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Canadian Civil Liberties Assn. v. Canada (Attorney General)

The Corporation of the Canadian Civil Liberties Association, Appellant (Applicant) and The Attorney General of Canada, Respondent

Ontario Court of Appeal

Abella, Austin and Charron JJ.A.

Heard: November 4 and 5, 1997
Judgment: July 9, 1998[FN*]
Docket: CA C11823

Proceedings: affirming (1992), 91 D.L.R. (4th) 38 (Ont. Gen. Div.) (Ont. Gen. Div.); and reversing (1990), 45 Admin. L.R. 94 (Ont. H.C.)

Counsel: *Ian J. Roland*, *Martin J. Doane* and *Pamela Shime*, for the appellant.

Donald MacIntosh and *David Sgayias*, for the respondent.

Subject: Public; Constitutional; Civil Practice and Procedure

Constitutional law --- Determining constitutionality — General

Non-profit corporation brought application for declaration that ss. 12 and 21 to 26 of Canadian Security Intelligence Service Act were unconstitutional, as they violated ss. 2(b) to 2(d), 7 and 8 of Charter — Corporation argued that Act authorized intelligence service to use intrusive surveillance techniques, which inhibited individuals from expressing themselves freely and participating in legitimate activities — Application was dismissed — Although activities under review fell within sphere of conduct protected by ss. 2(b) to 2(d) of Charter, purpose and effect of Act was not to

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restrict freedoms guaranteed under Charter — Association related to corporation brought appeal, and Attorney General brought cross-appeal on issue of standing — Appeal dismissed and cross-appeal allowed — Association failed to raise serious issue of invalidity — Canadian Charter of Rights and Freedoms, ss. 2, 2(b) to 2(d), 7, 8 — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21-26.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — General

Non-profit corporation brought application for declaration that ss. 12 and 21 to 26 of Canadian Security Intelligence Service Act were unconstitutional, as they violated ss. 2(b) to 2(d), 7 and 8 of Charter — Corporation argued that Act authorized intelligence service to use intrusive surveillance techniques, which inhibited individuals from expressing themselves freely and participating in legitimate activities — Application was dismissed — Purpose of Act was not to restrict person's ability to make fundamental choices without interference of state — Individual's right to liberty under s. 7 of Charter was not restricted — Association related to corporation brought appeal on other grounds — Appeal dismissed — Canadian Charter of Rights and Freedoms, ss. 2(b) to 2(d), 7, 8 — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21-26.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Unreasonable search or seizure

Non-profit corporation brought application for declaration that ss. 12 and 21 to 26 of Canadian Security Intelligence Service Act were unconstitutional, as they violated ss. 2(b) to 2(d), 7 and 8 of Charter — Corporation argued that Act authorized intelligence service to use intrusive surveillance techniques, which inhibited individuals from expressing themselves freely and participating in legitimate activities — Application was dismissed — Search under Act was reasonable and did not infringe rights protected under s. 8 of Charter — Association related to corporation brought appeal, and Attorney General brought cross-appeal on issue of standing — Appeal dismissed and cross-appeal allowed — Issue as to whether s. 8 of Charter was violated by impugned provisions of Act was resolved on basis of stare decisis — Canadian Charter of Rights and Freedoms, ss. 2(b) to 2(d), 7, 8 — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21-26.

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

Non-profit corporation brought application for declaration that ss. 12 and 21 to 26 of Canadian Security Intelligence Service Act were unconstitutional, as they violated ss. 2(b) to 2(d), 7 and 8 of Charter — Corporation argued that Act authorized intelligence service to use intrusive surveillance techniques, which inhibited individuals from expressing themselves freely and participating in legitimate activities — Attorney General challenged corporation's standing — Corporation granted standing to bring application — Corporate status was not bar to public interest standing in challenges under s. 7 of Charter — Act was serious issue to advocacy groups and citizens at large, and there was no better way for issues to be litigated — Attorney General brought appeal — Appeal allowed — Motions judge erred in refusing to consider merits of application on issue of standing — Standing should have been refused on basis that association failed to raise issue recognized in Canadian constitutional jurisprudence — Canadian Charter of Rights and Freedoms, ss. 2(b) to 2(d), 7, 8 — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21-26.

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A non-profit corporation brought an application for a declaration that ss. 12 and 21 to 26 of the *Canadian Security Intelligence Service Act* were unconstitutional, as they violated ss. 2(b) to 2(d), 7 and 8 of the *Canadian Charter of Rights and Freedoms*. The corporation argued that the Act authorized the intelligence service to use intrusive surveillance techniques, which inhibited individuals from expressing themselves freely and participating in legitimate activities. The Attorney General challenged the corporation's standing. The motions judge granted standing to the corporation, on the basis that the Act was a serious issue to advocacy groups and citizens at large, and that there was no better way for the issues to be litigated. The trial judge dismissed the application, finding that although the activities under review fell within the sphere of conduct protected by ss. 2(b) to 2(d) of *Charter*, the purpose and effect of Act was not to restrict freedoms guaranteed under the *Charter*. It was held that the purpose of the Act was not to restrict a person's ability to make fundamental choices without the interference of the state, and that an individual's right to liberty under s. 7 of *Charter* was not being restricted. The trial judge further found that searches under the Act were reasonable, and did not infringe rights protected under s. 8 of the *Charter*. The Act required the intelligence service to obtain a warrant from the Federal Court before it could engage in surveillance activities, and reasonable grounds had to be established to obtain a warrant. An association related to the corporation brought an appeal of all issues, with the exception of the alleged infringement of s. 7 of the *Charter*. The Attorney General brought a cross-appeal on the issue of the association's standing to bring the application.

Held: The appeal was dismissed; the cross-appeal was allowed.

Charron J.A. (Austin J.A. concurring): The association failed to raise a serious issue of invalidity concerning the violation of s. 2 of the *Charter*. The application could not succeed due to the lack of an evidentiary basis in support of its allegations. The association presented no relevant adjudicative facts to support the allegations of infringement of s. 2, and relied entirely on the argument that the Act was overbroad. The association's position was that certain key components of the definition of "threats to the security of Canada" in the Act, when combined with the enabling provisions of the Act, in effect permit techniques of intrusive surveillance for use against Canadians which exceed any clearly demonstrated need. It is not acceptable to simply rely on "overbreadth" as proof of an infringement of *Charter* rights. *Charter* decisions cannot be made without a factual foundation, except in certain exceptional cases. This case was not one of those exceptional cases where the legislation, on its face, violated one of the fundamental freedoms.

The question as to whether s. 8 of the *Charter* was violated by the impugned provisions of the Act was resolved on the basis of *stare decisis*. The issue had been raised in a previous application brought by a private litigant who had been subjected to a search by the intelligence service. The court in that case had determined that s. 21 of the Act met the constitutional requirements set out in s. 8 of the *Charter*. In addition, the adjudicative facts presented in support of the claim of an infringement of s. 8 were so weak that it was questionable whether the association raised a serious issue of invalidity.

At the preliminary motion, the association argued that it should be granted public interest standing to bring the application. The association claimed that given the surreptitious nature of the impugned surveillance techniques, it was in the best position to bring the issues before the court, as individuals would be unable to gather satisfactory proof that their constitutional rights had been threatened or violated, and seek judicial protection. In order to obtain public interest standing, a party must show that there is a serious issue as to the validity of the legislation, that the party is

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directly affected by the legislation or has a genuine interest in its validity, and there is no other reasonable and effective way to bring the legislation's validity before the court. The motions judge erred in refusing to consider the merits of the application when determining the issue of standing. The granting of public interest standing is a discretionary matter, and the discretion must be exercised judicially and in accordance with established principles. The proper exercise of discretion includes consideration of the sufficiency of the evidence. Standing should have been refused on the basis that the association failed to raise issues recognized in Canadian constitutional jurisprudence. In addition, with respect to the s. 8 challenge, standing should have been refused on the basis that it had been attacked by a private litigant. It was not necessary to grant standing to the association to ensure that the legislation would not be immune from constitutional challenge. The motions judge erred in finding that the most reasonable and effective manner in which the issues could be brought before the court was to grant the corporation standing.

Abella J.A. (dissenting in part): The motions judge correctly exercised his discretion in granting the corporation standing to bring its application. There was a serious issue as to the constitutionality of portions of the legislation and the corporation was in the best position to bring the issue effectively to the court's attention. Although recent cases emphasized the significance of an adequate factual context, they did not suggest that the merits of a case be given pre-eminent consideration when considering the threshold issue of standing. It would be a significant diminution of access to public interest standing to merge the question of standing and merits. It is necessary to have enough evidence to show an issue is arguable, and serious enough to warrant judicial scrutiny, but not to demonstrate the likelihood of success. A determination of merits at the outset could defeat the purpose of public interest standing principles, and exclude from judicial examination, issues worthy of serious consideration. It was in the public's interest that the the *Canadian Security Intelligence Service Act* be judicially reviewed to ensure that it met constitutional standards. The corporation had devoted years to ensuring that covert surveillance was not a ruse for intelligence-gathering into lawful, constitutionally protected activities. No person or organization had greater expertise in the area or was better able to elucidate the relevant issues for the court. The fact that a private litigant had previously raised a related issue should not foreclose the granting of standing to an organization.

