O'Neill et al. v. The Attorney General of Canada

[O'Neill v. Canada (Attorney General)]

82 O.R. (3d) 241

Ontario Superior Court of Justice,
Ratushny J.
October 19, 2006

Charter of Rights and Freedoms -- Freedom of expression -- Provisions of Security of Information Act which make it criminal offence to communicate, possess and retain "secret official" and "official" information violate s. 2(b) of Charter and are not saved under s. 1 of Charter -- These provisions are of no force or effect -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Security of Information Act, R.S.C. 1985, c. O-5, ss. 4(1)(a), 4(3), 4(4)(b).

Charter of Rights and Freedoms -- Freedom of the press -- Government alleging criminal offences under Security of Information Act against journalist and obtaining search warrants for her home and office in order to intimidate her into revealing source of leak of information -- Government actions constitute abuse of process and violate freedom of the press -- Search warrants are quashed and seized materials must be returned -- Canadian Charter of Rights and Freedoms, ss. 2(b), 24(1) -- Security of Information Act, R.S.C. 1985, c. O-5.

Charter of Rights and Freedoms -- Fundamental justice -- Mens rea -- Sections 4(1)(a) and 4(4)(b) of Security of Information Act make it criminal offence to communicate, possess and retain "secret official" and "official" information -- Offence under s. 4 is punishable by up to 14 years' imprisonment -- Offences in ss. 4(1)(a) and 4(4)(b) are "true crimes"

-- Offences [except for possession of prohibited thing "without lawful excuse" under s. 4(4)(b)] impose criminal liability without fault -- These provisions violate s. 7 of Charter and are not saved under s. 1 of Charter -- Provisions are of no force or effect -- Security of Information Act, R.S.C. 1985, c. O-5, ss. 4(1)(a), 4(4)(b).

Charter of Rights and Freedoms -- Fundamental justice -- Overbreadth -- Provisions of Security of Information Act which make it criminal offence to communicate, possess and retain "secret official" and "official" information are overbroad -- Provisions violate s. 7 of Charter and are not saved under s. 1 of Charter -- Provisions are of no force or effect -- Canadian Charter of Rights and Freedoms, ss. 1, 7 -- Security of Information Act, R.S.C. 1985, c. O-5, ss. 4(1)(a), 4(3), 4(4)(b).

Charter of Rights and Freedoms -- Fundamental justice -- Vagueness -- Provisions of Security of Information Act which make it criminal offence to communicate, possess and retain "secret official" and "official" information are impermissibly vague -- Provisions violate s. 7 of Charter and are not saved under s. 1 of Charter -- Provisions are of no force or effect -- Canadian Charter of Rights and Freedoms, ss. 1, 7 -- Security of Information Act, R.S.C. 1985, c. O-5, ss. 4(1)(a), 4(3), 4(4)(b).

Charter of Rights and Freedoms -- Unreasonable search and seizure -- Search with warrant -- Government alleging criminal offences under Security of Information Act against journalist and obtaining search warrants for her home and office in order to intimidate her into revealing source of leak of information -- No jurisdictional error in issuance of warrants -- Warrants do not violate s. 8 or s. 2(b) of Charter -- Canadian [page242] Charter of Rights and Freedoms, ss. 2(b), 8 -- Security of Information Act, R.S.C. 1985, c. O-5.

Criminal law -- Abuse of process -- Government alleging criminal offences under Security of Information Act against journalist and obtaining search warrants for her home and office in order to intimidate her into revealing source of leak

of information -- Government actions constitute abuse of process -- Search warrants quashed and seized materials must be returned -- Security of Information Act, R.S.C. 1985, c. O-5.

The applicant journalist ("O") wrote a news article, which was published in the applicant newspaper, concerning Maher Arar, a Syrian-born Canadian citizen who was arrested and deported to Syria by American authorities. The R.C.M.P. suspected that there had been an unauthorized leak of information to O. Search warrants were obtained and executed at O's home and at the office of the applicant newspaper in the course of an investigation into alleged violations of ss. 4(1)(a), 4(3) and 4(4)(b) of the Security of Information Act ("SOIA"). Generally, s. 4 of the SOIA makes it a criminal offence to communicate, possess and retain "secret official" and "official" information. No charges were laid against the applicants. The applicants brought an application challenging the validity of the searches and seizures on three grounds: ss. 4(1)(a), 4(3) and 4(4)(b) of the SOIA violate ss. 7 and 2(b) of the Canadian Charter of Rights and Freedoms; the issuance and execution of the search warrants constituted an abuse of process; and the search warrants were invalid.

Held, the application should be granted.

The impugned provisions of the SOIA violate s. 7 of the Charter in that they are overbroad. The provisions are intended to criminalize, and therefore deter and protect against, the unauthorized release of government information that carries with it some element of harm to the national interest if released, causing it to be categorized as "secret official" or "official". There is no definition in the SOIA of the terms "secret official", "official", "lawful authority" or "authorized". Regardless of whatever classification system the Government of Canada might employ by way of its administrative policies applying to its employees and officials, there is no classification system made applicable by law, as opposed to an administrative guideline, to the impugned sections of the SOIA to assist in determining their meaning. The sections are, therefore, standardless, with the result that they are facially meaningless. In their present state, the

impugned sections give the state the unfettered ability to protect whatever information it chooses to classify as "secret official" or "official" or unauthorized for disclosure, and to punish by way of a criminal offence those "speakers", "receivers" and "listeners" who come within that protected sphere. The means suggested by the Crown could not save the impugned sections from their overbreadth. The Access to Information Act, R.S.C. 1985, c. A-1 is not a statute that can be used to limit the Act except, potentially, for civil servants and only then in relation to written records. The general availability of a public interest defence for the SOIA offences created by the impugned sections is speculative. Reliance upon the judicious application of prosecutorial discretion in respect of those offences can only provide an insecure safety net when that prosecutorial discretion is unlimited and unguided by the legislation.

The impugned provisions of the Act also violate s. 7 of the Charter in that they are impermissibly vague. Because the sections fail to define what is caught by "secret official" and "official" information, individuals, and particularly those who are not bound by government policy guidelines, are unable to know from the impugned sections when they are approaching the boundaries of criminal [page243] sanction and unable to make a considered evaluation of whether their conduct is likely to be criminal or not. Similarly, the lack of delineation of a zone of risk by those sections gives no guidance to law enforcement officials in determining whether a crime has been committed; the result is that there are no controls on the exercise of their discretion, and there is a danger of arbitrary and ad hoc law enforcement.

Sections 4(1)(a) and 4(4)(b) of the SOIA expose those convicted of an offence to the possibility of a prison sentence of up to 14 years. These offences are "true crimes". As a matter of fundamental justice, then, the offences must include a fault or mens rea requirement. There is no requirement by the words of s. 4(1)(a) that the possessor or communicator know or have reasonable grounds to believe that he or she has had possession of a prohibited thing or is without authorization. Section 4(1)(a) imposes no requirement of any element of fault,

either subjective or objective. Instead, it imposes criminal liability solely on the basis of the accused's act of communicating the prohibited thing. Accordingly, s. 4(1)(a) violates s. 7 of the Charter.

With respect to s. 4(4)(b), there are a number of offences comprised within that subsection, each having a different actus reus. There is possession of a prohibited thing, communication of a prohibited thing, possession of a prohibited thing and the retained possession of a prohibited thing. Only the act of possession of a prohibited thing includes some kind of element of fault by the use of the words "without lawful excuse". The other offences within that subsection impose criminal liability solely on the basis of the accused's commission of the prohibited act; as such the offences of possession, communication and retaining possession violate s. 7 of the Charter.

The Crown conceded that the impugned provisions restrict freedom of expression contrary to s. 2(b) of the Charter.

A law that is unconstitutionally vague cannot amount to a "limit prescribed by law" or constitute a "reasonable" limit prescribed by law so as to be justifiable under s. 1 of the Charter. In any case, the impugned provisions are not justified under s. 1. Their purpose is pressing and substantial, but the overbreadth and vagueness of the sections do not pass the rational connection aspect of the proportionality test. The provisions have not been well tailored to suit their purpose. They arbitrarily and unfairly and with a blunt club of criminal sanction restrict freedom of expression, including freedom of the press. For the same reasons, neither is the second aspect of the proportionality test, that the impugned measures minimally impair ss. 7 and 2(b) Charter rights, satisfied. If the impugned provisions are not rationally connected to Parliament's objective and do not minimally impair Charter rights, the state has not proven on a balance of probabilities that the infringements are demonstrably justifiable in a free and democratic society. Sections 4(1)(a), 4(3) and 4(4)(b) of the SOIA are of no force or effect.

The applicants established on a balance of probabilities that the search warrants, and particularly the allegations of criminality against O, were used to gain access to O for the purpose of intimidating her into compromising her constitutional right of freedom of the press: that is, to reveal her confidential source or sources of the prohibited information. It was reasonable to infer that the warrants were obtained and executed primarily for purposes other than the enforcement of the SOIA against O, and that their purpose, instead, was to uncover the source of the leaks. That constituted abusive conduct and intimidation of the press. The R.C.M.P. actions so offended the public's sense of decency and fairness that the integrity of the judicial process was undermined. The obtaining [page244] and execution of the search warrants amounted to an abuse of process and a violation of freedom of the press. The appropriate remedy was to quash the search warrants and to order the return of the things seized.

The issuing justice did not fall into jurisdictional error in issuing the search warrants, and the warrants were not issued in violation of ss. 8 and 2(b) of the Charter. The constitutional defects of the SOIA leakage offences had no effect on the jurisdiction of the issuing justice. As the documents sought by the warrant documentation related to an alleged offence by the press itself, this fact necessarily affected the balancing between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the person whose premises would be the subject of the intended search. The issuing judge was entitled to balance privacy interests and freedom of the press. O was named as having committed two of the three alleged offences, and the issuing judge would have understood that the search was necessary to obtain evidence against her. Because O was implicated in the offences being investigated, s. 2(b) of the Charter could not shield her from a search and seizure related to that investigation. The issuing justice had before him some reliable evidence that might reasonably be believed as to the requisite reasonable and probable grounds regarding the alleged offences and the places and things to be searched and upon which he could have exercised his discretion and issued the warrants. The warrants complied with s. 487 of the Criminal

Code, R.S.C. 1985, c. C-46 and were valid on their face.

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APPLICATION for an order declaring sections of the Security of Information Act to be unconstitutional and for an order quashing search warrants.

Richard G. Dearden, Wendy J. Wagner and David M. Paciocco, for applicants.

Robert J. Frater, Marian Bryant and Steve White, for respondent.

Edith Cody-Rice, for intervenor Canadian Broadcasting Corporation.

Stuart Svonkin, for intervenor Canadian Civil Liberties

Association.

[1] RATUSHNY J.: -- The issues in this case arise out of two searches and seizures conducted by the R.C.M.P. at a journalist's home and newspaper's office in the course of its investigation of alleged criminal offences under s. 4 of the Security of Information Act, R.S.C. 1985, c. O-5 [as am.] (the "SOIA") regarding unauthorized "leaks" of "secret official" government information.

[2] The applicant Juliet O'Neill ("O'Neill") is a journalist writing for the Ottawa Citizen newspaper. The applicant Ottawa Citizen Group Inc. was the publisher of the Ottawa Citizen at the material time.

[3] The allegations of unauthorized leaks arose out of a news article (the "O'Neill article") written by O'Neill and published in the Ottawa Citizen on November 8, 2003 concerning Maher Arar, a Syrian-born Canadian citizen whom American authorities had arrested and deported to Syria in September 2002.

[4] On January 20, 2004, the R.C.M.P. obtained two search warrants to search O'Neill's home and an Ottawa Citizen office used by her. These warrants were issued by a justice of the peace in support of a criminal investigation into alleged violations of ss. 4(1)(a), 4(3) and 4(4)(b) of the SOIA concerning the communication of "secret official" information and its subsequent receipt and retention. O'Neill was named as having committed the receipt and retention offences under the latter two sections of the SOIA. The searches occurred on January 21, 2004 and resulted in the seizure of documents and computer information. No charges have been laid to date.

[5] In their application (the "Main Application") the applicants challenge the validity of the searches and seizures and ask for the return of the seized items on three grounds:

(1) Sections 4(1)(a), 4(3) and 4(4)(b) of the SOIA (the "impugned sections") are unconstitutional as they

violate ss. 7 and 2(b) of the Canadian Charter of Rights and Freedoms, Part I of [page248] the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter");

(2) The issuance and execution of the search warrants constituted an abuse of process;

(3) The invalidity of the search warrants.

[6] I will deal with each of these issues in turn.

