

File No. T-796-14

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

LINDSAY M. LYSTER and JOHN DOE

PLAINTIFFS

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.


IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiffs' solicitor or, where the plaintiffs do not have a solicitor, serve it on the plaintiffs, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Court Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: - 1 APR 2014

Issued by:  **MUN Y. CHAN**
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TO: The Attorney General of Canada
Attention: William F. Pentney, Deputy Attorney General of Canada

CLAIM

1. The plaintiffs claim on their own behalf and on behalf of the Class (as hereinafter defined):
 - a. an order certifying this action as a class proceeding pursuant to Rules 334.16 and 334.17 of the *Federal Courts Rules*, SOR/98-106;
 - b. an order pursuant to Rules 334.12, 334.16 and 334.17 of the *Federal Courts Rules* appointing the plaintiffs or, alternatively, one of the plaintiffs, as the representative plaintiff(s) for the Class;
 - c. a declaration that ss. 273.65, 273.68 and 273.7 (the “**impugned provisions**”) of the *National Defence Act*, R.S.C. 1985, c. N-5 (the “*Act*”) unjustifiably infringe ss. 2(b) and 8 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), Part I of *The Constitution Act*, 1982 being Schedule B to the *Canada Act*, 1982, c. 11, and are of no force and effect;
 - d. a declaration that the Authorizations and/or the Directives (as defined below) unjustifiably infringe Class Members’ rights and freedoms under ss. 2(b) and 8 of the *Charter*;
 - e. such just and appropriate remedy as may be ordered pursuant to s. 24 of the *Charter*, including general damages for breach of ss. 2(b) and 8 of the *Charter*;
 - f. general and punitive damages pursuant to ss. 17 and 18 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50;
 - g. an order that the Defendant expunge all the information in its possession, control or power which was obtained or preserved contrary to the above-noted violations of s. 2(b) and/or s. 8 of the *Charter*;
 - h. interest pursuant to ss. 36 and 37 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and /or s. 31 of the *Crown Liability and Proceedings Act*;
 - i. special costs or alternatively costs, and applicable taxes thereon; and
 - j. such further and other relief as this Honourable Court deems just.

THE PLAINTIFFS

2. The plaintiff Lindsay M. Lyster (“**Lyster**”) is a lawyer and the President of the British Columbia Civil Liberties Association (the “**BCCLA**”). The BCCLA is a non-profit, advocacy group incorporated in 1963 pursuant to British Columbia’s *Society Act*, R.S.B.C. 1996, c. 433, with a registered office located at 900 Helmcken Street, 2nd Floor, Vancouver, British Columbia, V6Z 1B3.
3. Lyster is a Canadian citizen and resides in British Columbia.

4. Lyster has used the following devices, predominantly in Canada:
 - a. a cellular telephone, until approximately 2008. Through this device, Lyster regularly made and received telephone calls (in the case of each of these activities, both domestically and internationally);
 - b. a smartphone (an iPhone), from approximately 2008. Through this device, Lyster regularly sends and receives text messages and makes and receives telephone calls (in the case of each of these activities, both domestically and internationally), and regularly accesses the Internet and social media sites; and
 - c. a laptop computer, since approximately 2004. Through this device, Lyster regularly accesses the Internet and social media sites.
5. For the purposes of this claim, cellular telephone, smartphones including iPhones, BlackBerries, laptop computers, iPads and similar devices are referred to as “**Wireless Devices**”.
6. Lyster has used a variety of search engines including Google, Explorer and Yahoo in order to access the Internet. Lyster accesses the Internet not only to read text, but also to access her bank statements and other private financial information, make online purchases, view video imagery and access Skype in order to conduct VOIP based video teleconferences.
7. In order to access the Internet from her laptop computer and her smartphone, Lyster periodically uses the Wi-Fi access provided at various airports in Canada and other public spaces throughout Canada.
8. Lyster has reasonable grounds to believe that her private communications and/or metadata have been intercepted or gathered by Communications Security Establishment Canada (“CSEC”), without prior judicial warrant, pursuant to Authorizations and/or Directives since 2001.
9. The plaintiff John Doe (“**Doe**”) is a Canadian citizen:
 - a. who resides in Canada;
 - b. who has used one or more Wireless Devices since 2001; and
 - c. whose private communications and/or metadata have been intercepted or gathered by CSEC, without prior judicial warrant, pursuant to Authorizations and/or Directives since 2001.