Cases considered by *Charron J.A.* (*Austin J.A.* concurring):

Atwal v. Canada (1987), 79 N.R. 91, 36 C.C.C. (3d) 161, 12 F.T.R. 318n, 28 Admin. L.R. 92, 32 C.R.R. 146, 59 C.R. (3d) 339, [1988] 1 F.C. 107 (Fed. C.A.) — considered

Borowski v. Canada (Minister of Justice), [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 12 Sask. R. 420, 39 N.R. 331, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588 (S.C.C.) — applied

Canada v. Pharmaceutical Society (Nova Scotia), 15 C.R. (4th) 1, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 93 D.L.R. (4th) 36, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* [1992] 2 S.C.R. 606, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 43 C.P.R. (3d) 1, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 74 C.C.C. (3d) 289, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 10 C.R.R. (2d) 34, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 139 N.R. 241, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 114 N.S.R. (2d) 91, 313 A.P.R. 91 (S.C.C.) — applied

Canadian Council of Churches v. R., *(*sub nom. *Canadian Council of Churches v. Canada)* 132 N.R. 241, 5 C.P.C. (3d) 20, 2 Admin. L.R. (2d) 229, *(*sub nom. *Canadian Council of Churches v. Canada)* 88 D.L.R. (4th)

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193, 16 Imm. L.R. (2d) 161, *(*sub nom. *Canadian Council of Churches v. Canada (Minister of Employment & Immigration))* 8 C.R.R. (2d) 145, *(*sub nom. *Canadian Council of Churches v. Canada (Minister of Employment & Immigration))* [1992] 1 S.C.R. 236, 49 F.T.R. 160 (note) (S.C.C.) — applied

Danson v. Ontario (Attorney General), 43 C.P.C. (2d) 165, 73 D.L.R. (4th) 686, [1990] 2 S.C.R. 1086, 50 C.R.R. 59, 41 O.A.C. 250, 112 N.R. 362, 74 O.R. (2d) 763 (note) (S.C.C.) — distinguished

Energy Probe v. Canada (Attorney General) (1989), 3 C.E.L.R. (N.S.) 262, 58 D.L.R. (4th) 513, 33 O.A.C. 39, 37 Admin. L.R. 1, 35 C.P.C. (2d) 201, 40 C.R.R. 303, 68 O.R. (2d) 449 (Ont. C.A.) — referred to

Finlay v. Canada (Minister of Finance) (1986), [1987] 1 W.W.R. 603, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321, 71 N.R. 338, 23 Admin. L.R. 197, 17 C.P.C. (2d) 289, 8 C.H.R.R. D/3789 (S.C.C.) — applied

Hy & Zel's Inc. v. Ontario (Attorney General), 160 N.R. 161, 67 O.A.C. 81, [1993] 3 S.C.R. 675, 107 D.L.R. (4th) 634, 18 C.R.R. (2d) 99 (S.C.C.) — applied

MacKay v. Manitoba, [1989] 6 W.W.R. 351, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385, 99 N.R. 116, 61 Man. R. (2d) 270, 43 C.R.R. 1 (S.C.C.) — distinguished

MacNeil v. Nova Scotia (Board of Censors) (1975), 12 N.S.R. (2d) 85, [1976] 2 S.C.R. 265, 5 N.R. 43, 32 C.R.N.S. 376, *(*sub nom. *Nova Scotia Board of Censors v. MacNeil)* 55 D.L.R. (3d) 632 (S.C.C.) — applied

Thorson v. Canada (Attorney General) (No. 2) (1974), [1975] 1 S.C.R. 138, 1 N.R. 225, 43 D.L.R. (3d) 1 (S.C.C.) — applied

Cases considered by *Abella J.A.* (dissenting in part):

Atwal v. Canada (1987), 79 N.R. 91, 36 C.C.C. (3d) 161, 12 F.T.R. 318n, 28 Admin. L.R. 92, 32 C.R.R. 146, 59 C.R. (3d) 339, [1988] 1 F.C. 107 (Fed. C.A.) — referred to

Borowski v. Canada (Minister of Justice), [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 12 Sask. R. 420, 39 N.R. 331, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588 (S.C.C.) — applied

Canadian Council of Churches v. R., *(*sub nom. *Canadian Council of Churches v. Canada)* 132 N.R. 241, 5 C.P.C. (3d) 20, 2 Admin. L.R. (2d) 229, *(*sub nom. *Canadian Council of Churches v. Canada)* 88 D.L.R. (4th) 193, 16 Imm. L.R. (2d) 161, *(*sub nom. *Canadian Council of Churches v. Canada (Minister of Employment & Immigration))* 8 C.R.R. (2d) 145, *(*sub nom. *Canadian Council of Churches v. Canada (Minister of Employment & Immigration))* [1992] 1 S.C.R. 236, 49 F.T.R. 160 (note) (S.C.C.) — applied

Energy Probe v. Canada (Attorney General) (1989), 3 C.E.L.R. (N.S.) 262, 58 D.L.R. (4th) 513, 33 O.A.C. 39, 37

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Admin. L.R. 1, 35 C.P.C. (2d) 201, 40 C.R.R. 303, 68 O.R. (2d) 449 (Ont. C.A.) — applied

Finlay v. Canada (Minister of Finance) (1986), [1987] 1 W.W.R. 603, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321, 71 N.R. 338, 23 Admin. L.R. 197, 17 C.P.C. (2d) 289, 8 C.H.R.R. D/3789 (S.C.C.) — applied

Hy & Zel's Inc. v. Ontario (Attorney General), 160 N.R. 161, 67 O.A.C. 81, [1993] 3 S.C.R. 675, 107 D.L.R. (4th) 634, 18 C.R.R. (2d) 99 (S.C.C.) — applied

MacNeil v. Nova Scotia (Board of Censors) (1975), 12 N.S.R. (2d) 85, [1976] 2 S.C.R. 265, 5 N.R. 43, 32 C.R.N.S. 376, (sub nom. *Nova Scotia Board of Censors v. MacNeil)* 55 D.L.R. (3d) 632 (S.C.C.) — applied

Thorson v. Canada (Attorney General) (No. 2) (1974), [1975] 1 S.C.R. 138, 1 N.R. 225, 43 D.L.R. (3d) 1 (S.C.C.) — applied

Statutes considered by *Charron J.A.* (*Austin J.A.* concurring):

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2 — referred to

s. 2(b) — considered

s. 2(c) — considered

s. 2(d) — considered

s. 7 — referred to

s. 8 — considered

Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23

Generally — referred to

s. 2 "threats to the security of Canada" — considered

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s. 12 — considered

ss. 21-26 — considered

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 52(1) — considered

Immigration Act, 1976, S.C. 1976-77, c. 52

Generally — referred to

Statutes considered by *Abella J.A.* (dissenting in part):

Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23

s. 2 — considered

APPEAL by association from judgment reported at (1992), 91 D.L.R. (4th) 38, 8 O.R. (3d) 289 (Ont. Gen. Div.), dismissing association's application attacking constitutionality of provisions of *Canadian Security Intelligence Service Act*; CROSS-APPEAL by Attorney General from judgment reported at (1990), 45 Admin. L.R. 94, 74 O.R. (2d) 609, 72 D.L.R. (4th) 742, 45 C.P.C. (2d) 308 (Ont. H.C.), granting association standing to bring application attacking constitutionality of provisions of *Canadian Security Intelligence Service Act*.

***Charron J.A.* (*Austin J.A.* concurring):**

1 The appellant, the Corporation of the Canadian Civil Liberties Association, was granted standing to bring an application challenging the constitutional validity of certain investigative powers contained in the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (the "Act"), and seeking injunctive relief. The issue of standing was determined prior to the hearing as a preliminary matter. The decision is reported at (1990), 74 O.R. (2d) 609 (H.C.J.) [References are to this decision unless otherwise stated.]. Following a hearing, the application was dismissed: (1992), 8 O.R. (3d) 289 (Gen. Div.).

2 The appellant appeals from the dismissal of the application. The respondent, the Attorney General of Canada, cross-appeals on the issue of standing.

3 I have come to the conclusion that the issue of standing is determinative in this case. The main issues argued by counsel in relation to the appeal on the substantive merits of the application are more properly directed to the question

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of standing. In my view, the motions judge erred in granting the appellant standing to bring its application. In the result, I would allow the cross-appeal and dismiss the appellant's application on the ground of no standing. Consequently, I would also dismiss the appeal on the same ground.

A. The Applicant

4 The appellant 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 (the "Association"). In its material, the appellant states that its governance is closely linked to that of the Association. The appellant essentially relies on the status of the Association in support of its application for standing in this case.

5 The appellant describes the Association in its factum as follows:

> The Association is a national organization with more than sixty-five hundred (6,500) individual members. The Association's major objectives include the promotion of legal protection of the freedom and dignity of the individual against unreasonable invasion of public authority and the advancement of fair procedures for the determination of individual rights and obligations. The Association has long had a serious concern with the powers accorded the police and national security agencies in Canada. It has publicly addressed how far the powers of a national security agency may impinge on basic civil liberties such as those of speech, freedom of association and reasonable expectation of privacy.