I. Constitutional Issues

[7] The applicants' constitutional issues are the following:

(1) Do ss. 4(1)(a), 4(3) and 4(4)(b) of the SOIA infringe s. 7 of the Charter for being overbroad, arbitrary or vague? The intervenor, Canadian Civil Liberties Association (the "CCLA"), adds an additional issue and that is whether ss. 4(1)(a) and 4(4)(b) of the SOIA also infringe s. 7 of the Charter because they create an offence without any requirement of proof of fault or mens rea. This fault issue does not apply to s. 4(3) of the SOIA which does include an element of mens rea;

(2) Do ss. 4(1)(a), 4(3) and 4(4)(b) of the SOIA infringe s. 2(b) of the Charter by restricting freedom of expression including freedom of the press?

(3) If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the Charter?

1. Do the impugned sections of the SOIA infringe section 7 of the Charter?

[8] The impugned sections of the SOIA are the following:

4(1) Every person is guilty of an offence under this Act who, having in his possession or control any secret official

code word, password, sketch, plan, model, article, note, document or information that relates to or is used in a prohibited place or anything in a prohibited place, or that has been made or obtained in contravention of this Act, or that has been entrusted in confidence to him by any person holding office under Her Majesty, or that he has obtained or to which he has had access while subject to the Code of Service Discipline within the meaning of the National Defence Act or owing to his position as a person who holds or has held office under Her Majesty, or as a person who holds or has held a contract made on behalf of Her Majesty, or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract, [page249]

(a) communicates the code word, password, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it; (Note: This is the actual wording of this subsection.)

. . . . .

(3) Every person who receives any secret official code word, password, sketch, plan, model, article, note, document or information, knowing, or having reasonable ground to believe, at the time he receives it, that the code word, password, sketch, plan, model, article, note, document or information is communicated to him in contravention of this Act, is guilty of an offence under this Act, unless he proves that the communication to him of the code word, password, sketch, plan, model, article, note, document or information was contrary to his desire.

(4) Every person is guilty of an offence under this Act who

. . . . .

(b) allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code word or password so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code word or password issued for the use of a person other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police constable.

[9] By s. 27 of the SOIA, a person who commits an offence under these sections is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years or, of an offence punishable on summary conviction and liable to imprisonment for a term of not more than 12 months or to a fine or to both.

[10] Section 7 of the Charter states:

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

[11] Section 7 of the Charter is breached by state action depriving someone of life, liberty or security of the person contrary to a principle of fundamental justice. The burden is on the applicant to prove both the deprivation and the breach of fundamental justice: Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, [2004] S.C.J. No. 6, at p. 91 S.C.R.

[12] Although the Crown has not conceded that the impugned sections adversely affect a person's right to liberty and security of the person and neither the applicants nor the intervenors have [page250] addressed this point, it is obvious by virtue of the offences created by these sections together with their penalties that the deprivation element of s. 7 of the Charter has been proven.

[13] The next question is whether the impugned sections infringe a principle of fundamental justice by being overbroad or vague. The issues of arbitrariness and mens rea are considered as part of this analysis.

Overbreadth

[14] The impugned sections make it a criminal offence to communicate, possess and retain certain categories of government information without authorization. Sections 4(1)(a) and 4(3) refer to the categories as being "secret official" and s. 4(4)(b) refers to them as "official" and "secret official".

[15] The applicants argue the sections are overbroad because there is no limit on the government's reach under them. They argue that because of the wide net cast by the wording of these sections, the Government of Canada is able to arbitrarily protect whatever information it chooses to classify as either "secret official" or "official" or not "authorized" for release so that it has an unfettered ability to criminalize the release and receipt of any government information.

The Standard for overbreadth

[16] Statutory construction is the essential first step in cases involving claims of overbreadth and vagueness. As the Chief Justice of Canada noted in R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at paras. 32 and 33,

> Until we know what the law catches, we cannot say whether it catches too much. This Court has consistently approached claims of overbreadth on this basis. It is not enough to accept the allegations of the parties as to what the law prohibits. The law must be construed, and interpretations that may minimize the alleged overbreadth must be explored [. . .] The interpretation of the section is a necessary pre-condition to the determination of constitutionality[. . .]:
>
> Much has been written about the interpretation of legislation [. . .] However, E.A. Driedger in Construction of

> Statutes (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[. . .] Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the Charter.[. . .] If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted . . . [page251]

[17] It is this approach that I undertake to follow in interpreting the impugned sections.

Interpretation of the impugned sections

[18] The applicants have filed the affidavit of Wesley K. Wark, a professor of history and an author and consultant on national security matters. I accept his expert opinion evidence as to the legislative antecedents of the SOIA.

[19] As Mr. Wark has stated, although the current SOIA was enacted as part of the Anti-terrorism Act, S.C. 2001, c. C.41 (the "Anti-terrorism Act"), most of its provisions have long been the law of Canada as part of Canada's old Official Secrets Act.

[20] Canada adopted its first Official Secrets Act in 1889 (52 & 53 Vict., c. 52), dealing with spying in s. 1 and breaches of official trust in s. 2. The s. 2 breach of trust provisions applied solely to the holders of a government office or contract, addressed unauthorized communications and only applied if the communication in question could be shown to be contrary to the public interest or the interests of the state (the "damage component"). National security was offered as the reason for the Official Secrets Act 1889 when the first draft of the Bill was introduced in England (Wark Affidavit at para. 13); however, a 1972 British Departmental Committee (the

"Franks Committee") examining the leakage provisions of the 1889 Act concluded that "a major object of the 1889 Act was to provide stronger measures against leakage of official information by civil servants": Wark Affidavit at para. 14 and attached Franks Committee Report.

[21] The second ancestor of the current SOIA was the U.K. Official Secrets Act 1911 (U.K.), 1 & 2 Geo. V, c. 28, that broadened the reach of the breach of trust provisions in s. 2 to include all those who communicated official information without authority including those who received it in contravention of the Act but who owed no official duty to the government. The damage component was removed. The Franks Committee noted that it was clear from the text of the Bill alone that these leakage provisions in s. 2 were intended "to give greater protection against leakages of any kind of official information whether or not connected with defence or national security" even though the "Government presented the Bill as a measure which was aimed at spying and was essential on grounds of national security" because of an atmosphere of crisis in the summer of 1911 affecting Britain and other European countries. The British Parliament passed the 1911 statute with "great haste" and it applied to the Dominions including Canada without any debate in Canada: Wark Affidavit at paras. 21-25. [page252]

[22] The third ancestor of the SOIA was the British Official Secrets Act 1920 (U.K.), 10 & 11 Geo. V, c. 75 that supplemented the 1911 Act with changes aimed primarily at existing espionage provisions but also supplemented the leakage provisions, adding "secret official" to the list of protected things. As for the 1911 Act, the 1920 Act was presented in the British Parliament as being solely about national security issues, referred to as "spying and attempts at spying": Wark Affidavit at paras. 26-29.

[23] The 1920 British Official Secrets Act, however, was not made applicable to Canada until its provisions were largely imported into the fourth ancestor of the SOIA, the Official Secrets Act, 1939, S.C. 1939, c. 49. Section 2 of the British 1911 and 1920 Acts were enacted as s. 4 of Canada's 1939

Official Secrets Act, repeating the communication and receipt offences and creating a new offence of retention of unauthorized information. Canada's 1939 Act was presented to the House of Commons and to the Senate as a national security measure "to prevent spying and to inflict penalties on persons who are trying to betray official secrets". Section 4 of Canada's Official Secrets Act, 1939 continues largely unchanged in the present s. 4 of the SOIA: Wark Affidavit at paras. 30-33.

[24] In 2001 and as part of the enactment of the Anti-terrorism Act in response to the events of September 11, 2001 in the United States, the Government of Canada re-enacted Canada's Official Secrets Act, 1939 as the Security of Information Act. New provisions were added, however the old sections from the 1939 Act were retained, including the old offences of unauthorized disclosure in s. 4 of the Official Secrets Act, 1939: Wark Affidavit at para. 38.

[25] Section 4 of the SOIA has long been the subject of criticisms related to cumbersome drafting and ill-considered means to achieve its purpose: Wark Affidavit. An attempt has to be made to define that purpose so as to understand "what it catches". In my view, the purpose of the impugned sections of the SOIA is inextricably related to their historical roots because of their largely unchanged and undebated continuance from the old ss. 2 and 4 of their antecedent statutes.

[26] The Crown submits there is no great mystery as to the object and scope of the impugned sections and that it is clear Parliament intended to deter the unauthorized release of all secret official information, not just that in relation to national security affairs. This appears to be a self-evident purpose until one inquires into what it means and asks what is encompassed by secret official and official information.

[27] The applicants refer to the Crown's formulation of the intent of the impugned sections as a circuitous statement of their [page253] object and argue instead that these old leakage provisions from 1889 and continuing to 2001 and the present were passed to permit the government to control the release of

damaging information.

[28] In my view, both of these statements of the legislative purpose of the impugned sections are correct. It is necessary to point out that I am not interpreting the purpose of the SOIA as a whole, but only the leakage provisions in the impugned sections.

[29] I interpret the impugned sections according to their plain wording considered in the context of their predecessor and present statutes, as intending to criminalize and, therefore, deter and protect against the unauthorized release of government information that carries with it some element of harm to the national interest if released, causing it to be categorized as "secret official" or "official".

[30] I interpret "secret official" and "official" in this way because a plain reading of the SOIA together with its historical and 2001 context makes it clear that not all government information is to be withheld, that public servants owe a duty of trust to their employer and that it has been long accepted as necessary for governments to be able to protect some categories of sensitive information so as to be able to function effectively: Canada, Law Reform Commission, Crimes Against the State, Working Paper 49, 1986 ("LRC 1986"), at pp. 53-54; Canada, Report of the Royal Commission on Security, H.W. Mackenzie, Chair (Ottawa: Queen's Printer, 1969), p. 77; MacDonald Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Police, First Report, October 9, 1979, pp. 24-25 (Recommendation 13), pp. 24-25 (Recommendation 12), p. 24 (Recommendation 10).

The breadth of the impugned sections

[31] The next question is whether what is caught by the objective of protecting the unauthorized disclosure of secret official or official information is too broad. While a measure of deference must be paid to the objectives and methods selected by a legislature, where a provision threatens life, liberty or security of the person "in a manner that is unnecessarily broad, going beyond what is needed to accomplish

the governmental objective", it is not in accordance with the principles of fundamental justice: R. v. Heywood, [1994] 3 S.C.R. 761, [1994] S.C.J. No. 101, at para. 52.

[32] In other words, the means chosen to accomplish the state objective or purpose of the legislation have to be evaluated in relation to that purpose. The court has to ask the question whether the means chosen by the state are necessary to achieve the state objective or whether they are broader than necessary to [page254] accomplish that objective: R. v. Demers, [2004] 2 S.C.R. 489, [2004] S.C.J. No. 43, at paras. 41 and 43.

[33] I now turn to the consideration of the impugned provisions.

[34] I have no difficulty interpreting "secret official" in s. 4(1)(a) and 4(3) as modifying all of the various forms of protected things listed. This has been an issue in previous cases and I agree, in particular, with the court's statements in Rose to this effect: R. v. Rose, [1947] 3 D.L.R. 618, 87 C.C.C. 114 (Que. K.B. (Appeal Side)), at p. 130 C.C.C.; R. v. Toronto Sun Publishing Co. (1979), 24 O.R. (2d) 621, [1979] O.J. No. 4228 (Prov. Ct. (Crim. Div.)), at p. 7 O.R.; R. v. Treu (1979), 49 C.C.C. (2d) 222, 104 D.L.R. (3d) 524 (Que. C.A.), at p. 251 C.C.C.

[35] I agree the drafting for all the impugned sections is certainly inelegant. However, their meaning is still able to be understood and interpreted except, and these are fatal defects both with respect to the overbreadth and vagueness issues, when one asks: (i) what is meant by the references to "secret official", "official" and "authorized"; (ii) how authorization for disclosure occurs; and (iii) for s. 4(4)(b) only, whether even authorized releases are criminalized under this subsection.

[36] There is no definition in the SOIA of the terms "secret official", "official", "lawful authority" or "authorized" in the impugned sections and there is no reference in any other statute of Canada as to how these terms are to be construed. Therein lies the heart of the problem.

[37] Back in 1889, 1911, 1939 and 2001 when the leakage provisions were repeatedly re-enacted into law, there may well have been a sense of comfort and justification arising out of each of those times of crisis and uncertainty that lent support to a perception that the government needed, in the national interest, to have sweeping control over the release of state information. However, an understandable reason for a legislative objective cannot justify an unnecessary overbreadth in the legislation enacted to achieve that objective, especially when held up to the clear light of Charter rights and freedoms.

