context. With respect to privacy of the individual, LaForest J., stated [p. 256]:

> One further general point must be made, and that is that if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being *secure* against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated. This is especially true of law enforcement, which involves the freedom of the subject.

It was held that the seizure infringed upon all spheres of privacy: spatial, personal and informational.

97 The applicant relies on *Atwal v. R.* (1987), 35 C.C.C. (3d) 161 (Fed. C.A.); *R. v. Wong* (1987), 34 C.C.C. (3d) 51 (Ont. C.A.); *R. v. LeBeau* (1988), 41 C.C.C. (3d) 163 (Ont. C.A.); *R. v. Finlay and Grellette* (1985), 23 D.L.R. (4th) 532 (Ont. C.A.); *Wiggins v. R.*, [1990] 1 S.C.R. 62 (S.C.C.); and *Duarte v. R.*, [1990] 1 S.C.R. 30 (S.C.C.), to stand for the proposition that video surveillance, state authorized interceptions of private communications and the use of "body packs" by informers constitute searches and seizures within the meaning of s. 8 where the individual effected has a reasonable expectation of privacy.

98 In *R. v. Wong*, *supra*, the issue addressed by the Court was whether the video surveillance of the accused who were keeping a common gaming house, constituted a breach of s. 8 of the *Charter*. The police had put in place a monitoring camera in the hotel room which was being used for the illegal gambling without obtaining a warrant nor authorization under Part IV. 1 of the *Criminal Code*. The court held that the surreptitious video surveillance, even

without interception of conversations, constituted a search where the person observed by the camera had a reasonable expectation of privacy. However, the Court held in this case there was no reasonable expectation of privacy [pp. 63-4]:

> *Here it is necessary to consider only the first requirement of the principle, namely, whether any of the respondents exhibited an actual (subjective) expectation of privacy. They did not. It is impossible to accept that any of the respondents had any reasonable expectation of privacy.* It is clear that notices had been given out which indicated that gaming would take place in this room on the evening of September 30th. The same notices had been seen by the police pertaining to an earlier night when gaming had taken place in the room. *It is difficult to imagine that any of the 30 to 35 people gathered together in a hotel suite could have had any real expectation of privacy.*
>
> None of the respondents testified that they had a subjective expectation of privacy and it is difficult to believe that they could give such evidence. It may well be that they were in the same room with strangers. The occupants' only common interest was to gamble illegally for high stakes. All but Santiago Wong were no more than casual visitors to the rooms with no basis for challenging the legality of the search. Neither is it possible that Santiago Wong had any reasonable expectation of privacy. He was booking the room regularly and it was clear from the police observations that the room had been used for gambling on other occasions. *Wong had invited and accepted so many people in the room that there could not have been any reasonable expectation of privacy by anyone in the room, least of all Santiago Wong who benefitted by the presence of the others.*
>
> *Video surveillance of persons in a hotel room could in certain circumstances constitute a search of the most intrusive kind.* However, in this case, as there was no reasonable expectation of privacy, s. 8 of the Charter cannot have any application. The evidence of the video surveillance should have been admitted. (Emphasis added)

99 In *R. v. LeBeau*, *supra*, the facts indicate that the police had a video camera installed in a public washroom, where the police had determined that the public washroom was being used as a meeting place by a group of men for the purposes of participating in sexual acts. The appellants argued that such surveillance was in breach of their s. 8 *Charter* right. The Court held that electronic surveillance by way of video recording may amount to a search within the meaning of s. 8 of the *Charter* if it is carried out while the person observed by the camera had reasonable expectation of privacy, but these appellants did not have a reasonable expectation of privacy [pp. 185-6]:

> The police surveillance established that this public washroom had become the meeting-place for this group of men, to which the appellants appear to have adhered, for the practice of homosexual acts. The conduct probably offended s. 157 of the *Criminal Code*. That others would observe and recognize what was going on from the persistent use that these men made of the place was a risk that they undoubtedly understood. In the circumstances, by reason of their look-outs and precautions, perhaps they had an expectation that they would escape detection by the police or interference by the public. *But that is not an expectation of privacy. This is not the case of a person resorting to the privacy of a closed cubicle in a public wash-room for its expected use or for some personal indulgence that would be considered objectionable if carried on in public.* (Emphasis added)

100 In *R. v. Finlay and Grellette*, *supra*, it was held that the interception of private communications constitutes a search or seizure within the meaning of s. 8 of the *Charter*.