6 The motions judge recognized the Association's "long history of involvement in the public debate over the constitutional validity of the CSIS legislation" (at p. 617) and the contributions to the debate of its General Counsel, Alan Borovoy. It would appear from the reasons of the motions judge that the appellant and the Association were treated as one and the same for the purpose of the application for standing. The parties on appeal have chosen to confine their argument to their respective facta on the issue of standing and no issue is raised on this question in either factum. In these circumstances, I am prepared to adopt the same approach as the motions judge and consider the appellant's interest to be the same as that of the Association.

B. Nature and Scope of the Application

7 The appellant seeks a declaration that ss.12 and 21 to 26 inclusive of the Act are unconstitutional and of no force and effect to the extent that they authorize the use of intrusive surveillance techniques of lawful activities of Canadian citizens and permanent residents. It is contended that the impugned legislative provisions violate the freedoms of speech, assembly and association and the right to be secure against unreasonable searches or seizures as guaranteed under ss. 2(b), (c), (d) and 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The appellant has abandoned its claim that the Act violated s. 7 *Charter* rights. The appellant also relies on s. 52(1) of the *Constitution Act*. The relevant constitutional provisions read as follows:

> 2. Everyone has the following fundamental freedoms:

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> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

8 The appellant is also seeking injunctive relief restraining the Canadian Security Intelligence Service ("CSIS") from acting under the impugned provisions of the Act. Specifically, the appellant seeks the following relief:

> (a) A declaration that s. 12 of the 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 defined as "threats to the security of Canada" in s. 2 of the Act.;
>
> (b) A declaration that ss. 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 s. 2 of the Act;
>
> (c) A 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 s. 2 of the Act.

9 CSIS is mandated, pursuant to ss.12 and 21 to 26 of the Act, to collect information respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, to report to and advise the Government of Canada. "Threats to the security of Canada" are defined in s. 2 of the 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,

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> (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 or 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 ultimately 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). [Emphasis added.]

10 The appellant argues that certain key components of that definition, when combined with some of the enabling provisions found in ss.12 and 21 to 26 of the Act, in effect permit techniques of intrusive surveillance for use against Canadian citizens and permanent residents which exceed any clearly demonstrated need. The appellant therefore relies on the overbreadth of the legislative provisions as a basis for establishing a violation of *Charter* rights and freedoms. The impugned provisions of the Act are appended to this decision for ease of reference.

11 The appellant concedes that there is a need for the creation of a government intelligence service. However, it is the appellant's position that the powers of surveillance available to CSIS against Canadian citizens and permanent residents in regard to their *lawful* activities are "excessive and needlessly broad." The appellant *does not* take issue with CSIS surveillance in relation to *unlawful* activities of Canadian citizens and permanent residents, or in relation to *activities*, lawful or unlawful, *of foreign visitors*.

12 The appellant further restricts its application to the use of *intrusive* techniques of surveillance authorized under the Act. It takes issue with the express authority under the Act for the use by CSIS, pursuant to judicial warrant, of powers such as electronic surveillance, mail opening, surreptitious searches and the invasion of confidential records. The appellant also takes issue with the deployment of covert informants, a surveillance technique CSIS can use without judicial authorization. The appellant *does not* take issue with the use of *overt* surveillance techniques.

13 In short, the appellant contends that the very existence of intrusive surveillance techniques under the Act inhibit and deter individuals from expressing themselves freely and participating in legitimate activities. The appellant expresses concern that, due to the surreptitious nature of the impugned CSIS surveillance techniques, its members and other Canadian citizens and permanent residents will not be able to gather satisfactory proof that their constitutional rights have been threatened or violated by CSIS and will therefore be unable to seek judicial protection of their rights and freedoms. Hence, it argues that it is in the best position to bring these issues before the court. The appellant states that it brings this application in order to secure and promote the constitutionally guaranteed rights of freedom of speech, freedom of assembly, freedom of association and the right to be secure against unreasonable searches or seizures.

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

14 In support of its application, the appellant relies on the alleged overbreadth of the impugned provisions themselves and on evidence which purports to show the adverse effects of the legislation. This evidence consists of four affidavits and a number of excerpts of reports prepared by the Security Intelligence Review Committee ("SIRC"). SIRC is an independent body established under the Act for the purpose of reviewing the performance of CSIS; ensuring that its activities are carried out in accordance with the Act and that the activities do not involve any unreasonable or unnecessary exercise by CSIS of its powers; and conducting investigations into complaints and other matters with respect to CSIS.

15 I will review this evidence in further detail later in this judgment; however, for the purpose of this overview, I will reproduce the motions judge's summary of the appellant's evidence (at p. 619):

> The applicant has put before the court affidavit evidence and copies of the SIRC Annual Reports for 1986-87 to 1988-89 inclusive, which purport to show that the use of intrusive surveillance techniques and other such powers have a "chilling effect" on the willingness of citizens to exercise their right to engage in lawful advocacy, protest or dissent. The applicant submits that since individuals proposing to do no more than engage in advocacy and dissent do not always know whether their lawful activities will be monitored, the cautious among them may, and do, choose to refrain from engaging in legitimate political activities for fear of becoming objects of CSIS surveillance. This assertion is supported somewhat by the affidavit evidence of three members of three different lawful advocacy groups who feel that they, their organizations and their membership have been the subject of CSIS surveillance. The fear of intrusion into their lives by CSIS, through the use of covert surveillance or actual interference in their affairs, is alleged by the applicant to be an infringement of the *Charter* rights of freedom of expression, assembly, association, the right to privacy and the right to be free from unreasonable search and seizure.

C. Principles Governing the Discretionary Grant of Public Interest Standing

16 The appellant does not contend that the impugned provisions of the Act affect its own rights or that it is affected differently from others so as to bring itself within the traditional rules governing standing. Rather, the applicant submits that, in the circumstances of this case, the court ought to exercise its discretion in recognizing its right to assert public interest standing.

17 It is well established that the granting of public interest standing is a discretionary matter. Further, it is trite law that a court must exercise its discretion judicially and in accordance with established principles. The Supreme Court of Canada, in a pre-*Charter* trilogy of decisions, established the requirements for a discretionary grant of public interest standing to challenge the validity of legislation: *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.); *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.); *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.).

18 These cases have established that, before a court will exercise its discretion in favour of an applicant seeking public interest standing, three criteria must be met:

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

(a) there must be a serious issue as to the validity of the Act;

(b) the applicant must be directly affected by the Act or have a genuine interest in its validity; and

(c) there must be no other reasonable and effective way to bring the Act's validity before the court.

These criteria have been reviewed by the Supreme Court in a number of post-*Charter* cases. As will become apparent from the brief review that follows, the criteria should not be considered as mere technical requirements to be applied in a mechanistic fashion. They have been extracted from various judicial responses to concerns arising out of any proposed extension of the scope of public interest standing. In order to understand and to apply these criteria properly these underlying concerns should be kept in mind.

19 In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.), the court extended the scope of the trilogy to non-constitutional challenges of administrative authority. Le Dain J., in writing for the court, identified the judicial concerns underlying the test for public interest standing and endeavoured to link its various requirements to these concerns (at p. 631-33):

> The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government.
>
> The concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability, which Laskin J. held in *Thorson* to be central to the exercise of the judicial discretion whether or not to recognize public interest standing.
>
> The judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody is addressed by the requirements affirmed in *Borowski* that there be a serious issue raised and that a citizen have a genuine interest in the issue.
>
> The judicial concern that in the determination of an issue a court should have the benefit of the contending views of the persons most directly affected by the issue - a consideration that was particularly emphasized by Laskin C.J. in *Borowski* - is addressed by the requirement affirmed in *Borowski* that there be no other reasonable and effective manner in which the issue may be brought before a court. [Emphasis added.]

20 While Le Dain J. identifies justiciability as a separate requirement, this factor appears to be subsumed in later cases in the consideration of the "serious issue" criterion.

21 In *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.), the court reviewed the approaches to

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

standing taken in the United Kingdom, Australia and the United States and concluded that each of these jurisdictions has taken a more restrictive approach than have the courts in Canada. The court then reviewed the criteria established by the earlier quartet of cases and posed the question whether the current test for public interest standing should be extended. While the court maintained the criteria set out in the earlier cases, it clearly opted for a restrictive approach in their application. Cory J., in writing for the court, stated as follows (at pp. 252-53):

> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act*, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
>
> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner. [Emphasis added.]

22 The Canadian Council of Churches (the "Council"), a federal corporation which represents the interests of a broad group of member churches including the protection and resettlement of refugees, was denied standing to challenge the constitutional validity of a number of provisions contained in the amended *Immigration Act*, *1976*. Although the court was satisfied that the Council had raised a serious issue of invalidity and had demonstrated a genuine interest, it failed on the third criterion. The court concluded as follows (at pp. 255-56):

> From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. [Emphasis added.]