[38] The existence of the stand-alone terms of "secret official", "official" and "authorized" means that when an interpretation of these sections is attempted, regardless of whatever other classification system the Government of Canada might employ by way of its administrative policies applying to its employees and officials, there is no classification system made applicable by law, as opposed to an administrative guideline, to the impugned sections of the SOIA to assist in determining their meaning (see the administrative guidelines in Treasury Board Secretariat, Government Security Policy, (www.tbs-sct.gc.ca) s.10.6; Treasury [page255] Board Secretariat, Operational Standard for the Security of Information Act, (www.tbs-sct.gc.ca/pubs_pol/gospubs/tbm_12a/siglist_e.asp) ("Treasury Board Operational Standard for the SOIA")).

[39] The consequence of this is that these sections are standardless, with the result that they are facially meaningless. In their present state, the impugned sections give the state the unfettered ability to arbitrarily protect whatever information it chooses to classify as "secret official" or "official" or unauthorized for disclosure and to punish by way of a criminal offence those "speakers", "receivers" and "listeners" who come within that protected sphere. This is particularly difficult and dangerous from the perspective of those outside of government who are in receipt of government information, whether occasionally or frequently, deliberately or inadvertently and who are not bound by

governmental policies or guidelines regarding the classification of government information. There is no guidance for the public in the SOIA as to what amounts to the prohibited conduct prescribed by these sections and their arbitrariness and breadth allow for the possibility that the release and possession of government information that carries with it no harm to the national interest can be criminalized.

[40] The applicants and the CCLA point me to the British Official Secrets Act, 1989 (Official Secrets Act, 1989 (U.K.), 1989 c. 6) as an important example of a more narrowly tailored measure to address national security concerns that has left behind the "blanket" approach of the leakage offences in the 1911 Act shared by the U.K. and Canada and which Canada still retains. This, they say, provides a "real world" example of less intrusive measures that are possible and that have not been adopted in Canada.

[41] The Crown submits that the breadth of the impugned sections has been modified by the enactment in 1983 of the Access to Information Act, R.S.C. 1985, c. A-1 (the "ATIA") and the principle that Parliament's various enactments are presumed to operate harmoniously allows the ATIA to assist in the interpretation of the impugned sections of the SOIA.

[42] As stated in Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 27, there is a general "principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".

[43] The ATIA sets up a detailed scheme giving those seeking government information broad rights of legal access and providing exemptions to those broad rights of access. Most of the exemptions are discretionary and they are either "harm based" [page256] (e.g., Canada (Information Commissioner) v. Canada (Prime Minister), [1992] F.C.J. No. 1054, [1993] 1 F.C. 427 (T.D.), at pp. 478-79 F.C.) or "class based" (e.g., personal information protected by the Privacy Act, R.S.C. 1985, c. P-21, s. 19).

[44] The Crown argues that broadly speaking, both the SOIA and the ATIA deal with a public servant's ability to dispense information and the ATIA can provide significant guidance to understanding what constitutes the actus reus as well as the mens rea of the impugned SOIA offences relating to the leaking of "secret official" or "official" information. That guidance, the Crown suggests, is to make it extremely likely that information will be "secret official" if it comes within the exemptions to access under the ATIA and this allows the public servant and the public to know when information is "secret official" under the SOIA. For the public servant, the Crown argues, there is also guidance in Treasury Board of Canada administrative policies applying to the SOIA (Treasury Board Operational Standard for the SOIA), regarding new concepts introduced in 2001 regarding "special operational information" and "persons permanently bound to secrecy".

[45] The problem with the Crown's argument is that there is not very much of a logical "drawbridge" connecting the impugned provisions of the SOIA and the ATIA for the purposes of harmonization. Also, the Treasury Board Operational Standard for the SOIA is only a guideline and not law.

[46] The state purpose has a very different focus in each of these three documents. The purpose of the impugned sections of the SOIA is to deter unauthorized leaks of certain government information to the public. The purpose of the ATIA is to provide the public with a broad scheme of access to government records. The Treasury Board Operational Standard for the SOIA speaks of the modernization of the espionage provisions and the introduction of new concepts in the SOIA such as "special operational information" and "persons permanently bound to secrecy", but leaves s. 4 including the impugned sections of SOIA untouched by these standards.

[47] The express legislative intent of the ATIA in its s. 2 is to provide the public with a right of access to written government records. "Records" is defined [s. 3 [as am.]]. The ATIA does not apply to government information not contained in written records. The SOIA does. A request for access to written records under the ATIA has to be made in writing and access has

to be given, subject to the exemptions, within 30 days. There is, necessarily, a delay factor built into a request for copies of written records under the ATIA. [page257]

[48] The SOIA terms of "secret official" and "official" remain isolated within that Act and are not found in either the ATIA or the Treasury Board Operational Standard for the SOIA. Nowhere does the ATIA make reference to the SOIA.

[49] The result is that the scheme of the ATIA provides no guidance to anyone in respect of what it considers to be "secret official" or "official" records either under it or under the SOIA, nor does it provide guidance in respect of unwritten or verbal "secret official" or "official" information that may fall within the ambit of unauthorized disclosure under the impugned SOIA sections. The ATIA does contain a provision (s. 74) allowing for an escape from criminal liability if the public servant had a good faith belief that he/she had the necessary authorization to release the records. However, this is nothing that members of the public including the press can ensure and guard against and it is not available legislatively to them under the SOIA.

[50] Further, to say, as the Crown argues, that the dangers associated with the expansiveness of the SOIA can be remedied so that all sensitive government information should first come through an access to information request under the ATIA, fails to recognize the reality of how our democracy functions in protecting freedom of expression and freedom of the press. It is accepted that it is an everyday occurrence for government information to be informally communicated, whether characterized as "leaks" or not, by government officials to members of the public and particularly to the press, outside the mechanism of the ATIA. However, under the wording of the impugned provisions of the SOIA, it is impossible either before or during these informal communications for the listener or the receiver of the information to know if the government regards these communications as protected information that carries with it a criminal sanction under the impugned sections of the SOIA. To suggest to the public and to members of the press that before they receive government information they may understand

might have some protected status under the SOIA they should first go through an access to information request under the ATIA, would itself amount to an unjustifiable limitation on the freedom of expression and amount to a clear "chilling" of free speech and of a free press.

[51] Another problem with the suggested resort to the ATIA is the essential issue of timeliness associated with the effective gathering and dissemination of news and information and which serves to give fuller bloom to our democratic core values of freedom of expression and freedom of the press. The mechanisms in place under the ATIA do not make it a disclosure regime that addresses this requirement. [page258]

[52] In summary, while all legislation is presumed to operate harmoniously, I have no evidence that Parliament ever intended the ATIA to be the exclusive avenue for the communication of government information and that every other avenue of communication is intended to amount to a criminal offence.

[53] I conclude that to presume an exclusive operational harmonization between the SOIA and the ATIA would be to presume too much. The two are not a fit. There is no evidence that Parliament ever intended the leakage provisions in the SOIA and the ATIA to work together to exclude the release of all other information. An attempt at their "harmonization" would amount to inappropriate judicial legislation to "fix" the impugned sections in the SOIA. Any changes required should be made by Parliament with full discussion of their repercussions for free speech and a free press.

[54] The Crown also submits there is another limitation that our courts, if asked, might be able to use to limit the scope of the impugned sections and that is a general common law public interest defence to justify the unauthorized disclosure. The Crown admits no case in Canada has expressly decided whether there is such a defence to charges under s. 4 of the SOIA. There has been discussion of its availability and desirability both in Canada and in the U.K., although the U.K. government rejected the idea of including such a defence in its revised Official Secrets Act, 1989, (U.K.), 1989 c. 6: A.

Kwong, "A Duty to Communicate: The Public Interest Defence to Offences under Section 5 of the Official Secrets Act" (1999) Sing. Law Rev. 177; Y. Cripps, "Disclosure in the Public Interest: The Predicament of the Public Sector Employee" (1983) Public Law 600; B.A. Hocking, "What Lies in the Public Interest? A Legal History of the Official Secrets Act in Britain" (1993) 9 Queensland University of Technology Law Journal 31; Ontario Law Reform Commission, Political Activity, Public Comment and Disclosure by Crown Employees (1986); Reform of Section 2 of the Official Secrets Act 1911 (London: Her Majesty's Stationer's Office, 1988), p. 13; MacDonald Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Police, First Report, October 9, 1979, pp. 24-25 (Recommendation 12).

[55] The Crown argues, nonetheless, that where legislation can be read in a way that promotes constitutional values, the courts should do so and if a court were to recognize the existence of a public interest defence for the impugned sections, that recognition of such a defence would be consistent with the principle of harmonization, as stated in Sharpe at paras. 33 and 122. [page259]

[56] However, as the Crown concedes, in 2001, Parliament specifically prescribed a form of public interest defence in s. 15 of the SOIA and did not make it applicable to s. 4 offences. This is more indicative, in my view, of Parliament's deliberate intention not to provide for the reading in of such defence for the leakage offences.

[57] I conclude that the present availability in Canada of a general public interest defence for these leakage offences is dubious and speculative.

[58] Finally, the Crown argues that the impugned sections are not overbroad because they are limited by the use of prosecutorial discretion where, as a matter of policy, the Attorney General of Canada only prosecutes where it would be in the public interest to do so: Federal Prosecution Service Deskbook, Chapter 15, "The Decision to Prosecute", publicly available at http://

www.justice.gc.ca/en/dept/pub/fps/fpd/ch15.html.

[59] The problems with this argument are, again, issues of reach and vagueness. The Attorney General's discretion to determine what falls into conduct that is in the public interest to be prosecuted is unfettered by the impugned sections. Furthermore, the judicious use of prosecutorial discretion only comes into play too late, after an investigation has occurred and after there has been a decision to charge a person with a criminal offence. Further, judicious use of prosecutorial discretion cannot cure constitutionally overbroad legislation. The "rule of persons" cannot replace the rule of law: Canadian Foundation, as quoted in para. 67 below.

[60] All of these Crown's arguments in support of the constitutionality of the impugned sections, namely, the reliance on the ATIA, a public interest defence and prosecutorial discretion, attempt to provide limitations on the scope of the subsections. In effect, however, these arguments amount to the recognition by the Crown that the impugned sections in their current form are overbroad except if limited by the means suggested.

[61] To summarize, I cannot find that the means suggested by the Crown can save the impugned sections from their overbreadth: the ATIA is not a statute that can be used to limit the SOIA except, potentially, for civil servants and only then in relation to written records; the general availability of a public interest defence for the SOIA offences created by the impugned sections is speculative; and, reliance upon the judicious application of prosecutorial discretion in respect of those offences can provide only an insecure safety net when that prosecutorial discretion is also unlimited and unguided by the legislation.

[62] This is legislation that fails to define in any way the scope of what it protects and then, using the most extreme form of government control, criminalizes the conduct of those who [page260] communicate and receive government information that falls within its unlimited scope including the conduct of government officials and members of the public and of the

press.

[63] If I am correct in setting the state objective for the impugned sections at the protection against the unauthorized release of certain government information that carries with it some element of harm to the national interest if released, then the means used have not been adequately tailored. They are not, largely by virtue of a lack of definition of the protected things, the "least restrictive" means "necessary" to achieve this objective: Demers, at para. 43.

[64] In R. v. Zundel, [1992] 2 S.C.R. 731, [1992] S.C.J. No. 70, at paras. 61 and 71, the Chief Justice of Canada made an observation in connection with the unconstitutionality of s. 181 of the Criminal Code, R.S.C. 1985, c. C-46 for infringing s. 2(b) of the Charter, a comment that is applicable to the present case and the impugned sections:

> Its danger, however, lies in the fact that by its broad reach it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest, however successive prosecutors and courts may wish to define these terms. The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear they will be caught.
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> . . . . .
>
> [T]hey underrate the expansive breadth of s. 181 and its potential not only for improper prosecution and conviction but for 'chilling' the speech of persons who may otherwise have exercised their freedom of expression.

[65] I conclude that by being unnecessarily broad, the impugned sections do threaten the life, liberty or security of the person contrary to a principle of fundamental justice and thereby breach s. 7 of the Charter.

Vagueness

[66] The applicants also argue that the impugned sections are "void for vagueness" because their confusing drafting coupled with their failure to define and, thereby, confine the scope of the protected information deprives those affected of the ability to make dependable assessments of whether their actions will be illegal, and gives government officials and law enforcement agencies a standardless sweep to invoke the criminal law to control the dissemination of even harmless information.

[67] As stated in Canadian Foundation, a law is unconstitutionally vague if it fails to "set an intelligible standard both for [page261] the citizens it governs and the officials who must enforce it" (para. 16). Citizens must be able to know when they are entering a risk zone for criminal sanction and law enforcement officers and judges have to be given some guidance to be able to determine whether a crime has been committed. The Chief Justice of Canada expressed the constitutional requirement for precision in Canadian Foundation at para. 16 as follows:

> A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"[. . .]