101 In *Wiggins v. R.*, *supra*, it was held that s. 178.11(2)(a) of the *Criminal Code* does not infringe or deny the rights and freedoms guaranteed by s. 8 of the *Charter*, but interception of private communications by an instrument of the state without prior authorization and without the consent of the originator or intended recipient thereof, does infringe the rights and freedoms guaranteed by s. 8 of the *Charter*.

102 In *Duarte v. R.*, *supra*, the appeal was concerned with the protection accorded by s. 8 of the *Charter* against electronic recording of conversations of individuals with the police and informers in the absence of judicial authorization. It was held that the interception of private communications by an instrument of the state with the consent of the originator or intended recipient thereof, without prior judicial authorization, does infringe the rights and freedom guaranteed by s. 8.

103 The applicant's authorities, although they stand for the propositions that s. 7 is intended to protect a person's reasonable expectation to privacy and that video surveillance, state authorized interceptions of private communications and the use of body packs constitute searches and seizures, where an individual participates in "lawful protest, advocacy or dissent", there cannot be a reasonable expectation of privacy. These activities are public in nature. This is supported by the applicant's own authorities: *R. v. O'Flaherty*, *supra*; *R. v. Wong*, *supra*; *R. v. LeBeau*, *supra*. The following authorities supplied by the respondent also support this finding: *Rakas et al. v. Illinois* (1978), 99 S.Ct 421; and *R. v. Shortreed*, (Unreported, Feb. 6, 1990; Ont. C.A.).

104 The respondent submits that not all intrusive investigative techniques can be classified as a search within the meaning of s. 8 of the *Charter*. Thus, surveillance of someone by following them in the street does not fall within s. 8. Otherwise, no police surveillance could be conducted without obtaining a search warrant. Furthermore, it is submitted that taking someone's picture in a public place would not be such a search; see *R. v. Wong*, *supra*; *Rakas et al. v. Illinois* (1978), 99 S.Ct. 421; and *R. v. Shortreed*, (Unreported, 1990 Ont. C.A.).

105 In *Rakas et al. v. Illinois*, *supra*, the Court stated [p. 439]:

> Judged by the foregoing analysis, petitioners' claim must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of the owner is not determinative of whether they had a legitimate expectation of privacy in the areas of the automobile searched. It is unnecessary for us to decide here whether the same expectations of privacy are warranted in a car as would be justified in a dwelling place in analogous circumstances. ... *But here petitioners' claim is one which would fail even in an analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger qua passenger simply would not normally have a legitimate expectation of privacy.* (Emphasis added)

106 In *R. v. Shortreed*, *supra*, the Court stated [p. 17]:

> *The police are not obliged to obtain the consent of a suspect before taking his photograph in a public place, provided no physical compulsion is involved.* For the same reasons that the assertion of one's right to silence does

> not impose the obligation of the police to cease asking non-coercive questions as part of the continuing investigation [*R. v. Hicks* (1988), 42 C.C.C. (3d) 394], the refusal of a suspect to allow himself to be photographed should not preclude appropriate efforts by the investigating officers to obtain one. *If this is done in a non-intrusive way and without trespass or other improper means, I do not regard the efforts as a breach of privilege, an invasion of privacy or a violation of Charter rights.* (Emphasis added)

107 The applicant argues that privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he must disclose personal information. Members of the TDN, the B.C. Council of Carpenters, the Coalition and of groups similar to these, have joined such groups on the implicit understanding that they would have a reasonable expectation of privacy concerning the information exchanged within such group. Canadians who are engaged in lawful activities have a reasonable expectation of privacy which extends to their person, their homes and to information about them. Any intrusive and surreptitious surveillance and search of their homes, private communications, persons or information about them constitutes a search and seizure within the meaning of s. 8 of the *Charter*.