23 In the subsequent case of *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 (S.C.C.), public interest standing was again denied, by majority decision, on the basis that other reasonable and effective ways to bring the issue before the court existed. In arriving at this conclusion, Major J., in writing for the majority, examined the lack

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856
of a proper evidentiary basis. He noted that the applicants relied upon the evidence filed in other applications and "presented almost no original evidence in support of their claim" (at p. 692). The court stated as follows (at pp. 693-94):

> As this Court stated in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp.361-62:
>
> > *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. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.
>
> More recently in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p.1093, this Court cautioned that "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". This mirrors the Court's vigilance in ensuring that it hears the arguments of the parties most directly affected by a matter. In the absence of facts specific to the appellants, both the Court's ability to ensure that it hears from those most directly affected and that *Charter* issues are decided in a proper factual context are compromised.

24 The majority decision does not provide any further analysis as to how the sufficiency of evidence relates to the issue of standing. L'Heureux-Dubé J. (McLachlin J. concurring) in her dissenting judgment in *Hy & Zel's* disagreed on this point. A consideration of her opinion may be useful in bringing the relationship between sufficiency of evidence and standing into better focus.

25 L'Heureux-Dubé J. was of the view that the appellants had standing under the traditional test and that they should also succeed under the test for discretionary grant of public interest standing. In considering the latter as an alternative basis for standing, she indicated her disagreement with the majority opinion on the relevance of the evidentiary basis to the issue of standing (at p. 720):

> This Court's decisions *MacKay* and *Danson*, which dealt with the need to avoid deciding *Charter* issues in a factual vacuum, are not at all relevant to the question of standing. If anything, they lend support to the notion that standing is an issue separate and apart from the question of the sufficiency of the evidence and, furthermore, that an appellant's standing can be unassailable even when there is not a shred of evidence to support a *Charter* claim.

In support of this statement, she notes that in *MacKay v. Manitoba*, [[1989] 2 S.C.R. 357 (S.C.C.)], the court indicated that there was not one particle of evidence before the court, yet there was no suggestion that the appellants lacked standing. Similarly, with respect to *Danson v. Ontario (Attorney General)*, [[1990] 2 S.C.R. 1086 (S.C.C.)], she noted that there was a complete absence of adjudicative facts, yet the court expressly stated that standing of the appellant was not an issue.

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

26 With respect, I have some difficulty with this reasoning since public interest standing was not in issue in either *MacKay* or *Danson*. In *MacKay*, the appellants were claiming that their own rights were violated, hence the traditional rules of standing would apply. However, the issue was never raised. In *Danson*, the facts could have given rise to a question of public interest standing but the only issue before the court was a narrow one, that is whether it was appropriate to seek constitutional declarations by way of application without alleging facts in support of the relief claimed. In answering this question in the negative, the court indeed expressly noted that standing of the appellant was not an issue before the court. I interpret this reference as a caution that the court's decision should not be taken as confirmation of Danson's standing.

27 In any event, L'Heureux Dubé J. was of the view that there was an evidentiary basis in *Hy & Zel's* and her comments on *MacKay* and *Danson* were not essential to her dissenting opinion. I mention her opinion on this point for sake of completeness because I wish to refer to another reference in her judgment which I find of assistance in establishing the link between the sufficiency of the evidence and standing. Earlier in her reasons, L'Heureux-Dubé J. provides a useful review of the various rationales which have been invoked for imposing restrictions on standing. She states (at pp. 702-3):

> Three major concerns are typically identified: the proper allocation of judicial resources; the prevention of vexatious suits brought at the behest of mere "busybodies"; and the particular requirements of the adversary system. The first category includes such concerns as fears about a multiplicity of suits, otherwise known as the "floodgates" argument. Within the second category, courts have employed standing restrictions to ensure that issues are fully canvassed by promoting the use of the judicial process to decide live disputes between parties as opposed to hypothetical ones. Under the latter category are subsumed such matters as the "justiciability" of the issue before the courts, whether the full dimensions of the issue can be expected to be aired before the court and limits on the exercise of judicial power.

28 I would agree with L'Heureux-Dubé J. that the issue of sufficiency of the evidence is entirely separate from the question of standing for those litigants who have a cause of action under the traditional rules, a situation which she was of the view existed in *Hy & Zel's*. These litigants have standing as of right. They do not depend on a discretionary grant of standing to pursue their claim. Any screening of unmeritorious claims which may be made under the rules of procedure on the ground of a lack of a proper evidentiary basis will not likely be related to any issue of standing.

29 However, where a litigant does not have a cause of action under the traditional rules and requires a discretionary grant of public interest standing to pursue its claim, the concerns identified above have to be addressed and these concerns, as held by the majority in *Hy & Zel's*, include a consideration of the sufficiency of the evidence. More will be said later on what constitutes a sufficient evidentiary basis for this purpose.

30 If one considers the rationales for imposing restrictions on standing which were identified by L'Heureux-Dubé J., it would seem to me quite clear that the lack of a proper evidentiary basis could have a bearing on considerations such as "the proper allocation of judicial resources", "ensuring that issues are fully canvassed", "promoting the use of the judicial process to decide live disputes between parties as opposed to hypothetical ones" and determining "whether the full dimensions of the issue can be expected to be aired before the court".

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

D. The Decision Under Appeal and the Issues Raised on the Cross-Appeal

31 The motions judge correctly instructed himself as to the three criteria which must be met before public interest standing will be granted. He did not, however, have the benefit of the subsequent decisions of the Supreme Court in *Canadian Council of Churches* and *Hy & Zel's* which assist in further defining these criteria. His decision with respect to each of the criteria is as follows:

1. Serious issue of invalidity

32 The motions judge addressed the question whether the seriousness of an issue relates to its general public importance or to its substantive merits. He reviewed some of the relevant jurisprudence and concluded that this requirement could not be equated to "a reasonable cause of action" and, hence, that this criterion related to the general importance of the issue. He stated as follows (at p. 618):

> In the case before me, the parties have agreed to have the issue of standing determined as a preliminary issue. While the nature of the applicant's interest in the substantive issues raised by the application is set out by the allegations and contentions in the application record and in the factums and authorities brief filed by the parties, I do not think it prudent to rule on the substantive merits of the application. Rather, the appropriate inquiry at this stage of the proceedings is to ask whether or not the application raises issues of general public importance which deserve the consideration of this court.
>
> In applying this standard as to whether or not the applicant has raised a "serious issue" as to the validity of the legislation, I do not wish to be seen as injecting another verbal formula into the process of determining the applicant's standing. Rather, interpreting the "serious issue" criterion to mean that the issue be one of general public importance is to indicate that by granting standing, the court is prepared to place a certain societal value on an interest and protect it by allowing it to be the subject of litigation, thus recognizing that the individual or group seeking to litigate is not disputing something of merely idiosyncratic interest.

The motions judge then reviewed the issues raised by the appellant in its application and concluded as follows (at p. 619):

> 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.

33 The respondent, in its cross-appeal, submits that the motions judge erred in relating the seriousness of the issues raised by the application to their general importance rather than to the substantive merits of the application. It is the respondent's position that the application has no substantive merit because it is unsupported by any evidentiary basis. Rather, it is based on hypothetical consequences which, it is argued, cannot form the basis for granting de-

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856
claratory and injunctive relief. Consequently, the respondent submits that standing ought to have been denied for failure to raise a serious issue of invalidity.

34 It is clear from the above-noted review of the jurisprudence that the motions judge erred in refusing to consider the merits of the application. In particular, *Canadian Council of Churches* and *Hy & Zel's* establish beyond controversy that the merits of the application are a relevant consideration, and indeed can become determinative, on the issue of standing. This court is in as good a position as the motions judge to assess this factor and I will address it later in these reasons.

2. Appellant's genuine interest in the validity of the Act

35 No issue is raised on appeal on this criterion. The respondent concedes that the appellant has demonstrated a genuine interest in the validity of the Act.

36 In my view, this concession is properly made with respect to the Association. As stated earlier, the parties appear to have been content throughout to have the appellant's interest considered as being the same as that of the Association.

3. Another reasonable and effective way to bring the issues before the court

37 The motions judge's decision on this issue summarizes well the position of the parties and it is useful to set out the full text of his reasons on this point (at pp. 619-21):

> 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 issues in

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

> 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.

38 The respondent submits that the motions judge erred in this conclusion. Persons whose activities are actually targeted by the legislation and who can claim that CSIS has actually violated their rights can, and do, challenge the constitutionality of the legislation. By way of example, the respondent notes the case of *Atwal v. Canada* (1987), 36 C.C.C. (3d) 161 (Fed. C.A.) where, by majority decision, the Federal Court of Appeal held that s. 21 of the Act met the constitutional requirements set out in s. 8 of the *Charter*. The respondent argues that those persons directly affected by the Act are the ones who can bring the issues before the court in the most reasonable and effective manner. It is submitted that, because the court did not have before it those persons who are most directly affected by the legislation, the application proceeded without a proper factual foundation.

39 As seen in *Hy & Zel's*, the sufficiency of the evidence can have some bearing on the application of this criterion. I will therefore return to it after my review and assessment of the evidence and the merits of the application.

E. The merits of the application

40 As stated earlier, the respondent contends that the application is without merit because it is without any evidentiary basis. I will review the evidence in some detail in order to assess this factor.