[68] The issue then, is whether the impugned sections delineate a risk zone for criminal sanction so as to provide "fair notice" to people who are "approaching the boundaries"

of that risk zone, as the applicants express the concept, and also so as to limit law enforcement discretion and prevent a "standardless sweep" that allows law enforcement officials to pursue their personal predilections: R. v. Morales, [1992] 3 S.C.R. 711, [1992] S.C.J. No. 98, at para. 18.

[69] As for the claim of overbreadth, statutory construction is also the essential first step for a claim of vagueness.

[70] The purpose of the impugned subsections, as stated before, is to criminalize so as to deter and protect against the unauthorized release of government information that carries with it some element of harm to the national interest if released, causing it to be categorized as "secret official" or "official".

[71] The concept of fair notice of the zone of risk has largely been touched upon in the earlier overbreadth analysis of the impugned sections as catching too much, despite the Crown's suggested means of limiting their scope. Because these sections cannot be interpreted as having defined what is caught by "secret official" and "official" information, individuals and particularly those who are not bound by government policy guidelines, are not able to know from the impugned sections when they are "approaching the boundaries" of criminal sanction so that they can make a considered evaluation of whether their conduct is likely to be criminal or not. Similarly, the lack of delineation of a zone of risk by these sections gives no guidance to law enforcement [page262] officials to be able to determine whether a crime has been committed under them, with the result that there are no controls on the exercise of their discretion and there is the danger of arbitrary and ad hoc law enforcement.

[72] I conclude that the impugned sections are, therefore, unconstitutionally vague for not sufficiently delineating the risk zone for criminal sanction. They endanger the life, liberty or security of the person contrary to a principle of fundamental justice and thereby breach s. 7 of the Charter.

The mens rea requirement in sections 4(1)(a) and 4(4)(b)

[73] Sections 4(1)(a) and 4(4)(b) of the SOIA expose those convicted of an offence to the possibility of a prison sentence. Section 7 of the Charter prohibits the imposition of imprisonment in the absence of proof of an element of fault referred to as the mens rea: R. v. Hundal, [1993] 1 S.C.R. 867, [1993] S.C.J. No. 29, at para. 25, referring to Reference re Motor Vehicle Act (British Columbia) S 94(2), [1985] 2 S.C.R. 486, [1985] S.C.J. No. 73, and R. v. Vaillancourt, [1987] 2 S.C.R. 636, [1987] S.C.J. No. 83.

[74] The level of fault required as a matter of fundamental justice depends on the nature of the offence. As stated in Hundal, at paras. 26-28, referring to R. v. Wholesale Travel Group Inc. (1991), 4 O.R. (3d) 799n, [1991] 3 S.C.R. 154, [1991] S.C.J. No. 79:

> Depending on the provisions of the particular section and the context in which it appears, the constitutional requirement of mens rea may be satisfied in different ways. The offence can require proof of a positive state of mind such as intent, recklessness or wilful blindness. Alternatively, the mens rea or element of fault can be satisfied by proof of negligence whereby the conduct of the accused is measured on the basis of an objective standard without establishing the subjective mental state of the particular accused. In the appropriate context, negligence can be an acceptable basis of liability which meets the fault requirement of s. 7 of the Charter [. . .] Thus, the intent required for a particular offence may be either subjective or objective.
>
> A truly subjective test seeks to determine what was actually in the mind of the particular accused at the moment the offence is alleged to have been committed [. . .]
>
> On the other hand, the test for negligence is an objective one requiring a marked departure from the standard of care of a reasonable person. There is no need to establish the intention of the particular accused. The question to be answered under the objective test concerns what the accused

"should" have known. The potential harshness of the objective standard may be lessened by the consideration of certain personal factors as well as the consideration of a defence of mistake of fact [. . .] Nevertheless, there should be a clear distinction in the law between one who was aware (pure subjective intent) and one who should have taken care irrespective of awareness (pure objective intent). [page263]

[75] The Crown concedes and I conclude that the offences created by ss. 4(1)(a) and 4(4)(b) of the SOIA are "true crime" offences. These sections were enacted in 2001 as part of the Anti-terrorism Act, an Act aimed at the prosecution and prevention of terrorism offences that carry with them a high degree of seriousness and social stigma. The maximum penalty of 14 years for the leakage offences under the impugned sections is a significant penalty. Under the Criminal Code, the only penalties higher than this maximum of 14 years under the SOIA are for life imprisonment. In my view, the penalty for s. 4 offences under the SOIA, including the s. 4(1)(a) offence of releasing information in a situation amounting to a significant breach of trust, reflects Parliament's intention that these offences be considered as morally reprehensible acts and serious criminal offences.

[76] As a matter of fundamental justice because the s. 4 offences are "true crime" offences, they must, therefore, include a fault or mens rea requirement. The CCLA argues that this fault requirement should be one of "pure subjective intent" as referred to in Hundal. The Crown disagrees and argues that these sections do require proof of some blameworthy mental state by the reference, in s. 4(1)(a), to releasing information without authorization and by the use, in s. 4(4)(b), of the words "without lawful authority or excuse".

[77] The task for me in the context of this present analysis under s. 7 of the Charter is not (as was the case, for example in Hundal) to determine where on the spectrum between pure subjective intent and pure objective intent the mens rea of these sections falls. Instead, my task is to interpret these subsections to determine whether there is some requirement of a

fault element, as there must be for true crime offences as a matter of fundamental justice.

[78] I do, therefore, agree with the Crown's characterization of the issue as being whether the sections require proof of some blameworthy mental state.

[79] With respect to s. 4(1)(a), I am unable to discern from it what blameworthy mental state is required to be proved before a conviction can occur. The actus reus of the offence is the possession of and the communication of the prohibited thing to "other than a person to whom he is authorized to communicate with". The Crown argues that knowing what you are releasing and doing it without authorization are morally blameworthy mental states so that the element of fault is not missing from this subsection. However, there is no requirement by the words of s. 4(1)(a) that the possessor and communicator know or have [page264] reasonable grounds to believe, as is the case for the receipt offence in s. 4(3), that he/she has had possession of a prohibited thing or is without authorization.

[80] I conclude that s. 4(1)(a) imposes no requirement of any element of fault, either subjective or objective. Instead, it imposes serious criminal liability based solely on the act of communication of the prohibited thing having been committed by the accused and as such, it violates s. 7 of the Charter.

[81] With respect to s. 4(4)(b), there are a number of offences comprised within that subsection, each having a different actus reus. There is the allowing possession of a prohibited thing, the communicating of a prohibited thing, the possession of a prohibited thing and the retaining possession of a prohibited thing.

[82] As I interpret that section, only the act of possession of a prohibited thing includes some kind of element of fault by the use of the words "without lawful excuse" which could be interpreted to allow for subjective knowledge, so that only that kind of offence is saved from violating s. 7 of the Charter. The other offences within that subsection impose criminal liability based solely on the prohibited act having

been committed by the accused and as such, these other offences of allowing possession, communicating and retaining possession violate s. 7 of the Charter.

2. Do the impugned sections of the SOIA infringe section 2(b) of the Charter?

[83] Section 2(b) of the Charter states:

2. Everyone has the following fundamental freedoms:

. . . . .

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

[84] The Crown concedes and I agree, that the impugned sections constitute a prima facie violation of s. 2(b) Charter rights. The sections restrict activity that attempts to convey meaning (R. v. Keegstra, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131, at para. 30) so that they restrict "expression" protected by s. 2(b) of the Charter. Furthermore, their purpose is to restrict the free flow of government information and their effect is to limit freedom of expression including freedom of the press regarding the functioning of government institutions: Irwin Toy Ltd. v. Qubec (Attorney General), [1989] 1 S.C.R 927, [1989] S.C.J. No. 36, at pp. 971-73 S.C.R. [page265]

3. Are the infringements of sections 7 and 2(b) of the Charter saved by section 1 of the Charter?

[85] Section 1 of the Charter states:

1. The Canadian Charter of Rights and Freedoms guarantees the right and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[86] Where "a limitation on rights is established, the onus shifts to the Crown to show that the legislation is justified

under s. 1" (Zundel at para. 37) and where a freedom guaranteed by the Charter is infringed by a criminal prohibition, the Crown bears a heavy burden of justifying that infringement: Zundel, at para. 37 and Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, [1990] S.C.J. No. 52, at para. 5.

[87] As stated in Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, [1991] S.C.J. No. 45, at paras. 51 and 52, a law that is unconstitutionally vague cannot amount to a "limit prescribed by law" nor to a "reasonable" limit prescribed by law to be able to be justified under s. 1 and because this threshold requirement for its application is not met, the further s. 1 analysis (the Oakes test: R. v. Oakes (1986), 53 O.R. (2d) 719n, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7) is not necessary.

[88] A cautionary note, however, is offered, regarding the "reluctance to disentitle a law to s. 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers" because it may very well be "reasonable in the circumstances to confer a wide discretion" so that "it is preferable in the vast majority of cases to deal with vagueness in the context of a s. 1 analysis rather than disqualifying the law in limine" (Osborne at para. 52). Quoting from the present Chief Justice of Canada in Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129, at para. 130, "[. . .] I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a 'limit prescribed by law', unless the provision could truly be described as failing to offer an intelligible standard".

[89] In my view, this is a case of the impugned sections failing to offer an intelligible standard for citizens and law enforcement officials regarding their risk zone for criminal sanctions so that the Oakes test need not be undertaken in respect of the s. 7 infringements.

[90] Nonetheless, I undertake that balancing analysis from Oakes at paras. 63-71 out of abundant caution and to illustrate

the importance of the guarantee of freedom of expression. [page266]

[91] In Zundel at para. 21, the Chief Justice of Canada highlighted the fundamental importance of freedom of expression to the Canadian democracy by quoting the words of Cory J. in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, at p. 1336 S.C.R.:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized [. . .] It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

[92] In Keegstra at para. 89, Dickson C.J.C. described the connection between freedom of expression and the political process as the linchpin of the s. 2(b) guarantee:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

[93] In Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, [1996] S.C.J. No. 38, at para. 18, La Forest J. said:

> The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to

criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption.

[94] It is in this context that the s. 1 analysis is undertaken to consider whether the restrictions imposed by the impugned sections on freedom of expression in connection with the political process are justified as being in the "clearest of circumstances".

Whether the purpose of the impugned sections is "pressing and substantial"

[95] I recognize as a broad general principle, as stated before, that it is essential for government to be able to deter the release of certain types of government information including through the use of criminal sanctions. I recognize, too, in the uncertain national security climate after the terrorist events of 2001 leading to the enactment of the impugned sections as part of the SOIA, that this purpose was reinforced. [page267]

[96] I find that the purpose of the impugned sections as I have understood it to be is "pressing and substantial" or, to use the language of Dickson C.J.C. in Oakes at para. 69 (referring to R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17, at p. 352 S.C.R.) that the objective of the impugned subsections is "of sufficient importance to warrant overriding a constitutionally protected right or freedom", so that this first feature of the Oakes test is satisfied by the impugned sections. The problem lies with the means used.

[97] In Application Under s. 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248, [2004] S.C.J. No. 40, at paras. 5-7, Iacobucci and Arbour JJ. eloquently describe the difficulties facing the state in achieving balanced responses to terrorism:

> The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect

> for the rule of law. Indeed, a democracy cannot exist without the rule of law [. . .]
>
> Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. Yet, at the same time, while respect for the rule of law must be maintained in the response to terrorism, the Constitution is not a suicide pact [. . .]
>
> Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.

Whether the impugned sections are proportional to their purpose

[98] The second feature of the Oakes test involves assessing the proportionality between the purpose of the impugned sections and the sections themselves, to determine if the means chosen to override a constitutionally protected right or freedom are reasonable and demonstrably justified, so as to balance the interests of society with those of individuals and groups: Oakes at para. 70.

[99] The first aspect of this proportionality requirement is that there be a rational connection between the impugned measures and their objective in that the measures adopted must be "carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations": R. v. Lucas, [1998] 1 S.C.R. 439, [1998] S.C.J. No. 28, at para. 52 referring to Dickson C.J.C. in Oakes at para. 70. [page268]

[100] I find that by creating criminal sanctions, these sections are, in that sense alone, connected to their important

purpose of deterring unauthorized leaks of certain types of government information that carry with them some element of harm to the national interest.

[101] However, when the wording of the impugned sections, being the "measures adopted", is considered, for all of the reasons referred to in connection with their overbreadth and vagueness analysis, they are not able to qualify under the rational connection aspect of the proportionality test as not being arbitrary or unfair. They have not been well tailored to suit their purpose: R. v. Edwards Books and Art Ltd. (1986), 58 O.R. (2d) 442, [1986] 2 S.C.R. 713, [1986] S.C.J. No. 70, at para. 122. They arbitrarily and unfairly and with a blunt club of criminal sanction restrict freedom of expression including freedom of the press.