108 The constitutionality of a statute authorizing a search and seizure will depend on the "reasonableness" or "unreasonableness" of the impact on the subject of the search or seizure and not simply on the rationality of furthering some government objective. As stated by Dickson J. in *Hunter v. Southam Inc.*, *supra*, p. 650:

> ...[A]n assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

109 As summarized in *R. v. Atwal* (1987), 36 C.C.C. (3d) 161, the case of *Hunter v. Southam Inc.*, *supra*, establishes that four minimum criteria must be met if legislation authorizing a search and seizure is to comply with s. 8, namely [p. 182]:

> (i) prior authorization for the search and seizure where feasible;
>
> (ii) the determination whether to grant the prior authorization must be made by a person capable of acting judicially;
>
> (iii) the determination must be based on sworn evidence; and
>
> (iv) the objective standard on which the determination is based must include reasonable and probable grounds to believe that an offence has been committed and that evidence of the offence is to be found at the place of the search.

110 In cases not involving law enforcement, the standard may be different, but it has been repeatedly held that the standard to be applied in determining whether or not to authorize a search cannot be so wide and vague as to leave the individual without any protection against unreasonable searches and seizure. A search and seizure is unreasonable if it is unjustified, as stated in *Hunter v. Southam Inc.*, *supra*; *Nima v. McInnes*, [1989] 2 W.W.R. 634 (B.C.S.C.); *The*

Minister of National Revenue and Kruger (1984), 13 D.L.R. (4th) 706 (Fed C.A.).

111 With respect to the standard to be applied in cases not pertaining to law enforcement Dickson J. stated in *Hunter v. Southam Inc.*, *supra*, at 659:

> The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point were credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.

112 In *Nima (Oriental Rug Bazaar) v. McInnes*, *supra*, the petitioner argued that by authorizing the issuance of a warrant upon a reasonable belief that the evidence "may", as opposed to "will", be found, the section creates a criterion which falls short of the standard required to protect the rights described on s. 8 of the *Charter*. The Court held that the submission found decisive support in the judgment of *Hunter v. Southam et al.*.

113 In *Re Minister of National Revenue et al. and Kruger Inc. et al.*, *supra*, the constitutionality of s. 231(1) of the *Income Tax Act* was challenged insofar as it conferred on the Minister, when he has grounds to believe that one particular offence has been committed, the power to authorize a general search and seizure relating to the violation of any provisions of the *Income Tax Act* or the regulations. The Court held that this section offended s. 8 of the *Charter* [p. 716]:

> Searches and seizures are intrusions into the private domain of the individual. They cannot be tolerated unless circumstances justify them. A search is unreasonable if it is unjustified in the circumstances. Section 8 does not merely prohibit unreasonable searches and seizures. It goes further and guarantees the right to be secure against unreasonable search and seizure. That is to say, that s. 8 of the *Charter* will be offended, not only by an unreasonable search or seizure without justification, but also by a statute conferring on an authority so wide a power of search and seizure that it leaves the individual without any protection against unreasonable searches and seizures. ...
>
> However, I cannot accept the general proposition that the mere fact that a taxpayer has, at a particular time, committed an offence under the *Income Tax Act* or the regulations, however trifling the offence, affords sufficient justification for the general power of search and seizure conferred by s-s. 231(4).

114 In *R. v. Finlay and Grellette*, *supra*, under s. 178.13 of the *Criminal Code*, a judge must be satisfied that the granting of the authorization would be in the "best interests of the administration of justice". It was held that this term imports the requirement that the judge be satisfied that the granting of the authorization will further or advance the objectives of justice and imports a balancing of the interest of law enforcement and the individual's interest in privacy.

115 The respondent argues that the Act which authorizes surveillance and the issuance of warrants does not violate s. 8 of the *Charter*, as the Act requires CSIS to obtain a warrant from the Federal Court of Canada before it is

permitted to engage in wiretapping, eavesdropping by microphone, intercepting recorded communications, searching for documents and paraphernalia and intercepting mail. A judge empowered to issue a warrant under the Act is defined as a judge of the Federal Court designated by the Chief Justice for the purpose of the Act. The Federal Court Judge will determine the ambit of the power to be conferred by considering ss. 21 through 26 of the Act.

116 It is submitted that by requiring "reasonable grounds" before a warrant is issued, s. 21 of the Act provides an objective standard for a Federal Court Judge to balance the competing considerations of state security and the other objectives of CSIS legislation against an individual's reasonable expectation of privacy. The respondent submits that the Act's requirements for the issuance of a warrant comply with the requirements laid down by the Supreme Court of Canada in the seminal case of *Hunter v. Southam Inc.*, and applied in *R. v. Atwal*, *supra*.