1. The evidence

41 In reviewing and assessing the evidence, it may be useful to recall the nature and scope of the application. What is brought in issue is the deleterious effect of the *intrusive* techniques of CSIS surveillance, (this is electronic surveillance, mail opening, surreptitious searches, the invasion of confidential records and the deployment of covert informants), as they relate to the lawful activities of Canadians and permanent residents. No issue is taken with the constitutional scope of *overt* surveillance techniques.

42 It is also important to review the distinction between adjudicative facts and legislative facts. Sopinka J. in *Danson* refers to this distinction (at p. 1099):

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p.353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis' words, "who did what, where, when, how, and with what motive or intent ...". Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: see e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, *per* Laskin C.J., at p.391; *Re Residential Tenancies Act 1979*, [1981] 1 S.C.R. 714, *per* Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, *per* McIntyre J., at p.318.

43 As noted earlier, the applicant filed four affidavits and various excerpts of reports from SIRC. The contents of this material can be summarized as follows:

a) affidavit by A. Alan Borovoy

44 Mr. Borovoy identifies himself as General Counsel of the Canadian Civil Liberties Association and states that, as such, he has authority to speak on behalf of the appellant. He states that the corporate objects of the appellant are identical to those of the Association. He then describes the Association, its objects and its extensive involvement in the litigation of civil liberties issues over the years.

45 This part of the affidavit, which consists of approximately one half of it, is of relevance to show that the Association (and presumably, the appellant) has a genuine interest in the validity of the Act. It is of no relevance to the substantive merits of the application.

46 In the second half of the affidavit, Mr. Borovoy describes some of the contents of the SIRC reports and refers to the other affidavits filed in support of the application. He then expresses the following belief with respect to the activities of CSIS:

> ... it is very difficult to conduct such pervasive intelligence operations without casting a chill over political liberty and personal privacy. At the very least, many people are likely to feel that they are under surveillance. This will particularly apply to those who have unconventional beliefs and ideologies. If such people think their organizations are infested with spies, they will not speak freely at their meetings. If they think they are being followed, they will not attend certain functions. If they think that their telephones are tapped, they will not speak freely on the telephone.

Mr. Borovoy then describes some "evidence" discovered as a result of the Association's investigations into the American experience. None of this "evidence" is filed. The remaining few paragraphs make further reference to SLRC reports. Finally, Mr. Borovoy states that unless an organization such as the appellant initiates legal proceedings to challenge the intrusive surveillance powers contained in the Act, such challenge is not likely to be made for a long

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856
period of time. He concludes as follows:

> Since so many activities of a civilian intelligence agency are surreptitious and are undertaken essentially to gather and analyze information, and not to collect evidence for prosecution in court, it is unlikely that the individuals whose rights are most seriously violated would have satisfactory proof that they were targets, nor would they have a ready opportunity to challenge that targeting in court.

47 Quite clearly, this second half of the affidavit consists of personal opinion and argument. Apart from its questionable admissibility either as adjudicative fact or legislative fact, it is of no evidentiary value on the merits of the application.

b) affidavit of Margaret Third-Tsushima

48 The affiant identifies herself as the Executive Director of the St. Barnabas Refugee Society. She states that the St. Barnabas Society was instrumental in the formation of the Edmonton branch of the Coalition for a Just Refugee and Immigration Policy ("the Coalition") and remains a member of this Coalition. She describes the objectives of the Coalition as "includ[ing] lobbying for the enactment of legislation to ensure a fairer and more efficient processing of refugee claims in Canada, the easing of the restrictions in immigration law on family reunification, and the defeat of Bills C-55 (regarding a new refugee determination process,) and C-84 (providing for the interdiction of ships and detention of refugee claimants)".

49 Ms. Third-Tsushima states that the Alberta Federation of Labour ("AFL") has been an active member of the Coalition, and its representative on the Coalition, Mr. Don Aitken, has on occasion been spokesperson for the Coalition. She states that she also has, on occasion, been spokesperson for the Coalition.

50 The affiant then relates the incident which caused her some concern. In the spring of 1987, shortly after Mr. Aitken appeared at a press conference as spokesperson for the Coalition, she received a call from a person (whose name she cannot recall) who identified himself as an agent for CSIS and who asked her to meet him to discuss the Coalition. She agreed to meet him. She described the encounter as follows:

> In the spring of 1987, shortly after Mr. Aitken appeared at a press conference as spokesperson for the Coalition, I received a telephone call from an agent of the Canadian Security Intelligence Service (CSIS) asking that I meet with him at the Westin Hotel in Edmonton in order to discuss the Coalition.
>
> I met with the CSIS official in the lounge of the Westin Hotel. The CSIS officer, whose name I do not recall, asked me several questions about the Coalition. For example, he asked me to identify the members of the Coalition. I cooperated fully by answering all of his questions but suggested that he attend a Coalition meeting which is open to the public and which would likely answer most of his questions. The CSIS official also offered, more than once during the course of the conversation, to buy me a drink.
>
> After I answered a number of his questions, the CSIS official then expressed concern about the participation of

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> one of the members in the Coalition. He advised me that the Coalition should be particularly careful as such groups can be influenced and taken over by foreign powers. He commented that one group was involving itself as a member of the Coalition when it had never been involved in immigration and refugee matters before.
>
> Near the end of the conversation, the CSIS official intimated that he was concerned that the AFL was a member of the Coalition. However, he did not expressly say that this was the group that was being directed by, or could be influencing or taking over the Coalition on behalf of, a foreign power. However he mentioned the names of no other members of the Coalition during the whole of our meeting.

51 Ms. Third-Tsushima then describes the effect this encounter had on her. First, it caused her to contact Mr. Aitken to advise him about the meeting with the CSIS official. She states that Mr. Aitken volunteered, on behalf of the AFL, to drop out of the Coalition or to "take a back seat in the affairs of the Coalition". She states that, on behalf of the Coalition, she refused his offer and insisted that the AFL continue on as a full member as before. Secondly, she describes her subjective concerns as follows:

> I am concerned that CSIS was attempting to cause dissension between members by questioning the motives of certain members and/or to cause certain members to be excluded or limited in participation, thus limiting the effectiveness of the Coalition. I am also concerned that, if CSIS has shown an interest in the internal affairs of the Coalition, it might have used, or might be willing to use, techniques of intrusive surveillance against me or other members of the Coalition, such as wiretapping and the use of covert informants. I am particularly concerned about a wiretap at the offices of the St. Barnabas Refugee Society as it speaks with refugees who may be escaping persecution by foreign governments. Some of those conversations deal with information which, if passed on by CSIS to such a foreign government, could go so far as to endanger the lives of potential refugee claimants.

52 It is difficult to see how this evidence can assist the appellant in establishing an infringement of *Charter* rights and freedoms as alleged. Quite clearly the incident described by the affiant is an *overt* act of surveillance, a technique which the appellant concedes is constitutionally permissible. Any effect the described CSIS intervention may have had on Mr. Aitken (assuming this evidence can be admitted through this affiant) can hardly be said to constitute evidence of the adverse effects of the *impugned* provisions, that is those provisions which permit *intrusive* techniques. In any event, it is not clear what adverse effect this constitutionally permissible intervention has had on anyone's *Charter* rights or freedoms. The suggestion appears to be that this overt act of surveillance almost caused Mr. Aitken to curtail his freedom to associate with the Coalition. But, in the end result, it would appear that he carried on as before.

53 At best, this affidavit can be said to show that, once this affiant was armed with the knowledge that an organisation which whom she is associated was a source of interest to CSIS, she developed a subjective fear that the organisation may have been or may become the target of intrusive surveillance techniques and hence, presumably a possible victim of s. 8 violations. In my view, this evidence adds nothing more to the simple reliance on the overbreadth of a legislative provision on its face to establish a *Charter* infringement. Whether this argument raises a serious issue of invalidity is a matter I will address later.

54 In any event, this evidence is so weak that it is difficult to see how it has any probative value at all. A few questions which come to mind are the following:

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> Is the subjective fear at all linked to the impugned provisions of the Act? Does Ms. Third-Tsushima even have knowledge of the existence of the Act or of the tenor of any of its provisions? Would she have the same fear if the Act didn't exist or if some of its provisions were struck down?
>
> Is her fear reasonable? Is it perhaps based on an ignorance of the fact that, except for the deployment of covert informants, all forms of intrusive surveillance are subject to judicial control under the Act? Or is it based rather on a general distrust of the judicial system's efficiency in protecting her *Charter* rights?
>
> How does this evidence connect the subjective fear (presumably related to the impugned provisions) to the alleged *Charter* violations? In other words, as the result of this fear, has any of the freedoms of speech, assembly and association or the right to be secure against unreasonable searches and seizures been curtailed for anyone?

c) affidavit of William Zander

55 Mr. Zander states that he is, and has been since 1975, President of the British Columbia Provincial Council of Carpenters. He describes the Council as a province-wide federation of carpenter unions chartered by the United Brotherhood of Carpenters and Joiners of America and as the certified bargaining agent for 25 local unions in the province of British Columbia.