[102] Neither is the second aspect of the proportionality requirement, that the impugned measures minimally impair or impair ss. 7 and 2(b) Charter rights no more than reasonably necessary, able to be satisfied, for all of the same reasons. The impugned sections have not been carefully limited to be a "measured and appropriate response" to the harms they address: Keegstra referred to in Sharpe at para. 95. Their overbreadth and vagueness prevent a finding of minimal impairment. Instead, because of their lack of appropriate tailoring, they are able to criminalize a wide variety of conduct that should not be caught, for example, the communication, receipt or possession and retention of information that invokes no harm element to the national interest. They also have the very real potential to "chill" the pursuit and enjoyment of the right of freedom of expression by the public and by the press.

The "final balance"

[103] Under the third and final branch of the Oakes test, the "final balance", "all the elements identified and measured under the heads of Parliament's objective, rational connection and minimal impairment" are balanced "to determine whether the state has proven on a balance of probabilities that its restriction on a fundamental Charter right is demonstrably

justifiable in a free and democratic society": Sharpe at para. 102.

[104] It follows that if the impugned provisions are not rationally connected to Parliament's objective and do not minimally impair Charter rights, the state has not proven on a balance of probabilities that the infringements are demonstrably justifiable in a free and democratic society and cannot be saved by s. 1. This is the situation in the present case. [page269]

[105] In summary, the impugned sections of the SOIA infringe ss. 7 and 2(b) of the Charter and they are not saved under s. 1.

4. Disposition on the constitutional issues

[106] The Crown has requested that any declaration of invalidity be suspended for one year to permit Parliament to legislate.

[107] I can understand no merit in this. It is three subsections of the SOIA and not the entire SOIA that has been declared unconstitutional. The immediate invalidity of these subsections will not create a complete void in the government's ability to protect against the unauthorized release of harmful government information.

[108] Government employees owe a duty to their employer and they are bound by the terms of their employment and applicable disclosure policies and guidelines. There are civil remedies available against those who breach a term of employment or a duty of trust. There are also Criminal Code offences directed against public officers alleged to have committed a breach of trust or anyone facilitating terrorist activity.

[109] The impugned sections, by being overbroad and vague, infringe a principle of fundamental justice and seriously restrict freedom of expression and of the press and impose a criminal sanction against those caught within their scope. Rather than being under-inclusive in the sense of failing to

extend a legislative benefit to certain classes of individuals, in which case there could be merit to a request for a suspension of a declaration of invalidity so that the benefit is not lost for those already included, they are dangerously over-inclusive in their punitive scope. As such they should not be able to be utilized and should immediately have no force and effect.

[110] Pursuant to s. 52 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, subsections 4(1)(a), 4(3) and 4(4)(b) of the Security of Information Act are declared of no force and effect.

[111] The applicants also request an order under s. 24(1) of the Charter for a return of the things seized (including Exhibit "E" ordered sealed on January 29, 2004). The Crown opposes this remedy and requests instead that I exercise my discretion under s. 24(1) and order the things seized be held by this court for 30 days to permit an application for a new search warrant. The rationale behind the Crown's request is that there are alternate grounds, the offence of breach of trust by a public officer under s. 122 of the Criminal Code, for the issuing of a new search warrant and there is a very real probability that among the things seized is evidence that would be needed in a prosecution of this very serious offence. [page270]

[112] The Crown relies on R. v. Dobney Foundry Ltd. (No. 2), [1985] B.C.J. No. 2252, 19 C.C.C. (3d) 465 (C.A.), at pp. 473-74 C.C.C. following R. v. Chapman (1984), 46 O.R. (2d) 65, [1984] O.J. No. 3178 (C.A.) for the principle that if the Crown asserts the seized items are needed for the purposes of a criminal prosecution, the Crown has the onus to show the necessity of retaining the seized things and the court has a discretion under s. 24(1) of the Charter as to whether they should be ordered returned or allowed to be retained by the Crown.

[113] In Dobney, the owners of the seized documents were suspected of an offence of forming a monopoly in the sale of certain items of trade. The British Columbia Court of Appeal

allowed the appeal and ordered the retention of the seized documents. It was satisfied there was evidence of a serious and chargeable offence and that the seized records could be expected to contain documents relevant to the proof of that offence. The authorities had conducted themselves reasonably during the execution of the warrants. The nature of the warrants' defects related to an overbroad document search in terms of the relevant time period. The loss of possession of the documents would not cause significant hardship to the owners. In those circumstances, the court was satisfied that the documents were needed for the purposes of a prosecution.

[114] In R. v. Vincent, [1996] Q.J. No. 2210, 110 C.C.C. (3d) 460 (C.A.), there was a similar result but for an additional reason. Contraband cigarettes had been seized pursuant to search warrants that inadvertently named a future offence date and omitted to name one of the places where the warrants had been executed. As a result, the warrants had been quashed and the cigarettes ordered returned. The Qubec Court of Appeal, at p. 464 after commenting that "in the case of an unreasonable seizure which violates s. 8 of the Charter, the return constitutes, at first glance, the most appropriate, if not the most obvious remedy under s. 24(1)", allowed the appeal of the return order, primarily on the basis that the possession of the seized contraband cigarettes was prima facie unlawful.

[115] There is no prima facie unlawful possession in the present case. Rather, and considering at this juncture only the constitutional issues, it is a situation of the applicants' things having been seized in respect of alleged offences that have been declared to be of no force and effect. No charges have been laid against the applicants. As a result of the declaration of constitutional invalidity of the impugned sections of the SOIA, none of the alleged charges that formed the grounds for the issuance of the search warrants and the subsequent seizures can be laid [page271] against the applicants. There is, therefore, no valid allegation of wrongdoing against the applicants and there has never been any other allegation of wrongdoing against them.

[116] The alleged offences, by their overbreadth and

vagueness, violate not only the applicants' s. 7 Charter rights but also their s. 2(b) rights as members of the press. They were targets of the searches and seizures precisely because they were members of the press. The offences alleged against them are not serious offences in all of the circumstances. The Crown is not, as in the other cases referred to above, asking this court to assist it in its future prosecution of the applicants but in its possible future prosecution of another person or persons. Because the seized things have been sealed by court order, the Crown is uncertain as to whether they will be of assistance in a future prosecution. The applicants' present status in respect of the allegations of wrongdoing under the SOIA is now that of innocent third parties whose Charter rights have been violated. To allow the Crown to use the "fruits" of a search and seizure obtained under the authority of subsections that violate fundamental principles of natural justice and the core freedom of association and of the press, would itself amount to a further injustice against the applicants and a further violation of freedom of the press.

[117] Therefore, I decline to order the retention of the things seized. Under s. 24(1) of the Charter, there is an order for their return to the applicants.

[118] I now proceed to consider the applicants' two other challenges to the validity of the searches and seizures.

II. Abuse of Process

[119] The two search warrants (the "O'Neill Warrant" and the "Citizen Warrant", collectively the "Warrants") were issued by a justice of the peace on January 20, 2004 and executed the next day, on January 21, 2004. The applicants submit that both Warrants were obtained and executed in a manner that abused or misused the processes of the administration of justice and violated s. 2(b) of the Charter.

[120] The applicants allege the following abuses of process and violations of freedom of the press have occurred:

(1) The applicants were induced to publish information that had

been strategically leaked to O'Neill by a state official or officials in defence of an R.C.M.P. anti-terrorism investigation, but were then made subject to an R.C.M.P. investigation for having done so; [page272]

(2) The Warrants were obtained and executed for the improper purposes of discouraging leaks of government information generally, and/or to chill the media;

(3) The decision to allege that there were grounds to accuse O'Neill of having committed criminal offences was calculated to avoid or diminish the freedom of the press obstacles against obtaining the Warrants;

(4) The investigation into the leaks was cast inaccurately as a national security investigation, thereby intentionally or negligently inflating the seriousness of the offences being investigated;

(5) There was non-disclosure to the issuing justice of centrally important facts;

(6) The O'Neill Warrant was used inappropriately to gain access to O'Neill for the purpose of her interrogation and attempts were made during the execution of that Warrant, under the auspices of its execution, to use the threat of charges to interrogate and intimidate her into compromising the constitutional right of freedom of the press.

The evidence before this court

[121] The evidence before me is comprised only of evidence introduced by the applicants. That evidence is extensive. The Crown has not introduced any evidence and it has chosen not to object to the admissibility of any of the applicants' evidence, focusing its objections instead, on the weight to be accorded to it and the logical inferences able to be drawn from it. The Crown has also chosen not to cross-examine any of the authors of the applicants' affidavit evidence.

[122] The applicants' evidence includes affidavit evidence

referring to and attaching:

-- the O'Neill Warrant and the Citizen Warrant together with supporting and associated documentation, subject to Sealing Orders that seal and therefore do not disclose portions of the Information to Obtain the Warrants (collectively, the "Warrant Documentation"). Corporal Quirion, the R.C.M.P. officer who obtained the Warrants, was cross-examined by the applicants and the transcript of that cross-examination also forms part of the evidence before me; [page273]

-- extensive R.C.M.P. and federal governmental documentary evidence disclosed by the Crown, subject to certain redactions, pursuant to my Rulings (the "Disclosure Rulings") dated May 26, 2005 and January 16, 2006 (collectively, the "Disclosure Documentation");

-- certain of the documentary evidence disclosed to the public in accordance with rulings from Justice O'Connor in connection with the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the "Arar Commission");

-- certain Arar Commission exhibits;

-- excerpts from transcripts of proceedings before the Arar Commission;

-- excerpts of House of Commons Debates;

-- documents obtained from federal government departments through requests made pursuant to the Privacy Act and the ATIA;

-- various media reports.

[123] The Warrant Documentation and the Disclosure Documentation contain numerous redactions that I have ruled on in my Disclosure Rulings. I no longer have before me the content of those redactions and I do not consider them to be part of the admissible evidence so that they form no part of my

consideration of any of the applicants' issues on the Main Application.

[124] Much of the evidence appended to the affidavits is, I agree, admissible under s. 30 of the Canada Evidence Act, R.S.C. 1985, c. C-5, as business records and therefore, able to be regarded as reliable as having been made in the course of the government's business.

[125] The applicants have filed the affidavit of Ms. Wendy Wagner as counsel for O'Neill regarding statements made by the R.C.M.P. to O'Neill during Ms. Wagner's attendance during the search of the O'Neill residence. This evidence is admissible evidence of those statements having been made and as such is not inadmissible hearsay as the Crown has asserted. Its relevance relates to the propriety of the police questioning.

[126] The applicants have also filed a number of affidavits from persons associated with the profession of journalism in a variety of capacities, referred to as "Confidential Source affidavits". While I do not wish to minimize the expertise of the Confidential [page274] Source affiants in their respective fields, opinion evidence is presumptively inadmissible in a court of law except when the expert is properly qualified and the boundaries of his or her expertise have been defined. Where some of the statements in the Confidential Source affidavits amount to expert opinion evidence relied upon for the opinions expressed, I find that such opinion evidence is inadmissible and I have not relied on it. This applies to some portions of the Confidential Source affidavits, parts of which the applicants have withdrawn on this basis and to other similar affidavits. It does not apply to the Wark Affidavit referred to under the constitutional issue, aside from subpara. (d) on its p. 18 that I agree is inadmissible opinion evidence.

[127] For the other evidence, the weight to be accorded to it depends upon its use and I am cognizant of the dangers of relying upon hearsay evidence for the truth of the statements made where there are no circumstantial guarantees of their reliability and no ability to test their accuracy. There has been no objection from the Crown as to the authenticity of any

of this other evidence but the Crown does disagree, as stated previously, with the applicants as to its weight and the logical inferences able to reasonably be drawn from it. For the media reports and excerpts of House of Commons Debates introduced by the applicants, I have only considered the statements in them as having been made and there is no assumption as to their accuracy or their truth. Their relevance is merely to illustrate the visibility of the public debate occurring at the time.

[128] The Final Report of the Arar Commission dated September 18, 2006 is not part of the evidence before this court. After the conclusion of the hearing of the Main Application, the Crown did apply to have an excerpt of it admitted. However, by my Ruling dated October 2, 2006, the Crown's application for the introduction of this new "evidence" was denied. As stated in my Ruling, this Final Report is in the category of expert opinion evidence that is presumptively inadmissible in a court of law unless expressly admitted. Therefore, I also do not take judicial notice of it and I have purposefully not read it.