117 In *R. v. Atwal*, *supra*, one of the issues addressed by the Court was "assuming compliance with s. 21 of the Act, whether the authorizing provisions of the Act failed to meet the minimum standards for a reasonable search and seizure thereby violating s. 8 of the *Charter*; specifically, whether s. 21 of the Act met the fourth criteria of the test set out in *Hunter v. Southam Inc.*, for a search and seizure to comply with s. 8. Mahoney J. for the Federal Court of Appeal held that s. 21 of the Act was not in conflict with s. 8 of the *Charter* [p. 183]:

> The warrant in issue was granted in respect of a threat to national security, not the commission of an offence in the conventional sense. To conclude, as *Hunter et al. v. Southam Inc.* anticipated, that a different standard should apply where national security is involved is not necessarily to apply a lower standard but rather one which takes into account of reality.
>
> Since the Act does not authorize the issuance of warrants to investigate offences in the ordinary criminal context, nor to obtain evidence of such offences, it is entirely to be expected that s. 21 does not require the issuing judge to be satisfied that an offence has been committed and that evidence thereof will be found in execution of the warrant. What the Act does authorize is the investigation of threats to the security of Canada and, *inter alia*, the collection of information respecting activities that may, on reasonable grounds, be suspected of constituting such threats. Having regard to the definition of "judge", s. 21(2)(a) of the Act fully satisfies, *mutatis mutandis*, the prescription of *Hunter et al. v. Southam Inc.* as to the minimum criteria demanded by s. 8 of legislation authorizing a search and seizure. The judge is required to be satisfied, on reasonable and probable grounds established by sworn evidence, that a threat to the security of Canada exists and that a warrant is required to enable its investigation. In my opinion, that is an objective standard.
>
> ...I find no merit in the argument that the warrant is invalid, on its face, by reason of its failure to meet the minimum standards for a reasonable search and seizure required by the *Charter*.

118 It is the respondent's position that *R. v. Atwal*, *supra*, is binding on all designated judges and therefore there is no need for this Court to entertain a similar challenge to this Act.

119 In summation, the object of this Act is not law enforcement, and therefore the standard set out in *Hunter v. Southam Inc.*, *supra*, with respect to statute authorized searches does not necessarily apply, yet upon reviewing ss. 21 through s. 26, the statute meets the four minimum criteria set out in *Hunter v. Southam Inc.*, *supra*. Moreover, the

Federal Court of Appeal in *R. v. Atwal* has held that the Act meets the criteria set out in *Hunter v. Southam Inc.*, *supra*. It is to be concluded that a statute authorized search under the Act would be reasonable. Therefore, the Act does not infringe the right to be free from unreasonable search and seizure.

Section 7 of the Charter of Rights

120 It is the applicant's submission that the impugned provisions of the Act allow CSIS to invade an individual's personal autonomy in a manner that is completely unfettered by procedural safeguards or in a manner that is not in accordance with the principles of fundamental justice.

121 The applicant submits that the impugned provisions of the Act authorize and CSIS has used, intrusive surveillance techniques in the private lives of Canadians engaged in lawful activities. The impugned provisions effect the liberty of individuals to engage in personal decision making about their political or social beliefs and as such violate s. 7 of the *Charter*.

122 The respondent submits that the applicant has failed to discharge its onus to establish that the Act, either in its purpose or effect, violates s. 7 of the *Charter*.

123 The applicant submits, as stated in *Re Singh and the Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, the interests of life, liberty and security of the person are independent rights which must be given independent meaning. Thus, a violation of any one of these interests constitutes a violation of the right.