56 Mr. Zander states that in the summer of 1985, it was brought to his attention that there had been "outside interference" in the affairs of one of the local unions. He does not describe the nature of this interference, which presumably would have occurred prior to or during the summer of 1985. He then states that two rival slates were vying for the election of officers to the executive of this local union and that in the fall of 1985, he was advised that a member of the Royal Canadian Mounted Police (RCMP) had attended a strategy session of one the groups, the "opposition slate" seeking to displace the incumbent officers. He was informed by a letter from one of the members of the "opposition slate" that this RCMP officer, whose name could not be recalled, had been *invited* to attend the meeting. The letter, annexed to the affidavit, does not say who invited the RCMP officer.

57 This information about the attendance of the RCMP officer at the meeting prompted Mr. Zander to write to the Honourable Perrin Beatty, Solicitor General of Canada at the time, "registering [his] objection" to RCMP interference in local union affairs and requesting that a thorough investigation be made. Mr. Beatty responded, indicating that the RCMP were not involved in the alleged affair and informing Mr. Zander that his letter had been forwarded to CSIS.

58 A few months later, it was confirmed that the officer had been a member of CSIS. Mr. Beatty wrote to Mr. Zander and informed him that the Director of CSIS "is fully satisfied that there has been no impropriety by a member of the Service in relation to the affairs of the British Columbia Provincial Council of Carpenters". Mr. Zander communicated his dissatisfaction to Mr. Beatty with this response. In yet further correspondence, Mr. Beatty assured Mr. Zander that the contact between the union members and the member of CSIS was voluntary and that there had been no improprieties. The affidavit describes further exchanges between Mr. Beatty and Mr. Zander to the same effect.

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59 The affiant also states that the matter was raised by Mr. Svend Robinson as Member of Parliament during question period in the House of Commons, demanding an explanation for "CSIS involvement in the internal affairs of the union". In answer to the question, the Solicitor General of Canada at the time referred to the exchange of correspondence mentioned above.

60 Mr. Zander then expresses his concerns as follows:

> As a result of CSIS involvement in the internal democratic process of Local 452, the reputation of the British Columbia Provincial Council of Carpenters has been harmed. Concerns about CSIS involvement have been expressed directly to me by union members. They have asked me what it is that the union is doing that could trigger CSIS involvement. If our union is so open, they asked, why should CSIS be interested in local union affairs. Similar concerns have been intimated to me by other union members. It is my belief that some of the union members are concerned that if they become involved in union politics they could become targets of CSIS surveillance. As a result, they may be less likely to get involved in union affairs by running for election for union office.
>
> As a result of the CSIS involvement in the internal democratic process of Local 452, I am now concerned that CSIS may be using some of its other techniques of intrusive surveillance that are available to it, such as wiretapping and the use of covert informants, against the union.

61 This affidavit also describes the effect of *overt* techniques of CSIS surveillance, an activity which falls outside the scope of the appellant's application. It is essentially of the same tenor as Ms. Third-Tsushima's affidavit and it is fraught with the same difficulties noted above.

d) affidavit of Wendy Wright

62 Ms. Wright states that she is a member and a spokesperson of the Toronto Disarmament Network (TDN). She describes the TDN as an umbrella organization of approximately 80 Toronto groups which support various peace initiatives described in a document entitled "Basis of Unity". These initiatives include the opposition to war, the support of general disarmament, the opposition to policies which increase the level of conventional and nuclear armaments, the reduction and elimination of nuclear weapons on a world scale, the opposition to the militarization of space, the dissolution of military blocks and the opposition to the export of nuclear technology and radioactive fuels which may be used for the production of nuclear weapons.

63 Ms. Wright describes a number of public activities carried out by the TDN in furtherance of its objectives and expresses her belief that these activities are recorded by police agencies. She states that unidentified photographers are always present at any public demonstrations conducted by TDN. These photographers "generally" refuse to identify themselves.

64 Ms. Wright expresses the belief that fear of CSIS surveillance has undermined TDN's efforts to carry out its programs and objective. She states that this fear has been evidenced by "restricted participation in demonstrations, fear

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of signing petitions, fear of loss of reputation and decreased morale among supporters". She has been told by a number of individuals who would otherwise join in public demonstrations that they do not do so because of the taking of photographs. People have told her that they do not sign petitions for fear of being placed on a "police list".

65 Ms. Wright also expressed the belief that TDN has been the object of surreptitious surveillance by CSIS because of an "illegal break and enter" which occurred on August 6, 1988. Ms. Wright describes how the state of the office after the intrusion was discovered led her to believe that the intruders were looking for information on TDN's sources of funding and its connection with the Soviet Union and how this inference, in turn, led her to believe that the intrusion was the result of CSIS surveillance. She relies on the following facts in support of her belief:

- Shortly before the intrusion, a Co-ordinator of the TDN had travelled to the Soviet Union on invitation by the government of the Soviet Union to view the destruction of a nuclear missile and this trip received media attention.

- Some cash boxes had not been touched by the intruders.

- The financial records were neatly stacked on a different shelf while material unrelated to the internal affairs of TDN was strewn across the floor.

- The minute books were not found on the floor and "appeared to have been scrutinized".

Ms. Wright does not indicate whether anything was taken at the time of the break and enter. She states that police investigated the occurrence and, to her knowledge, the intruders were never found.

66 She states that "[t]he intensity and regularity of CSIS surveillance detracts from the reputation of the peace movement as a legitimate social force". She gives no other specifics with respect to this intense and regular CSIS surveillance. Presumably, she is referring to the unidentified photographers and the break and enter.

67 She states that, following the break-in on August 6, 1988, "office morale suffered". She states that she believes that members feared that further intrusive searches of the premises or "other reprisals might follow future travels abroad". "Further, members were required to choose whether they were more frightened by the threat of nuclear war or the threat of government retaliation." She expresses the opinion that "this kind of fear inhibits and chills legitimate efforts in the organization and communication of ideas and the achievement of the programs and objectives of TDN." She does not provide any specifics as to how and to what extent TDN activities have been curtailed.

68 Finally she expressed the view that this fear of surveillance interferes with "our freedom of expression and freedom of conscience by curtailing participation in demonstrations, petitions and other activities through which we lawfully express our social and political beliefs".

69 This evidence is relied upon by the appellant to show the adverse effects of the impugned provisions on the s. 2 freedoms of speech, assembly and association. It is also relied upon to establish a s. 8 infringement of the right to be

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secure against unreasonable searches or seizures.

70 In so far as s. 2 freedoms are concerned, the evidence is subject to much the same difficulties described above. Many of the effects described flow from the presence of the unidentified photographers. Even assuming CSIS involvement in that activity, it remains an *overt* technique which is conceded to be constitutionally permissible. It does not assist the appellant in establishing the adverse effects of the impugned legislative provisions.

71 In so far as the August 6 intrusion may have had an effect on s. 2 freedoms, again assuming CSIS involvement, the evidence goes no further than expressing a subjective fear and making a bare allegation of interference with the programs and objectives of TDN. No evidence is provided of any curtailment of the freedom of speech, assembly or association. In my view this affidavit does not add anything of substance to the appellant's bare reliance on the overbreadth of a legislative provision on its face to establish a s. 2 *Charter* infringement.

72 At best, this affidavit provides some evidence towards proving a s. 8 breach. I will comment further on the sufficiency of this evidence when I return to the test for standing.

e) excerpts of SIRC reports

73 As indicated earlier, the Security Intelligence Review Committee ("SIRC") is an independent body established under the Act for the purpose of reviewing the performance of CSIS; ensuring that its activities are carried out in accordance with the Act and that the activities do not involve any unreasonable or unnecessary exercise by CSIS of its powers; and conducting investigations into complaints and other matters with respect to CSIS. SIRC has extensive powers under the Act to enable it to fulfil its mandate. The material reveals that SIRC has access to all information in CSIS's hands. Apart from investigating any complaints, it carries an ongoing extensive review of all CSIS activities. Annual reports are prepared.

74 Some of SIRC's reports are relied upon by the appellant as legislative facts in support of its application. The excerpts relied upon by the appellant include the following:

- recommendations on CSIS policies and practices

- comments on some perceived by-products of overt CSIS surveillance activities: on the one hand, deterrence of terrorists, on the other hand, inhibition in the exercise of legitimate and lawful dissent

- expressions of concern over the scope and wording of the s. 2 definition of "threats to the security of Canada" and recommendations for amendments to bring more precision and clarity to the legislation

- criticism with respect to many of the activities of the counter-subversion branch of CSIS (since disbanded)

- identification of situations where CSIS has overstepped its mandate

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• suggestions for management of targeting

• compilation of statistics on warrants sought and obtained to authorize intrusive forms of surveillance.

75 In summary, the evidentiary basis in support of the application is as follows:

(1) with respect to the s. 2(b), (c), and (d) alleged infringements,

(a) the overbreadth of the impugned provisions and its consequential adverse effect on the freedoms of speech, assembly and association; and

(b) some legislative facts;

(2) with respect to the s. 8 alleged infringement,

(a) the overbreadth of the impugned provisions and its consequential adverse effect on the right to be secure against unreasonable searches or seizures;

(b) the August 6, 1988 incident at TDN headquarters; and

(c) some legislative facts.