[129] In considering the issue of abuse of process in connection with the obtaining and executing of the two Warrants, I have approached this issue from the perspective of the R.C.M.P. regarding the impugned sections as good and valid law under which it was able to proceed and that its belief as to this law's validity was reasonably held at that time, so as to separate out from the consideration of its actions the negative effects occasioned by that legislation's overbreadth and vagueness. To do otherwise would unfairly tarnish the actions of the R.C.M.P. with [page275] the defects associated with the legislation and would attribute to the R.C.M.P. consequences that were not of its own doing.

[130] I am aware of the limits of the evidence before me in that its breadth has been necessarily constrained by considerations of relevance to the issues on this application, pursuant to my Disclosure Rulings. I understand that the evidence before me may not be the entire picture of events occurring prior to the obtaining and execution of the Warrants. I am satisfied however, that there has been full compliance by

the Crown with the disclosure orders contained in those Rulings and that the applicants have been provided with "disclosure and production of all information in the Crown's possession or control, including in the possession or control of the RCMP" as set out in my Disclosure Ruling date May 26, 2005.

The applicants' burden of proof

[131] As for all Charter motions, the burden is on the party alleging a Charter breach to prove the alleged breach on a balance of probabilities: R. v. O'Connor, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, at para. 83.

[132] This also applies to the common law doctrine of abuse of process invoking the common law power of courts to protect the integrity of the administration of justice from disrepute: R. v. Campbell (1999), 42 O.R. (3d) 800n, [1999] 1 S.C.R. 565, [1999] S.C.J. No. 16, at para. 43 and O'Connor at para. 61.

[133] Action that is undertaken in abuse of process contravenes the Charter because "conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play [. . .] calls into question the integrity of the system [and] is also an affront of constitutional magnitude [. . .]". An abuse of process will violate the principles of fundamental justice guaranteed in s. 7 of the Charter: O'Connor at paras. 61-63.

[134] The abuses of process alleged in this application do not affect trial fairness as there are no criminal charges, but can be said to fall into what is sometimes referred to as the "residual category" of conduct caught by s. 7 of the Charter, referred to by Justice L'Heureux-Dub in O'Connor at para. 73 as:

> [T]he panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[135] The conduct being considered in this application is the prosecutorial conduct or law enforcement techniques of the R.C.M.P. and whether its actions in this case amount to conduct that citizens will not tolerate: Campbell at para. 43. [page276]

[136] In order to secure a remedy for an abuse of process, the applicants have to show more than abusive acts or omissions undertaken in the administration of justice. They also must meet a causation requirement in that the abusive conduct "must have caused actual prejudice of such magnitude [either to the accused or the integrity of the judicial system] that the public's sense of decency and fairness is affected": R. v. Regan, [2002] 1 S.C.R. 297, [2002] S.C.J. No. 14, at para. 52, referencing Blenco v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, [2000] S.C.J. No. 43.

[137] As reviewed before in connection with the constitutional issues, freedom of expression and freedom of the press are constitutionally protected freedoms that are of vital importance in facilitating democracy and "removing the defects of vicious governments" and "misgovernment". Freedom of the press is intended to complement and give effect to freedom of expression. It includes the "right to transmit news and other information [and] also the right to gather this information": Canadian Broadcasting Corp. v. New Brunswick (Attorney General) at paras. 18, 21, 24.

[138] The determination, therefore, that is to be made, paraphrasing from O'Connor and Regan, is whether I am satisfied on a balance of probabilities that the R.C.M.P., in its obtaining and execution of the Warrants, acted unfairly or vexatiously to such a degree that its actions contravened fundamental notions of justice such that the public's sense of decency and fairness is affected and thereby undermined the integrity of the judicial process and/or that it contravened s. 2(b) of the Charter.

Analysis

[139] I make the following factual findings so as to provide

a contextual basis upon which to consider whether abuses of process and violations of s. 2(b) of the Charter have occurred. These factual findings form the basis of my analysis and conclusions stated below.

[140] Some of the specific evidentiary sources for these findings are listed in each party's factum, namely, in the Applicants' Abuse of Process and Section 2(b) Factum and in the Crown's Memorandum of Argument of the Respondent on Abuse of Process and s. 2(b) of the Charter. The paragraphs from those facta that list those evidentiary sources are referred to below. I wish to make it clear, however, that the referencing below of paragraphs of each party's factum is only to identify some of the evidentiary sources for my finding and I do not necessarily agree with the [page277] statements of fact, argument or opinion contained in either factum except as stated below.

[141] I am satisfied from the admissible evidence before me of the following facts:

(1) In Syria, Mr. Arar was allegedly tortured, interrogated and forced to sign a false confession pertaining to his involvement in terrorist activities. (Applicants' Factum at para. 4)

(2) Following Mr. Arar's return to Canada in October 2003, there was a public outcry concerning the Government of Canada's treatment of him and in particular whether the Government of Canada had been complicit in his deportation to Syria. Allegations were made in Parliament and in the media that the R.C.M.P. may have passed on information about Mr. Arar to the American authorities and that the Government of Canada was involved in a "cover-up". (Applicants' Factum at para. 5)

(3) Commencing back in July 2003, there were media reports of various "leaks" from "officials" to the media of a kind that would damage the reputation of Mr. Arar and dispel the public perception that he was an innocent man. (Applicants' Factum at paras. 11 and 12)

(4) The O'Neill article was published November 8, 2003 and like other news articles that reported on allegedly "leaked" information, it contained allegations that, if true, would discredit Mr. Arar. The O'Neill article referred to one of the leaked documents having recounted what Mr. Arar had allegedly told Syrian military intelligence officials during the first few weeks of his incarceration about his connection to terrorist organizations. (Warrant Documentation)

(5) Mr. Arar's "confession" to Syrian authorities had been circulated widely within government and to the media and an official in the Department of Foreign Affairs ("DFAIT") spoke openly of it to a journalist. (Applicants' Factum at paras. 22-24)

(6) There is one reference in the Disclosure Documentation from the R.C.M.P. that one person regarded the allegedly leaked "confession" document not as a secret classified document but as "Reliable Disclosable Unclassified". (Applicants' Factum at para. 25)

(7) Commencing with Mr. Arar's return to Canada in October 2003, there were calls for a public inquiry into what had [page278] happened to him. The R.C.M.P. was concerned that a public inquiry might require that "sensitive intelligence" be disclosed. (Applicants' Factum at para. 26)

(8) R.C.M.P. officers within Project "A" O Canada, the unit conducting the relevant anti-terrorism investigations, believed they were being treated unfairly and were anxious to tell their story and to speak publicly concerning the Arar investigation. The Deputy Commissioner of the R.C.M.P., Garry Loeppky, by letter dated June 26, 2003, disagreed with the statement that "the Government of Canada has no evidence Mr. Arar was involved in any terrorist activities" and called the statement "misleading". He indicated, "Mr. Arar is currently subject of a national security investigation in Canada". (Applicants' Factum at paras. 47 and 49)

(9) There were calls from politicians and from the media for the Government of Canada to discover who was responsible for "a consistent stream of government leaks" and Mr. Arar's supporters criticized the leaks as an attempt to damage Mr. Arar's reputation and discredit his allegations. (Applicants' Factum at para. 27)

(10) On November 4, 2003, Mr. Arar gave a news conference that was widely covered by the media. He proclaimed his innocence and called personally for a public inquiry. (Applicants' Factum at para. 29)

(11) Part of the Disclosure Documentation makes it clear that shortly after Mr. Arar's press conference, officials of the Privy Council Office (the "PCO") and the R.C.M.P. were informed of the "intense pressure on the Canadian Government to hold a public inquiry" and that it would be "impossible to avoid a public inquiry -- too many unanswered questions and a compelling story by Arar". (Applicants' Factum at para. 30)

(12) Mr. Arar's counsel publicly criticized the R.C.M.P. Commissioner for not taking action to find the source of the leaks. (Applicants' Factum at para. 31)

(13) The O'Neill article was published on November 8, 2003. The PCO was concerned about the leaks included in the O'Neill article and believed they were harming the government. It undertook an administrative inquiry into the leaks and the Disclosure Documentation indicates that on November 12, [page279] 13 and 14, 2003, it made the R.C.M.P. aware of its serious concerns about the leaks. (Applicants' Factum at paras. 32, 34, 35)

(14) On November 13, 2003, after referring to the O'Neill article, R.C.M.P. Inspector Warren Coons made a request to Chief Superintendent Wayne Watson that "a criminal investigation be initiated pursuant to the Security of Information Act to determine if a member(s) of the R.C.M.P. provided classified information to a person not authorized

to receive such information". (Disclosure Documentation at p. 122, Volume II, Exhibit D5 to the Affidavit of Andrew Kidd dated March 30, 2006)

(15) On November 14, 2003, R.C.M.P. Assistant Commissioner Richard Proulx, after referring to "an apparent unauthorized disclosure of classified information pertaining to the Canada investigation" and this information having appeared in recent newspaper articles and having been shared with a number of government departments, wrote in a letter to the R.C.M.P. "J" Division that "I am requesting an investigation under the SOIA in an attempt to determine the source of this leak with the objective of criminal prosecution". (Disclosure Documentation at p. 89, Volume II, Exhibit D4 to the Affidavit of Andrew Kidd dated March 30, 2006)

(16) On November 14, 2003, R.C.M.P. Deputy Commissioner Loeppky shared his view with an official of the PCO that the R.C.M.P. investigation to date suggested there had been a breach of the SOIA. (Applicants' Factum at para. 36)

(17) On November 17, 2003, Deputy Commissioner Loeppky expressed to the Assistant Commissioner Criminal Intelligence Directorate of the Canadian Security Intelligence Service ("CSIS") that the R.C.M.P. would need to move forward quickly and the PCO was furnished with a detailed timeline relating to the SOIA investigation. (Applicants' Factum at para. 37)

(18) The Disclosure Documentation indicates R.C.M.P. investigating officers were aware as early as November 17, 2004 that there could be issues of privilege regarding a reporter's source. (Applicants' Factum at paras. 53, 121)

(19) On November 18, 2003, the notes of R.C.M.P. Inspector Wayne Hanniman indicated, "Director wants publishers of [page280] secret information considered in investigation". (Applicants' Factum at para. 121)

(20) On November 18, 2003, R.C.M.P. Chief Superintendent Watson

noted, "PCO, Sol Gen, CSIS agree with SOA Investigation". (Applicants' Factum at para. 38)

(21) Shortly after the publication of the O'Neill article, the R.C.M.P. suspected that the leaks might have come from within the R.C.M.P. (Applicants' Factum at para. 50)

(22) "It is clear that secret information was illegally taken by someone who had authorized access to it and then that person, acting unlawfully by breaching SOIA provisions, gave it to Ms. O'Neill. That she wrote an article containing the secret information is in evidence." (Crown's Factum statement at para. 36)

(23) Corporal Quirion (he was Sergeant Quirion at the time of his cross-examination before this court), part of the R.C.M.P.'s investigative team from New Brunswick for the SOIA investigation, indicated by the statements he made in the Warrant Documentation and specifically, in his sworn affidavit dated January 20, 2004 in support of the request for the Warrants, that:

-- he had grounds to believe O'Neill had received and published in the O'Neill article, information from a secret classified document contrary to the SOIA;

-- the investigation into the alleged leaks evidenced by the O'Neill article had commenced by the first week of December 2003;

-- O'Neill had been a target of the SOIA investigation as early as December 2, 2003;

-- on December 15, 2003, the R.C.M.P. had conducted surveillance of her;

-- on December 18, 2003, a search warrant had been obtained for Rogers Cable Inc. subscriber records regarding the computer O'Neill had used to send an e-mail to a certain person of interest to the R.C.M.P.;

-- on January 13, 2004, O'Neill's garbage was retrieved and searched; [page281]

-- on January 14, 2004, the R.C.M.P. interviewed a person who denied being the leaker and acknowledged receiving an e-mail message from O'Neill.

(24) Notes dated January 8, 2004 by the R.C.M.P. Deputy Commissioner Loeppky confirm a briefing about the investigation, indicating "interviews starting today (HQ) . . . Week of 19th -- search Ottawa Citizen". (Applicants' Factum at para. 52)

(25) During the execution of the Warrants on January 21, 2004, press information in terms of "media lines" was exchanged between the R.C.M.P. and the PCO and the PCO forwarded them immediately to the Prime Minister's Office. (Applicants' Factum at para. 40)

(26) The R.C.M.P., in turn, was supplied with the PCO media lines on a punctual basis after the execution of the Warrants and, one day after the search on January 22, 2004, the R.C.M.P. had a media line stating, "The R.C.M.P. is an independent policing organization. It does not take direction from the Government of Canada on operational matters." (Applicants' Factum at paras. 41-42)

(27) The objective of the criminal investigation under the SOIA including the objective of the obtaining and execution of the Warrants was to uncover the source of the leaks or, in other words, to find the person or persons responsible for releasing information from a secret document. (Applicants' Factum at paras. 44-46; Crown's Factum at para. 12 and finding 15 above)

(28) The Warrant Documentation says that the purpose of the Warrants is to "afford evidence of offences contrary to Section 4 of the Security of Information Act and assist in the identification of the persons(s) responsible for the wrongful communication of the secret classified document, also an offence under Section 4 of the said Act".