124 The applicant relies on the case of *R. v. Morgentaler, Smoling and Scott*, [1988] 1 S.C.R. 30, where it was held that the right to liberty includes a respect for human dignity which in turn includes the ability of an individual to make fundamental personal choices without interference from the state. Security of the person includes the freedom from both physical and psychological harm. Section 7 of the *Charter* also guarantees to every individual a degree of personal autonomy over decisions which affect their personal lives. With respect to liberty, Wilson J. stated [pp. 166-167]:

> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.
>
> . . . . .
>
> Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

Wilson J. further stated at p. 171:

> I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.
>
> The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant women. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

125 The respondent submits that s. 7 of the *Charter* does not protect a person against emotional stress in absence of a violation of liberty or security of the person; see *R. v. X.* (1982), 43 O.R. (2d) 685 (Ont. H.C.); and *Downes v. Minister of Employment and Immigration* (1986), 4 F.T.R. 215 (F.C.T.D.).

126 In *R. v. X.*, *supra*, the complainant of an alleged rape did not wish to testify, and asked to be excused from giving further testimony on the ground that her right to security of the person, protected by s. 7 of the *Charter* was being violated thereby. With respect to s. 7, Linden J. stated [pp. 688-9]:

> *It seems to me, however, that to violate any of these three rights [security of the person involves physical, mental and social well being], it is necessary for there to be some serious substantial interference with them. It is not enough, in my view, to cause only upset, worry and anxiety, for these fleeting feelings may be present, to a greater or lesser extent, in a great many situations*. There is no doubt that the applicant is under considerable stress and that she views her continued involvement in these proceedings with foreboding and even fear. She is deserving of sympathy and empathy from her fellow citizens. This court is most sensitive to her difficulty, as it is to that of all witnesses who must testify in criminal and indeed, other trials, particularly when these witnesses are the victims of those crimes. It is rarely a pleasant experience for witnesses or victims to testify, especially those who are victims of this particularly vicious type of offence.
>
> Nevertheless, I am unable to hold that the security of the person of this particular applicant had been interfered with by the State in requiring her to testify at the preliminary hearing in this case. Although it is clearly a stressful situation for her to testify, and it would certainly be to her emotional detriment, the evidence is not strong enough for me to conclude that her security of the person would be interfered with. Anxiety and stress, as real and unpleasant as they may be, are not enough to qualify as infringements of the security of the person. It is hard to differentiate the applicant's distress from that of many other rape victims, who often suffer emotional trauma in giving evidence, yet still proceed to do so as their public duty. (Emphasis added)

127 In *Downes v. Minister of Employment and Immigration, supra*, McNair J. states [p. 220]:

> I fail to see how the junior applicant could have his right of the security of the person violated if his father is forced to leave Canada. *Emotional stress is not, in my view, the sort of deprivation of security of person that is within the contemplation of s. 7 of the Charter*. (Emphasis added)

128 The purpose of the Act is not to restrict a person's ability to make fundamental personal choices without the interference of the state and, therefore, the individual's rights to liberty is not restricted. In addition the purpose of the Act is not to control the individual's personal autonomy over decisions which effect their personal lives. I would hold similarly that the execution of the Act does not have an effect on individual rights to liberty and security of the person.

129 Furthermore, the applicant argues the impugned provisions of the Act allow CSIS to invade an individual's personal autonomy in a manner that is completely unfettered by procedural safeguards or in a manner not in accordance with principles of fundamental justice.

130 The respondent submits that in order to show that the legislation is void for vagueness under s. 7 of the *Charter*, and therefore not in accordance with the principles of fundamental justice, the applicant must show that the statute is vague in all respects so that it really specifies no standard of conduct. As previously submitted, the CSIS legislation does establish a standard of conduct; see *R. v. Zundel* (1987), 56 C.R. (3d) 1 (Ont. C.A.); and *Village of Hoffman Estates et al. v. Flipside, Hoffman Estates Inc.* (1982), 455 U.S. 489 , adopted in *R. v. Morgentaler, Smoling and Scott* (1985), 52 O.R. (2d) 353.