F. Application of the Test for Public Interest Standing to the Appellant's Application

76 As I have indicated at the outset, it is my view that the motions judge erred in granting standing in this case. As it turns out, his reasons for dismissing the application on the merits lend support to the conclusion that this is not a proper case to grant public interest standing.

77 First, the motions judge's ultimate conclusion on the s. 2 alleged infringements was in essence a finding that the appellant had not raised an issue recognized in Canadian constitutional jurisprudence. In these circumstances, it could hardly be said that a serious issue of invalidity had been raised and standing ought to have been refused on that basis. In fact, the appellant argued that the motions judge's decision on s. 2 of the *Charter* was inconsistent with his decision to grant standing.

78 Second, on the s. 8 alleged infringement, the issue was ultimately resolved on the basis of *stare decisis*. The motions judge held that the decision of the Federal Court of Appeal in *Atwal v. Canada* was authoritative on the constitutional question before him. As seen earlier, when the impugned legislative provision is or will be subject to attack by a private litigant, the purpose for granting public interest standing disappears. Standing ought to have been refused on the basis that there was another reasonable and effective way to bring the issue before the court.

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

79 It therefore becomes quite apparent that the motions judge's fundamental error was in refusing to consider the merits of the application on the issue of standing. Had he considered the merits on the preliminary motion, he would likely have refused standing. I will review the issues raised on standing in light of the merits of the application.

1. Serious issue of invalidity

80 What will constitute a serious issue of invalidity is not easy to ascertain with any precision from the case law. It would be unwise to attempt to answer this question in any exhaustive manner in this case because the full scope of this question was not argued. I will limit my consideration of the question to the issues raised by the parties.

81 One question raised is whether it is sufficient for the appellant to raise issues of "general public importance" in the abstract without regard to the substantive merits of the application. This question has already been answered in the negative. It is now beyond controversy that the substantive merits of the application are relevant to a consideration of this criterion.

82 Of course, the consideration of the merits for the purpose of determining standing is not a determination of the ultimate merits of the case. It is more akin to the question whether there is a reasonable cause of action. Depending on the facts of the particular case, the issues of standing and reasonable cause of action tend to merge: see *Finlay*, at p. 636, *Canadian Council of Churches*, at p. 253, *Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449 (Ont. C.A.) at 465. In this case as well, the two issues tend to merge.

a) Alleged infringement of s. 2(b), (c) and (d) of the Charter

83 A consideration of the merits of the application leads to the conclusion that the appellant cannot succeed in its challenge to the constitutionality of the impugned provisions on the basis of the alleged infringements of s.2 (b), (c), and (d) because of the lack of an evidentiary basis. As set out above, the appellant presents no relevant adjudicative facts. The application is based entirely on the argument that the legislation is overbroad and, consequently, creates a "chill" or an adverse effect on the freedoms of speech, assembly and association.

84 In support of this argument, the appellant cited a number of American cases for their persuasive value. The motions judge, in his decision on the merits of the application, rejected the appellant's argument. With respect to each of the alleged s. 2(b), (c) and (d) infringement, the motions judge held that no breach had been established on the following basis (8 O.R. (3d) at 319):

> In conclusion, as previously determined with respect to s. 2(b) [and s. 2(c)] 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.

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85 The argument was put to this court, not in terms of the American "chilling effect doctrine" but in terms of "overbreadth" as a basis for establishing an infringement. I do not find it necessary to review any of the American authorities cited to us. Following the hearing in this matter, the case of *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.) was decided and, in my view, it is determinative on this point. The following passage fully answers the appellant's argument (at p. 628):

> Overbreadth in American law is tied to the First Amendment. It is grounds to obtain what is termed "facial invalidation" of a statute, as opposed to a declaration that the statute is unconstitutional in the case of the particular plaintiff, which is the usual remedy. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), indicates how overbreadth interacts with vagueness in First Amendment cases. The court wrote at pp. 494-95:
>
> > In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.
>
> Overbreadth ties in to the taxonomy of protected and unprotected conduct and expression developed by American courts under the First Amendment. Some conduct or expression receives First Amendment protection and some does not, and to the extent that a statute substantially touches upon protected conduct and cannot be severed or read down, it will be declared void (see L. H. Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 1022).
>
> This distinction between protected and unprotected conduct or expression is typical of American law, since the American Constitution does not contain a general balancing clause similar to s. 1 of the *Charter*. Balancing must be done within the First Amendmemt itself. In this respect, it can be seen that the doctrine of overbreadth in American law involves an element of balancing, since the aims and scope of the statute must be compared with the range of protection of the First Amendment. C. Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness", in R. J. Sharpe, ed., *Charter Litigation* (1987), at pp. 261-62, traces this element of balancing to *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).
>
> This Court has repeatedly emphasized the numerous differences which exist between the *Charter* and the American Constitution. In particular, in the interpretation of s. 2 of the *Charter*, this Court has taken a route completely different from that of U.S. courts. In cases starting with *Irwin Toy* up to *Butler*, including the *Prostitution Reference* and *Keegstra*, this Court has given a wide ambit to the freedoms guaranteed by s. 2 of the *Charter*, on the basis that balancing between the objectives of the State and the violation of a fight or freedom should occur at the s. 1 stage. Other sections of the *Charter*, such as ss. 7 and 8, do however incorporate some element of balancing, as a limitation within the definition of the protected right, with respect to other notions such as principles of fundamental justice or reasonableness.
>
> A notion tied to balancing such as overbreadth finds its proper place in sections of the *Charter* which involve a balancing process. Consequently, I cannot but agree with the opinion expressed by L'Heureux-Dubé J. in *Com-*

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

> *mittee for the Commonwealth of Canada* that overbreadth is subsumed under the "minimal impairment branch" of the *Oakes* test, under s. 1 of the *Charter*. This is also in accordance with the trend evidenced in *Osborne* and *Butler*. Furthermore, in determining whether s. 12 of the *Charter* has been infringed, for instance, a court, if it finds the punishment not grossly disproportionate for the accused, will typically examine reasonable hypotheses and assess whether the punishment is grossly disproportionate in these situations (*R. v. Smith*, [1987] 1 S.C.R. 1045, and *R. v. Goltz*, [1991] 3 S.C.R. 485). This inquiry also resembles the sort of balancing process associated with the notion of overbreadth.
>
> In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the Charter. As will be seen below, overbreadth is not at the heart of this case, although it has been invoked in argument. [Emphasis added.]

86 In my view, it is clear from the above that the appellant cannot simply rely on "overbreadth" as proof of an infringement of s. 2 freedoms. I also find the cases in *MacKay* and *Danson*, which emphasize the importance of a factual basis in *Charter* litigation, apposite to this case. Both cases are referred to above in the passage quoted from *Canadian Council of Churches*. I would further note the following passage from *Danson* at pp. 1099-1101:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack.
>
> In the present case, the appellant contends that he ought to be entitled to proceed with his application under Rule 14.05(3)(h) in the complete absence of adjudicative facts, and, moreover, that it is sufficient that he present in argument (but not prove by affidavit or otherwise) legislative "facts", in the form of textbooks and academic material about the prevailing understanding of the concept of the independence of the bar, and material concerning the legislative history of the impugned rules. In the view I take of this matter, the appellant is not entitled to proceed with the application as presently constituted.
>
> In the time between the granting of leave to appeal in this matter and the hearing of the appeal, this Court heard and decided *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 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. 361-62:
>
> > *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.

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

Later [in the *MacKay v. Manitoba* case], 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 appellant's 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 133:

> There may be rare 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 a 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 is Cory J.'s.]

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 the unconstitutional effects 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. As Morgan put it, op. cit., at p. 162: "... the process of constitutional litigation remains firmly grounded in the discipline of the common law methodology."

This case is not one of these exceptional cases where the law, on its face, violates one of the fundamental freedoms.

87 It therefore becomes clear upon considering the merits of the application that the appellant has failed to present a serious issue of invalidity in so far as it is based on s. 2 of the *Charter*.

b) Alleged infringement of s. 8 of the Charter

88 In my view, the adjudicative facts presented in support of the s. 8 claim are so weak that the same result should probably follow. However, I do not find it necessary to determine whether the appellant has succeeded in raising a serious issue of invalidity with respect to that aspect of the application since I am of the view that the appellant fails on the next criterion.

2. Another reasonable and effective way to bring the issue before the court

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856

89 As discussed above, standing should be granted in those situations where it is necessary to ensure that the legislation is not immune from constitutional challenge. To repeat the words of Cory J. in *Canadian Council of Churches*, "The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (at p. 252).

90 In this case, a challenge to the impugned provisions was made on the basis of s. 8 of the *Charter* in *Atwal v. Canada*. By majority decision, the Federal Court of Appeal upheld the constitutional validity of the legislation. In fact, the appellant on appeal urged this court to adopt the reasoning of the dissenting judge in *Atwal* and the respondent urged this court to follow the majority. It would appear from the motions judge's reasons that the argument followed essentially the same course in first instance. He ultimately ruled as follows (8 O.R. (3d) at 327-28):

> It is the respondent's position that *Atwal v. Canada*, *supra*, is binding on all designated judges and therefore there is no need for this court to entertain a similar challenge to this Act.
>
> 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 26, the statute meets the four minimum criteria set out in *Hunter v. Southam Inc.*, *supra*. Moreover, the Federal Court of Appeal in *Atwal v. Canada* 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. [Emphasis added.]