(29) Sergeant Quirion testified in his cross-examination that the R.C.M.P. regarded the communication, receiving and publishing of information from a secret classified document to be a matter of national security concern.

(30) During the execution of the O'Neill Warrant, an R.C.M.P. officer questioned O'Neill regarding the identity of her confidential source and told her it was his understanding that [page282] she would be charged with criminal offences under the SOIA. (Applicants' Factum at paras. 64-65)

(31) The execution of the Warrants chilled media reports on the Arar matter specifically and had a general chilling effect on political and investigative reporting. (Applicants' Factum at paras. 66-67)

[142] The six alleged abuses of process all overlap to some degree, but I will deal with each of them separately.

[143] The first alleged abuse of process is that "the applicants were induced to publish information that had been strategically leaked to O'Neill by a state official or officials in defence of an RCMP anti-terrorism investigation but were then made subject to an RCMP investigation for having done so".

[144] This allegation requires an evidentiary connection between the alleged leak or leaks to O'Neill and the Warrants so as to be able to establish that state officials used O'Neill to get certain facts published that they wanted published and then alleged she had committed a criminal offence for doing what they had set her up to do. If this could be reasonably inferred from the evidence, on the requisite basis of a balance of probabilities, I would agree that such conduct would amount to abusive conduct by those state officials such that the integrity of the administration of justice would be brought into disrepute and O'Neill's constitutionally protected freedom of expression and freedom of the press would be violated.

[145] However, based on the evidentiary findings referred to

above and also because the allegedly leaked "confession" document had been circulated widely within the government and in the media, I cannot ascertain or make a reasonable inference as to the source of the alleged leak or leaks to O'Neill, even though the R.C.M.P. suspected its own members at one stage of their investigation. Because I cannot reach a conclusion regarding the source of the leaks to O'Neill, I am not able to infer that there was a connection between those leaks and the obtaining and executing of the Warrants.

[146] The second and third alleged abuses of process are that "the Warrants were obtained and executed for the improper purposes of discouraging leaks of government information generally, and/or to chill the media" and "the decision to allege that O'Neill had committed criminal offences was calculated to avoid or diminish the freedom of the press obstacles against obtaining the Warrants".

[147] The Warrants, as stated above, were executed for the purpose of discovering the source of the unauthorized leaks of the [page283] prohibited information. Assuming the validity of the s. 4 offences in the SOIA as the R.C.M.P. was entitled to do, it was able to regard unauthorized leaks of protected information as amounting to criminal conduct. It was also able to regard these leaks as engaging a national security concern. As Sergeant Quirion testified during his cross-examination, unauthorized disclosure of "secret official" information was a matter of national security concern quite apart from concerns regarding the protected content of the leaked information. He did not elaborate. However, as stated before in considering the constitutional issues and because the purpose of the SOIA leakage provisions is to criminalize and therefore protect against the unauthorized release of government information that carries with it some element of harm to the national interest if released, I think it self-evident that such release encompasses national security concerns. Therefore, I agree with the Crown's assertion that one reason the unauthorized distributing of secret information is a national security concern is because it can jeopardize international confidence regarding Canada's ability to protect sensitive information.

[148] While the effect of the searches and seizures was certainly to place a "chill" on the media, and they did diminish freedom of expression and of the press, the originating source of this harm was the overbreadth of the impugned sections allowing the R.C.M.P. to have resort to them and, as discussed earlier, the constitutional defects of the impugned sections should not operate to tarnish the decision of the R.C.M.P. to proceed under them.

[149] In these second and third alleged abuses of process, the applicants submit the Warrants were obtained and executed for improper motives directed against the press so as to shut down the damaging leaks. To be able to infer improper motives or improper purposes, again, there would have to be more evidence before me than there is, to provide a connection between the acts of the alleged leaks and the acts of obtaining and execution of the Warrants. I am unable to arrive at an inference as to the source of the alleged leaks to O'Neill and I am also not able to infer that it was "more likely than not" that the R.C.M.P. targeted O'Neill for any other purpose than to discover the source of those leaks.

[150] The disposition of the fourth and fifth allegations follows from this. I cannot infer that the investigation into the leaks was "cast inaccurately as a national security investigation, thereby intentionally or negligently inflating the seriousness of the offences being investigated", the fourth alleged abuse of process or, that there was "non-disclosure to the issuing justice of centrally important facts" related to the casting of the investigation as involving national security, the fifth alleged abuse of process. [page284]

[151] I, therefore, dismiss the first five of the applicants' alleged abuses of process.

[152] The final alleged abuse of process is that the "O'Neill Warrant was used inappropriately to gain access to O'Neill for the purpose of her interrogation and attempts were made during the execution of that Warrant, under the auspices of its execution, to use the threat of charges to interrogate and intimidate her into compromising the constitutional right of

freedom of the press".

[153] I disagree with the applicants' contention that O'Neill was improperly "interrogated" during the search. I agree with the Crown that investigative questions are allowed during the course of an authorized search and seizure within Charter parameters, for example ss. 8, 9 and 10 of the Charter, and there are no such alleged violations.

[154] I am satisfied, however, on a balance of probabilities that it is reasonable to infer that the O'Neill Warrant and particularly the allegations of criminality against O'Neill were used to gain access to O'Neill for the purpose of intimidating her into compromising her constitutional right of freedom of the press, namely, to reveal her confidential source or sources of the prohibited information. In other words, I am satisfied that it is reasonable to infer that the Warrants were obtained and executed primarily for purposes other than the enforcement of the SOIA against O'Neill and that their purpose, instead, was to uncover the source of the leaks.

[155] I make these inferences on the basis of the para. 14 finding above indicating that the SOIA investigation began shortly after the O'Neill article was published and also on the basis of the other findings referred to above indicating that O'Neill became an early target of that investigation. The clear purpose of the investigation was to uncover the source of the unauthorized leak or leaks. The R.C.M.P. acknowledged this at the start of the SOIA investigation and in the Warrant Documentation. The findings referred to above point to a reasonable inference that approximately two weeks after the SOIA investigation had begun the R.C.M.P. had focused some of its investigative efforts on uncovering the name of O'Neill's confidential sources as a means of achieving its purpose. It knew at the very genesis of the SOIA investigation, sometime in the week following the publication of the O'Neill article, that there could be issues of privilege involved for a reporter's source. I think it reasonable to infer, particularly given the governmental pressure that was being exerted at that time and the November 18, 2003 communication referred to in the para. 19 finding above, that the R.C.M.P. quickly turned to [page285]

and kept in its sights an easy target from whom it could discover that source, i.e., the "publishers of secret information". The R.C.M.P. then alleged that one of those "publishers" had committed criminal offences, which it had a right to do under the SOIA, but it did this when its declared investigative purpose was simply to uncover the source of the leaks.

[156] As the applicants have stated, "O'Neill [was] not the focus of the investigation, but instead, an after-the-fact casualty of the resolve of some senior administrators in the R.C.M.P. to discover the source of embarrassing leaks". This is a reasonable inference from the facts.

[157] In summary, it is the allegation of criminality against O'Neill in the Warrants that is the abusive conduct in this case and that amounts to an intimidation of the press and an infringement of the constitutional right of freedom of the press.

[158] The next issue is whether these actions of the R.C.M.P. amount to conduct that offends the public's sense of decency and fairness such that it undermines the integrity of the judicial process.

[159] I find that it does, even though the original culprit for this abusive conduct is the SOIA and its leakage provisions, allowing the R.C.M.P. to lawfully allege criminal actions against the press in these circumstances and thereby gain "leverage" against the press in its quest to uncover the source of the leaks. As I have indicated before, the evidence before me does not allow for an inference of improper purpose on the part of the R.C.M.P. to "shut down" the media in reporting the damaging leaks, but it is the spectre of law enforcement officials being able, by virtue of the leakage provisions of the SOIA, to threaten criminal charges so as to uncover a reporter's confidential source and thereby effect a "chill", even unintended, on the right of freedom of expression and of the press that undermines the integrity of the judicial process.

[160] In Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421, [1991] S.C.J. No. 87, at paras. 2 and 3, La Forest J. spoke of the importance of protecting a reporter's sources as part of the constitutionally protected freedom of the press:

> [T]he freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference.
>
> I have little doubt, too, that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. That someone might be deterred from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident. [page286]

[161] At para. 7, La Forest J. commented on the Pacific Press case (British Columbia v. Pacific Press Ltd. (1977), 37 C.C.C. (2d) 487, [1977] 5 W.W.R. 507 (B.C.S.C.)), where reporters' handwritten notes and a reporter's "contact book" had also been seized in the search, and commented:

> The press should not be turned into an investigative arm of the police. The fear that the police can easily gain access to a reporter's notes could well hamper the ability of the press to gather information. I would think that, barring exigent circumstances, the seizure of items of this nature should only be permitted when it is clear that all reasonable alternative sources have been exhausted.

[162] In the concurrent case of Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1991] 3 S.C.R. 459, [1991] S.C.J. No. 88, at para. 44, Cory J. summarized the factors to be considered by a justice of the peace on an application for a search warrant for media premises. He stated, in part:

> (2) Once the statutory conditions [under s. 486(1)(b) of the Criminal Code] have been met, the justice of the peace should consider all of the circumstances in

determining whether to exercise his or her discretion to issue a warrant.

(3) The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant. [. . .]

. . . . .

(5) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.

[163] By its decision to allege criminal offences and obtain and execute the Warrants, the R.C.M.P. did treat O'Neill as one of its investigative arms to uncover the source of the leaks. Even though O'Neill was "implicated in the crime under investigation", but there were no allegations of criminality against the Ottawa Citizen Group Inc., there is no evidence that reasonable alternative measures to discover the source of the leaks had been exhausted. The R.C.M.P. was entitled to enforce the SOIA against O'Neill but when it did, its purpose was abusive. The [page287] constitutional defects in the leakage provisions of the SOIA enabled this course of action by the R.C.M.P.; however, in deciding to pursue it, the R.C.M.P. engaged in conduct that used the threat of criminal charges against the media to try to get the information it wanted.

Given the importance of the freedom of expression and the press in our democracy, this is conduct that has caused great prejudice to those freedoms.

[164] In all of the circumstances reviewed above in my findings, this is conduct, in my view, that does offend the public's sense of decency and fairness and does undermine the integrity of the judicial process.

[165] I therefore find that the obtaining and execution of the Warrants in these circumstances abused the general reputation of the administration of justice (O'Connor at paras. 34 and 35) and violated s. 2(b) of the Charter.

Remedy

[166] The applicants request a quashing of the Warrants and an order for the return of the things seized together with an order as to costs. This is in lieu of the usual remedy of a stay of proceedings only exercised in the "clearest of cases" (O'Connor at para. 43 and R. v. La, [1997] 2 S.C.R. 680, [1997] S.C.J. No. 30, at para. 66), that is inapplicable here as no charges have been laid.

[167] The consideration of the appropriate remedy is bound up in a consideration of the degree of the abusive conduct. Here, as stated before, the R.C.M.P. was entitled to believe that O'Neill was criminally liable under the SOIA. However, it was primarily interested in uncovering the source of the leaks, a journalist's confidential source, and I have found that it is reasonable to infer, on a balance of probabilities, that it alleged criminal charges against her to facilitate its investigation into that source. This is conduct that is offensive to such a degree, in my opinion, that the Warrants should not stand.

[168] Therefore, the Warrants are quashed and for the reasons already referred to under the constitutional issues, the things seized are ordered returned.

[169] Submissions as to costs may be made at a later date, as

stated at the end of this decision.

III. Validity of the Search Warrants

[170] The applicants allege the Warrants were issued in violation of ss. 8 and 2(b) of the Charter as follows:

(1) The Warrant Documentation failed to disclose reasonable and probable grounds to believe, according to the constitutional [page288] principles identified in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at pp. 114-15 C.C.C., that:

(a) the alleged offences had occurred, or

(b) there would be relevant evidence in the places to be searched, or

(c) the property the police were authorized to search and seize was strictly relevant to the alleged offences;

(2) The balancing of competing interests that the Charter requires as stated in Canadian Broadcasting Corp. v. New Brunswick (Attorney General) was not performed and had it been, there is a reasonable possibility the Warrants would not have issued;

(3) The issuing Justice of the Peace failed to impose conditions on the exercise of the Warrants, as set out in Canadian Broadcasting Corp. v. New Brunswick (Attorney General) at paras. 27, 30 and 43, so as to minimize the intrusion upon s. 2(b) of the Charter, the freedom of the press.