131 In *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.R. 1123, the Court cites with approval *R. v. Zundel*, *supra*; and *Village of Hoffman Estates et al. v. Flipside, Hoffman Estates Inc.*, *supra* adopted in *R. v. Morgentaler, Smoling and Scott*, *supra*. With respect to the issue of vagueness and overbreadth in relation to s. 7 of the *Charter*, Lamer J. states [pp. 1154]:

> The relationship between vagueness and overbreadth in Canadian law has been expressly addressed in *R.V. Zundel* (1987), 31 C.C.C. (3d) 97 (Ont. C.A.) ... in a decision rendered "By the Court", at pp. 125-126:
>
> > Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad. Vagueness or overbreadth, for the purpose of determining the permissibly regulated area of conduct, and whether freedom of expression under s. 2(b) of the *Charter* has been breached, may be different from vagueness or overbreadth for the purpose of applying the criteria in *Oakes* as to the application of s. 1 of the *Charter*.
>
> Further, the position in *Hoffman Estates*, *supra*, was adopted and followed by the Ontario Court of Appeal in *R. v. Morgentaler, Smoling and Scott* (1985), 52 O.R. (2d), at pp. 387-388. *It would seem to me that since the advent of the Charter, the doctrine of vagueness or overbreadth has been the source of attack on laws on two grounds. First, a law that does not give fair notice to a person of the conduct that is contemplated as criminal, is subject to a s. 7 challenge to the extent that such a law may deprive a person of liberty and security of the person in a manner that does not accord with the principles of fundamental justice. ... Second, where a separate Charter right or freedom has been limited by legislation, the doctrine of vagueness or overbreadth may be considered in determining whether the limit is "prescribed by law" within the meaning of s. 1 of the Charter*. In this regard I quote from the decision of Hugessen, J., of the Federal Court of Appeal in *Luscher v. Deputy Minister, Revenue Can-*

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> *ada, Customs and Excise*, [1985] 1 F.C., at pp. 89-90: In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability to the legal consequences. (Emphasis added)

132 It was held that a law that is impermissibly vague and that has as a potential sanction the deprivation of liberty or security of the person, offends s. 7 of the *Charter*.

133 I cannot hold that the Act is impermissibly vague, such that a person may be deprived of liberty or security of the person. There are various safeguards provided for in the Act to ensure that CSIS limits its activities to those that are strictly necessary.

134 I find the applicant has failed to establish that the *Canadian Security Intelligence Act* infringes upon s. 2(b)(c)(d), 7 or 8 of the *Charter*.

135 If the parties are unable to agreeds to costs they may make written submissions.

Appendix — Appendix A

The Canadian Security Intelligence Act, R.S.C. 1985, c. C-23: (Emphasis added)

> 2. In this Act, ...
>
> *"threats to the security of Canada"* means
>
> (a) *espionage or sabotage* that is against Canada or is *detrimental to the interests of Canada or activities directed toward* or in support of such espionage or sabotage,
>
> (b) *foreign influenced activities* within or relating to Canada that are *detrimental to the interests of Canada* and are clandestine or deceptive or involve a threat to any person,
>
> (c) *activities within or relating to Canada directed toward or in support of* the threat of use of acts of serious violence against persons or property *for the purpose of achieving a political objective within Canada or a foreign state*, and
>
> (d) *activities* directed toward undermining by covert unlawful acts, or *directed toward or intended ul-*

timately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

6. The Director, under the direction of the Minister, has the control and management of the Service and all matters connected therewith,

(2) In providing the direction referred to in subsection (1), the Minister may issue to the Director written directions with respect to the Service and a copy of any such direction shall, forthwith after it is issued, be given to the Review Committee.

(3) Directions issued by the Minister under subsection (2) shall be deemed not to be statutory instruments for the purposes of the *Statutory Instruments Act*.

7.(1) The Director shall consult the Deputy Minister on

(a) the general operational policies of the Service; and

(b) any matter with respect to which consultation is required by directions issued under subsection 6(2).

(2) The Director or any employee designated by the Minister for the purpose of applying for a warrant under section 21 or 23 shall consult the Deputy Minister before applying for the warrant or the renewal of the warrant.

. . . . .

12. The Service shall *collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence* respecting activities that may on reasonable grounds be suspected of constituting *threats to the security of Canada* and, in relation thereto, shall report to and advise the Government of Canada.

21.(1) Where the Director or any employee designated by the Minister for the purpose *believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada* or to perform its duties and functions under section 16, the Director or employee may, *after having obtained the approval of the Minister*, make an application in accordance with subsection (2) *to a judge* for a warrant under this section.