To grant standing in this case is to create a duplication which can hardly be said to be a wise allocation of limited judicial resources.

91 Further, the scant evidentiary basis in this case raises other concerns referred to by L'Heureux-Dubé J. in *Hy & Zel's*. A comparison of the factual basis in *Atwal* with the scant adjudicative facts alleged in this case confirms that better use can usually be made of the judicial process to decide live issues between parties as opposed to hypothetical ones. In *Atwal*, CSIS involvement was clearly established. An actual warrant had been obtained and executed pursuant to the Act. Clearly, the impugned provisions of the Act were engaged. In this case, a mere suspicion was raised that CSIS was involved. Many facts would have to be presumed before an intelligible debate on the constitutionality of the section could be engaged in. The scant evidentiary basis does not allow the issues to be fully canvassed.

92 Hence, again here, a consideration of the merits of the application makes it clear that, in so far as the application alleged a s. 8 violation, the motions judge erred in finding that the "most reasonable and effective manner in which the issues can be brought before the court is to grant the applicant standing". He ought to have refused standing for failure to meet this criterion.

G. Conclusion

93 In the result, I would allow the cross-appeal and set aside the motions judge's judgment dated March 25, 1992. I would dismiss the application on the ground of no standing. I would also dismiss the appeal on the ground of no

1998 CarswellOnt 2808, 111 O.A.C. 51, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 161 D.L.R. (4th) 225, (sub nom. Canadian Civil Liberties Assn. v. Canada (Attorney General)) 126 C.C.C. (3d) 257, 54 C.R.R. (2d) 118, 40 O.R. (3d) 489, 10 Admin. L.R. (3d) 56, [1998] O.J. No. 2856
standing.

Abella J.A. **(dissenting in part):**

94 I have had the benefit of reading the reasons of Charton J.A. While I agree with her disposition of the appeal on the merits, I am unable to agree with her conclusion that standing ought not to have been granted. In my view, Potts J. was correct in exercising his discretion to grant standing to the Corporation of the Canadian Civil Liberties Association (C.C.L.A.). There was, in this case, a serious issue as to the constitutionality of portions of the legislation and C.C.L.A. was in the best position to bring the issue effectively to the court's attention.

95 There is no dispute that the applicable authorities are *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.); *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.); *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.); *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.); *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.); and *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 (S.C.C.).

96 As Charton J.A. points out, the two latest cases were decided after the 1990 decision on standing in this case. In my view, while these two cases do not expand the law of standing, neither do they fundamentally restrict the scope or principles applied by Potts J. and set out in the "standing quartet" of *Thorson, MacNeil, Borowski*, and *Finlay*. The most recent cases continue to promulgate the triplicate requirements for the granting of standing: that there be a serious issue of legislative validity; that the applicant have a genuine as opposed to a theoretical interest in the issue; and that no other reasonable and effective way exists for bringing the issue before the court.

97 The discussions in *Canadian Council of Churches* and *Hy & Zel's* emphasize the significance of an adequate factual context. They reinforce the judicial interest in having the most effective presentation possible of important public issues and in avoiding gratuitous, frivolous or hypothetical litigation. But they do not, in my view, go so far as to suggest that the merits of a case be given pre-eminent consideration when considering the threshold issue of standing.

98 It would be a significant diminution of access to public interest standing to so merge the question of standing and the merits, that a preliminary conclusion about the merits determines whether the case should be heard at all. There must certainly be enough evidence to justify the conclusion that the issue is an arguable one and serious enough to warrant judicial scrutiny (*Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449 (Ont. C.A.)). But I would resist an approach that appears to require that there should be enough evidence to demonstrate the likelihood of success.

99 Focusing too emphatically on the merits at this stage means that a pre-trial assessment could immunize issues from judicial review in cases where it would be in the public's interest to have the matter openly reviewed.

100 It bears noting that in *Canadian Council of Churches*, Cory J. bracketed his comments on the need to prevent the overburdening of courts through the "unnecessary proliferation of marginal or redundant suits", with a restatement

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of the significance of public interest standing and the corresponding need to keep the door open:

> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act, 1982*.
>
> ... [W]hen exercising the discretion the applicable principles should be interpreted in a liberal and generous manner. [emphasis added] (pp. 252-53)

101 Standing is essentially a preliminary issue about access to the judicial system. Although it is undoubtedly tied to the substantive issues it seeks to expose, it is at heart a decision about whether an applicant is entitled to have the courts consider the merits of an arguable legal claim. To determine those merits at the outset could defeat the purpose of public interest standing principles. Those principles were designed to keep out needless claims and claimants, not just unsuccessful ones. A claimant entitled to standing may not ultimately be entitled to succeed on the claim itself, but that, it seems to me, is not a determinative argument against granting standing.

102 The 1989 Ontario Law Reform Commission's Report on Standing pointed out (at p. 92):

> ... courts are essentially engaged in a process of acknowledging and granting access to the courts to a variety of interests. This process reflects certain value judgments respecting what kinds of interest "deserve" recognition.

In determining how to exercise the discretion to grant standing, the evidence must, of course, be examined to ensure that the claim is not frivolous or unworthy of public attention. But it should not be used to exclude from judicial, and therefore public examination, issues worthy of serious consideration, whether or not the challenge proves ultimately to be successful.

103 The information contained in C.C.L.A.'s supporting affidavits raises serious questions about whether the constitutionally protected rights of citizens to engage in lawful expression, association, or assembly may be compromised or threatened under the authority of the *C.S.I.S. Act*. These were legal organizations engaged in legal activity. When members of labour unions, refugee organizations, or peace movements find themselves monitored by a branch of government, the Canadian public is entitled to be assured that the legislative framework under which the Canadian Security Intelligence Service (C.S.I.S.) operates does not equate lawful dissent with threats to national security. There is no question that the perception of C.S.I.S. intervention was, to say the least, unsettling to the people involved and potentially inhibiting (see Jonathan R. Siegel, "*Chilling Injuries as a Basis for Standing*" (1989), Yale Law Journal 906).

104 It goes to the heart of an open democracy that members of the public are, and perceive that they are, free from unwarranted government surveillance when they are engaging in lawful, even if provocative, activity. Yet under s. 2 of the *C.S.I.S. Act*, lawful activities *can* be investigated if done in conjunction with activities defined as threats to national security. This is an exceptional legislative tool. It was in the public's interest that the statutory scheme be judicially

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reviewed to ensure that it met constitutional standards.

105 Moreover, in my view, C.C.L.A. is the most effective litigant to raise the issues in an informed and comprehensive way. C.C.L.A. and its General Counsel, A. Alan Borovoy, have devoted years of institutional and professional energy to ensuring that under the rubric of "threats to national security", covert surveillance is not a ruse for intelligence-gathering into lawful, constitutionally protected activities. No person or organization has greater expertise in the area or is better able to elucidate the relevant issues for the court.

106 One of the major tenets in the Ontario Law Reform Commission's Report on Standing was that, given the nature of public interest standing, the requirement that no other way exists for bringing the matter before the court, should be liberally construed:

> ... no proceeding [should] be dismissed and no pleading struck out only on the ground that the person bringing the proceeding has no personal, proprietary, or pecuniary interest in the proceeding or that the person has suffered or may suffer injury or harm of the same kind or to the same degree as other persons. (at p. 79)

The fact that a private litigant once raised a related issue (*Atwal v. Canada* (1987), 36 C.C.C. (3d) 161 (Fed. C.A.)) should not therefore foreclose the granting of standing to C.C.L.A.

107 The question of who is most directly affected by the legislation and is therefore in the best position to raise the issues, is more easily applied in less opaque legal environments. By its nature, C.S.I.S. operates covertly and usually without prior or subsequent disclosure. Individuals may not know they are being targeted or what happens to the information gathered about them. The harm may not therefore be easily discernable, but there is nonetheless a profound public interest in ensuring that whatever is done, is done within constitutional limits.

108 By applying for standing, C.C.L.A. offered to bring the issue of the constitutionality of C.S.I.S.'s governing legislation before the courts on the public's behalf. The application raised serious issues which have profound implications, and was brought to the judicial forum by the best possible applicant.

109 The inability of C.C.L.A. to provide an evidentiary basis demonstrating the likelihood of success, or to prove that the legislative provisions are unconstitutional, in no way diminishes the importance of the issue being argued, or the benefit to the public of judicial consideration.

110 I would therefore dismiss the cross-appeal of Pott's J.'s decision to grant standing, but dismiss the appeal from his decision on the merits of the application.

Appeal dismissed; cross-appeal allowed.

Appendix "A"

Sections 12 and 21 to 26 of the *Canadian Security Intelligence Service Act*:

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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 [s. 16 is of no relevance to this appeal.], 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 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, documents 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

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(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 can 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

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(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 or 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 intercepting 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

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(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.

FN* Leave to appeal refused (March 11, 1999), Doc. 26897 (S.C.C.).

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