Standard of review

[171] The standard of review is related to the nature of the application. The applicants apply for relief by way of certiorari that allows this court to quash the Warrants if the issuing justice made a jurisdictional error. In considering whether a jurisdictional error occurred, the reviewing judge is

to consider the sworn search warrant information to determine "whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued": R. v. Araujo, [2000] 2 S.C.R. 992, [2000] S.C.J. No. 65, at para. 51. If there was, then the issuing justice has not exceeded his or her jurisdiction and relief by way of certiorari is not available: R. v. Church of Scientology (No. 6), [1987] O.J. No. 64, 31 C.C.C. (3d) 449 (C.A.), at p. 494 C.C.C.

[172] The reviewing judge does not substitute his or her view for that of the authorizing judge: Araujo at para. 51 quoting from R. v. Garofoli, [1990] 2 S.C.R. 1421, [1990] S.C.J. No. 115, at p. 1452 S.C.R.

[173] The questions I have asked myself in connection with the alleged violations, therefore, are whether the issuing justice had before him in a part of the Warrant Documentation, namely the sworn "Informations to Obtain Search Warrant", some reliable [page289] evidence that might reasonably be believed (a) as to the requisite reasonable and probable grounds, as set out in Hunter v. Southam at pp. 114-15 C.C.C., regarding the alleged offences and the places and things to be searched; and (b) upon which the issuing justice could have exercised his discretion and issued the Warrants: R. v. Church of Scientology (No. 6) at p. 494 C.C.C.; Canadian Broadcasting Corp. v. New Brunswick (Attorney General) at para. 43.

Analysis

[174] Some of the issues considered and decided in connection with the constitutional and abuse of process arguments surface again in considering the validity of the Warrants:

-- the ability of the R.C.M.P. and now, the issuing justice, to regard the impugned sections of the SOIA as constitutionally valid and to proceed under them;

-- the not inaccurate casting of the nature of the R.C.M.P. investigation as involving national security concerns;

-- the purpose of the obtaining and execution of the Warrants was to assist in the identification of the person or persons responsible for the unauthorized communication of the prohibited information;

-- the factors to be considered by a justice of the peace in considering an application for a search warrant for media premises as set out in Canadian Broadcasting Corp. v. New Brunswick (Attorney General) at para. 43;

-- the finding that the R.C.M.P. treated O'Neill as one of its investigative arms to uncover the source of the leaks and even though O'Neill was "implicated in the crime under investigation", there is no evidence that reasonable alternative measures to discover the source of the leaks had been exhausted.

All of these inform my analysis of the validity of the Warrants.

[175] I find, as a consequence of the ability of the R.C.M.P. to regard the impugned sections of the SOIA as constitutionally valid and to proceed under them, that it also had the ability to claim that the prohibited information had "secret" classified status, as Corporal Quirion stated in the Warrant Documentation, simply because for whatever reason and by whatever process, that was its governmental classification for the purposes of the [page290] SOIA leakage offences and that legislation enabled this kind of classification. In other words, I have approached the analysis of the validity of the Warrants from the perspective that the constitutional defects of the SOIA leakage offences do not operate to tarnish the assessment of whether the issuing justice acted within his jurisdiction.

[176] The Toronto Sun case (R. v. Toronto Sun Publishing Co., supra, is relied on by the applicants regarding the issue of whether there were reasonable and probable grounds before the issuing justice that the document in question was classified as "secret". In Toronto Sun, the defendants had been charged with offences under ss. 4(1)(a) and 4(3) of the Official

Secrets Act, virtually the same two out of three offences referred to in the Warrant Documentation. Waisberg J. was presiding at a preliminary hearing where the Crown had to adduce some evidence of each of the essential elements of the offences for there to be a committal to stand trial. He found that the document in question "was no longer, if ever, secret" and that the status of "secret" couldn't be proved by the mere stamping of the word on the document, which was the state of the evidence before him. The defendants were discharged.

[177] That case is inapplicable to the present issue of the validity of the Warrants. It involved an assessment of the Crown's evidence before a preliminary hearing judge and not the assessment of police investigatory evidence as was facing the issuing justice with respect to the Warrant Documentation. The quoted comments from Waisberg J. are more applicable to the constitutional defects of overbreadth and vagueness of the sections before him and do not, as previously stated, affect the assessment of the validity of the Warrants.

[178] I agree with the Crown that Corporal Quirion's statements in the Warrant Documentation that the internal classification of the document was "secret" is some evidence of its status and that the merit or sufficiency of this classification is not an issue at this investigative stage of obtaining the Warrants. This distinction between the investigative stage and the post charge stage also applies to my assessment of the evidence before the issuing justice in respect of the other essential elements of the alleged offences. The statements of Major J. in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1999] S.C.J. No. 87, at paras. 20-22, are particularly applicable in considering the applicants' arguments regarding reasonable and probable grounds of the essential elements. Major J. reviewed the purpose of the search warrant provisions of the Criminal Code and repeated the caution from Re Church of Scientology at p. 475 C.C.C. that the investigatory function of the [page291] police "should not be frustrated by the meticulous examination of facts and law that is appropriate to a trial process". I conclude that the majority of the applicants' arguments regarding reasonable and probable grounds belong in a trial

context.

[179] I also reiterate, as referred to in R. v. Sanchez (1994), 20 O.R. (3d) 468, [1994] O.J. No. 2260, 32 C.R. (4th) 269 (Gen. Div.), at p. 477 O.R., p. 269 C.R., the general interpretive rule that an issuing justice is entitled to draw reasonable inferences from stated facts and an informant is not obliged to underline the obvious.

[180] The applicants submit that in considering the evidence of the reasonable and probable grounds that was before the issuing justice, the "Grounds" affidavit of Corporal Quirion attached to each Information to Obtain Search Warrant as Appendix "C", cannot help define the vague or ambiguous description of the alleged offences contained in Appendix "B" to the same Information to Obtain Search Warrant. The applicants refer to no authority for this proposition and I conclude that it is incorrect. The first page of the Information to Obtain Search Warrant refers to its Appendices and it makes no sense to consider each Appendix in isolation or that the issuing justice approached his task in this way.

[181] An important factor in this case that distinguishes it from other media search cases is that O'Neill and possibly, although not expressly stated in the Warrant Documentation, the Ottawa Citizen Group Inc., is implicated in the Warrant Documentation as having committed the receipt and retention offences under s. 4 of the SOIA. As stated above, R.C.M.P. Sergeant Quirion, the officer who obtained the Warrants, was able to proceed with the investigation of those offences by way of the Warrants he was seeking and the issuing justice was able to consider whether the evidence before him amounted to reasonable and probable grounds that O'Neill had committed those offences, without regard to their constitutional validity.

[182] In Canadian Broadcasting Corp. v. New Brunswick (Attorney General) and also in Lessard, search warrants had been issued for media premises where the media were "innocent third parties" in that they were not implicated in the crime under investigation. The issue is these cases, both heard on

the same day by the Supreme Court of Canada, was whether freedom of the press in s. 2(b) of the Charter requires that a justice of the peace, before issuing a warrant to search media offices, be satisfied that no reasonable alternative source of the information exists: Canadian Broadcasting Corp. v. New Brunswick (Attorney General) at para. 1. Both cases speak of the need to balance [page292] competing factors before deciding to issue a search warrant and how s. 2(b) of the Charter affects that balancing.

[183] In Lessard, Cory J., writing for the majority, noted at para. 51:

> It must be remembered that all members of the community have an interest in seeing that crimes are investigated and prosecuted. In a situation such as this, the media might even consider voluntarily delivering their videotapes to the police. For example, if the tapes depicted a murder being committed and means of identifying the killer, would the media seek to withhold the tapes on the grounds that to release them would have a chilling effect on their sources and thus interfere with freedom of the press? I trust that position would not be taken.

[184] McLachlin J. (as she then was) dissented in Lessard and found that a breach of s. 2(b) had been established by the search and seizure notwithstanding, as the majority had relied upon, that some of the material seized depicting the commission of a crime may have already been published. In considering the values underlying freedom of the press and of the ways in which police search and seizure may impinge on those values, she made the following comments at paras. 67 and 68:

> [I]t is the prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants which creates the chilling effect. The fact that some of the material may have been published in no way diminishes such fears.
>
> I add that it is not every state restriction on the press which infringes s. 2(b). Press activities which are not

related to the values fundamental to freedom of the press may not merit Charter protection: see Irwin Toy Ltd. v. Quebec (Attorney General), supra. For example, the press might not be entitled to Charter protection with respect to documents relating to an alleged offence by the press itself.

[185] In the present case of course, the documents sought by the Warrant Documentation do relate to "an alleged offence by the press itself". When viewed from the issuing justice's perspective, this fact necessarily affects the balancing that must be undertaken between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the person whose premises will be the subject of the intended search: Canadian Broadcasting Corp. v. New Brunswick (Attorney General) at para. 25. The evidence before the issuing justice allowed him to understand that the press was not only being turned to so as to serve as an investigative arm of the police but also as the target with respect to alleged crimes committed by them and as such, he was entitled to give privacy interests and freedom of the press interests substantially less weight on the balance scale. [page293]

[186] The issuing justice knew from the Warrant Documentation that O'Neill was a journalist and that the R.C.M.P. was requesting her home and her newspaper's media office at Ottawa City Hall be searched. He limited the scope of the things to be searched for to those "related to the generation of the Nov. 8/03 article by Juliet O'Neill". He was informed that the purpose of the search was to afford evidence with respect to the commission of one or more of the alleged offences. O'Neill was named as having committed two of those three alleged offences and he would have understood that the search was necessary to obtain evidence against her.

[187] Notwithstanding her press status, the allegation that O'Neill had committed crimes allowed the issuing justice, in exercising his discretion as to whether to issue the Warrants, to give primacy to the state's interest in the investigation and prosecution of crimes and did not require that the R.C.M.P. first exhaust all alternative sources for that evidence. In other words, while O'Neill retained her status as a member of

the press and some collateral benefits under s. 2(b) of the Charter related to protecting the vital role of the media so that it is not unduly impeded in its publication of the news, because she was implicated in the offences being investigated, s. 2(b) could not shield her from a search and seizure related to that investigation.

[188] This brings into focus the harm caused by the decision of the R.C.M.P. to allege criminal offences against O'Neill as discussed above regarding the constitutional dangers of the impugned sections and the abuse of process that occurred. That decision and course of action by the R.C.M.P. impinged on her right to privacy of her own person and her right and the right of the Ottawa Citizen Group Inc. to freedom of the press and operated to cause primacy to be accorded to the state interest in the prosecution of crimes.

[189] On the basis that the issuing justice understood that O'Neill was being investigated for having committed criminal offences, I am satisfied that he had before him some reliable evidence that might reasonably be believed as to the requisite reasonable and probable grounds regarding the alleged offences and the places and things to be searched and upon which he could have exercised his discretion and issued the Warrants. The Warrants comply with the requirements of s. 487 [of] the Criminal Code and are valid on their face. There was no jurisdictional violation of ss. 8 or 2(b) of the Charter.

[190] More specifically, I find that the description of the offences being investigated is particularized in the "Grounds" in Appendix "C" so that the issuing justice could have understood the nature of the alleged offences from those grounds. He [page294] was informed that the press was involved and implicated in the offences being investigated. He was informed that it was the City Hall media office of the newspaper that was to be searched. He was entitled on that evidence, to understand that it was not the newspaper's main office that was being disrupted. He had evidence that the O'Neill article included verbatim content from the classified secret document. He had evidence that the places to be searched could reasonably and probably be expected to produce evidence

of the receipt and retention offences. He limited the things to be searched to those related to the generation of the O'Neill article. He also limited the time for the searches. He was able to reasonably infer from information provided to him regarding the nature of O'Neill's source, the nature of the investigation and the circumstances in which the information arrived in her possession, all as stated in Appendix "C" to the Information to Obtain Search Warrant, that she knew or had reasonable grounds to believe she was receiving unauthorized disclosure of secret information. With respect to the balancing of the competing interests, he was entitled to give primacy to the state interest in the investigation of crimes over the freedom of the press in these circumstances of the press being implicated in the crimes being investigated.

[191] Therefore, I conclude that the issuing justice did not commit any jurisdictional error. The Warrants were validly issued. This portion of the Main Application is dismissed.

IV. Costs

[192] If the parties are unable to reach an agreement with respect to costs, they may agree to submit written costs submissions to me, limited to a maximum of five written pages each, exclusive of attachments. If the parties cannot agree to proceed by way of written costs submissions, they are to contact my office to arrange a hearing date for oral submissions.

[193] All written costs submissions are to be submitted before November 30, 2006 or in the event of oral submissions, the parties are to contact me before December 1, 2006 to arrange a hearing date.

Application granted. [page295]