(2) An application *to a judge* under subsection (1) shall be made in writing and be accompanied by an *affidavit of the Applicant deposing* to the following matters, namely,

(a) the *facts relied on to justify the belief, on reasonable grounds, that a warrant* under this section is *required* to enable the Service to *investigate a threat to the security of Canada* or to perform its duties and functions under section 16;

(b) that other investigative procedures have been tried and have failed or why it appears that they are unlikely to succeed, that the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures *or that without a warrant under this section it is likely that information of importance with respect to the threat to the security of Canada* or the performance of the duties and functions under section 16 referred to in paragraph (a) *would not be obtained*;

(c) the type of communication proposed to be intercepted, the type of information, records, document or things proposed to be obtained and the powers referred to in paragraphs (3)(a) to (c) proposed to be exercised for that purpose;

(d) the identity of the person, if known, whose communication is proposed to be intercepted or who has possession of the information, record, document or thing proposed to be obtained;

(e) the persons or classes of persons to whom the warrant is proposed to be directed;

(f) a general description of the place where the warrant is proposed to be executed, if a general description of that place can be given;

(g) the period, not exceeding sixty days or one year, as the case may be, for which the warrant is requested to be in force that is applicable by virtue of subsection (5); and

(h) any previous application made in relation to a person identified in the affidavit pursuant to paragraph (d), the date on which the application was made, the name of the judge to whom each application was made and the decision of the judge thereon.

(3) Notwithstanding any other law but subject to the *Statistics Act, where the judge* to whom an application under subsection (1) is made is satisfied of the matters referred to in paragraphs (2)(a) and (b) set out in the affidavit accompanying the application, *the judge may issue a warrant authorizing the persons to whom it is directed to intercept any communication or obtain any information, record, document or thing and, for that purpose*,

(a) *to enter any place or open or obtain access to any thing*;

(b) *to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record, document or thing; or*

(c) *to install, maintain or remove any thing*.

(4) There *shall be specified in a warrant* issued under subsection (3)

(a) the type of communication authorized to be intercepted, the type of information, records, documents or things authorized to be obtained and the powers referred to in paragraphs (3)(a) to (c) authorized to be exercised for that purpose;

(b) the identity of the person, if known, whose communication is to be intercepted or who has possession of the information, record, document or thing to be obtained;

(c) the persons or classes of persons to whom the warrant is directed;

(d) a general description of the place where the warrant may be executed, if a general description of that place may be given;

(e) the period for which the warrant is in force; and

(f) such terms and conditions as the judge considers advisable in the public interest.

(5) A warrant shall not be issued under subsection (3) for a period exceeding

(a) sixty days where the warrant is issued to enable the Service to investigate a threat to the security of Canada within the meaning of paragraph (d) of the definition of that expression in section 2; or

(b) one year in any other case.

22. *On application in writing to a judge for the renewal of a warrant issued under subsection 21(3)* made by a person entitled to apply for such a warrant after having obtained the approval of the Minister, the judge may, from time to time, renew the warrant for a period not exceeding the period for which the warrant may be issued pursuant to subsection 21(5) if satisfied by evidence on oath that

(a) *the warrant continues to be required to enable the Service to investigate a threat to the security of Canada* or to perform its duties and functions under section 16; and

(b) any of the matters referred to in paragraph 21(2)(b) are applicable in the circumstances.

23.(1) On application in writing by the Director to any employee designated by the Minister for the purpose, *a judge may, if the judge thinks fit, issue a warrant* authorizing the persons to whom the warrant is directed to remove from any place any thing installed pursuant to a warrant issued under subsection 21(3) and, for that purpose, to enter any place or open or obtain access to any thing.

(2) There shall be specified in a warrant issued under subsection (1) the matters referred to in paragraphs 21(4)(c) to (f).

24. *Notwithstanding any other law, a warrant issued under section 21 or 23*

(a) *authorizes* every person or person included in a class of persons to whom the warrant is directed,

(i) in the case of a warrant issued under *section 21, to exercise the powers specified in the warrant* for the purpose of interception communications of the type specified therein or obtaining information, records, documents or things of the type specified therein, or

(ii) in the case of a warrant issued under *section 23, to execute the warrant*; and

(b) authorizes any other person to assist a person who that other person believes on reasonable grounds is acting in accordance with such a warrant.

25. No action lies under section 18 of the *Crown Liability Act* in respect of

(a) the use or disclosure pursuant to this Act of any communication intercepted under the authority of a warrant issued under section 21; or

(b) the disclosure pursuant to this Act of the existence of any such communication.

26. Part VI of the *Criminal Code* does not apply in relation to any interception of a communication under the authority of a warrant issued under section 21 or in relation to any communication so intercepted.

30.(1) The Governor in Council shall appoint an officer to be known as the Inspector General, who is responsible to the Deputy Minister.

(2) The functions of the Inspector General are

(a) to monitor the compliance by the Service with its operational policies;

(b) to review the operational activities of the Service; and

(c) to submit certificates pursuant to subsection 33(2).

33.(1) The Director shall, in relation to every period of twelve months or such lesser period as is specified by the Minister, submit to the Minister, at such times as the Minister specifies, reports with respect to the operational activities of the Service during that period, and shall cause the Inspector General to be given a copy of each such

report.

(2) As soon as practicable after receiving a copy of a report referred to in subsection (1), the Inspector General shall submit to the Minister a certificate stating the extent to which the Inspector General is satisfied with the report and whether any act or thing done by the Service in the course of its operational activities during the period to which the report relates is, in the opinion of the Inspector General,

(a) not authorized by or under the Act or contravenes any direction issued by the Minister under subsection 6(2); or

(b) involves an unreasonable or unnecessary exercise by the Service of any of its powers.

(3) As soon as practicable after reviewing a report referred to in subsection (1) and a certificate of the Inspector General referred to in subsection (2), the Minister shall cause the report and certificate to be transmitted to the Review Committee.

34.(1) There is hereby established a committee to be known, as the Security Intelligence Review Committee, consisting of a Chairman and not less than two and not more than four other members, all of whom shall be appointed by the Governor in Council from among members of the Queen's Privy Council for Canada who are not members of the Senate or the House of Commons, after consultation by the Prime Minister of Canada with the Leader of the Opposition in the House of Commons and the leader in the House of Commons of each party having at least twelve members in that House.

. . . . .

37. Every member of the Review Committee and every person engaged by it shall comply with all security requirements applicable by or under this Act to an employee and shall take the oath of secrecy set out in the schedule.

38. The function of the Review Committee are

(a) to review generally the performance by the Service of its duties and functions and, in connection therewith,

(i) to review the reports of the Director and certificates of the Inspector General transmitted to it pursuant to subsection 33(3),

(ii) to review directions issued by the Minister under subsection 6(2),

(iii) to review arrangements entered into by the Service pursuant to subsections 13(2) and (3) and 17(1) and to monitor the provision of information and intelligence pursuant to those arrangements,

(iv) to review any report or comment given to it pursuant to subsection 20(4),

(v) to monitor any request referred to in paragraph 16(3) made to the Service,

(vi) to review the regulations, and

(vii) to compile and analyse statistics on the operational activities of the Service;

(b) to arrange for reviews to be conducted or to conduct reviews pursuant to section 40; and

(c) to conduct investigations in relation to

(i) complaints made to the Committee under sections 41 and 42,

. . . . .

40. For the purpose of ensuring that the activities of the Service are carried out in accordance with this Act, the regulations and directions issued by the Minister under subsection 6(2) and that the activities do not involve any unreasonable or unnecessary exercise by the Service of any of its powers, the Review Committee may

(a) direct the Service or Inspector General to conduct a review of specific activities of the Service and provide the Committee with a report of the review; or

(b) where it considers that a review by the Service or the Inspector General would be inappropriate, conduct such a review itself.

41.(1) Any person may make a complaint to the Review Committee with respect to any act or thing done by the Service and the Committee shall, subject to subsection (2), investigate the complaint if

(a) the complainant has made a complaint to the Director with respect to that act or thing and the complainant has not received a response within such period of time as the Committee considers reasonable or is dissatisfied with the response given; and

(b) the Committee is satisfied that the complaint is not trivial, frivolous, vexatious or made in bad faith.

. . . . .

56.(1) After July 16, 1989, a comprehensive review of the provisions and operation of this Act shall be undertaken by such committee of the House of Commons or of both Houses of Parliament as may be designated or estab-

lished by Parliament for that purpose.

(2) The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further times as Parliament may authorize, submit a report on the review to Parliament including a statement of any changes the committee recommends.

END OF DOCUMENT