PROPOSED CLASS

10. The plaintiffs bring this action on their own behalf and on behalf of a proposed class of persons consisting of:

- a. Canadian citizens, permanent residents within the meaning of s. 2(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. F-7, and bodies corporate incorporated and continued under the laws of Canada or a province who have used one or more Wireless Devices since 2001; and
- b. individuals who do not fall within subparagraph (a) but have used one or more Wireless Devices in Canada since 2001

(collectively, the “Class”). The members of the Class are referred to collectively herein as the “Class Members”.

THE DEFENDANT

11. The defendant, the Attorney General of Canada, has an address for service at 900-840 Howe Street, Vancouver, British Columbia, V6Z 2S9, and is named as the proper representative of the federal Crown pursuant to s. 23 of the *Crown Liability and Proceedings Act*.
12. CSEC is part of the federal public administration and correspondingly of the federal Crown. CSEC is Canada’s national electronic intelligence gathering agency and is charged with collecting signals intelligence. Since the enactment of the *Anti-terrorism Act* in December 2001 (S.C. 2001, c. 41), CSEC has derived its statutory authority from Part V.1 of the *National Defence Act*, R.S.C. 1985, c. N-5, and has operated as a department within the portfolio of the Minister.

DECLARATORY ACTION

13. On October 22, 2013, the BCCLA commenced an action against the Defendant (the “**Declaratory Action**”) in the Supreme Court of British Columbia, Vancouver Registry, No. S-137827, primarily seeking declaratory relief in respect of the unconstitutionality of certain of the impugned provisions as well as the unconstitutionality of the Authorizations and Directives defined below.
14. The plaintiff has commenced this ancillary proceeding with the authority of the BCCLA in order for those persons whose private communications and/or metadata have been intercepted to have access to remedies under s. 24 of the *Charter* once the issues of the unconstitutionality of the impugned provisions, Authorizations and Directives are resolved in the Declaratory Action.

FURTHER DEFINITIONS

“private communication”

15. For the purposes of this claim, “private communication” has the same definition as is set out in s. 183 of the *Criminal Code*, R.S.C. 1985, c. C-46, and means any oral or telecommunication made by a person in Canada, or intended to be received by a person in Canada, in circumstances where it is reasonable to expect that the communication will

not be intercepted by any person other than the person intended to receive it. This definition is incorporated by reference under s. 273.61 of the *Act*.

16. Private communication includes the content of email communications, phone communications and text message communications, as well as photographs and video taken with, or stored on, a personal communication device.

“Authorization”

17. For the purposes of this claim, “Authorization” means a written authorization issued by the Minister under s. 273.65 of the *Act* permitting the CSEC to intercept private communications.

“Directive”

18. For the purposes of this claim, “Directive” means a ministerial directive issued by the Minister directing CSEC to collect, retain, analyze and/or use metadata associated with or produced by persons in Canada.

“metadata”

19. For the purposes of this claim, “metadata” means information associated with a telecommunication which identifies, describes, manages or routes that telecommunication or any part of that telecommunication.
20. Metadata includes:
 - a. geo-location information;
 - b. phone numbers of mobile phone call participants and call duration;
 - c. addresses of sender and recipient of email communication, time at which email communication was sent and size of email communication;
 - d. internet protocol addresses;
 - e. domain name records; and
 - f. signaling information emitted or received by a personal communication device in the course of the routine operations of the device.
21. Metadata is part of any “private communication” and itself can even be more revealing than the content of a private communication because it can be used to build detailed profiles of to whom a Canadian speaks, how often and how long he or she speaks to other persons, to whom such other persons then speak, etc.

“telecommunications”

22. For the purpose of this claim, “telecommunications” has the same definition as is set out in s. 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21, and means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system.

CSEC’S ACTIVITIES

23. Pursuant to s. 273.64(1) of the *Act*, the mandate of CSEC is:
- a. to acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with Government of Canada intelligence priorities;
 - b. to provide advice, guidance and services to help ensure the protection of electronic information and of information infrastructures of importance to the Government of Canada; and
 - c. to provide technical and operational assistance to federal law enforcement and security agencies in the performance of their lawful duties.
24. Section 273.64(2) of the *Act* provides that activities carried out under (a) and (b) above shall not be directed at Canadians (defined as in paragraph 10(a) above) or any person in Canada, and shall be subject to measures to protect the privacy of Canadians in the use and retention of intercepted information. Section 273.64(3) provides that activities carried out under (c) above are subject to any limitations imposed by law on federal law enforcement agencies and security agencies in the performance of their duties.
25. CSEC shares information it collects or acquires with foreign governments and intelligence entities including with the United States, the United Kingdom, New Zealand and Australia.
26. CSEC shares information it collects with government departments and agencies in Canada, including the Canadian Security Intelligence Service (“CSIS”), Foreign Affairs Canada, the Royal Canadian Mounted Police, the Canada Revenue Agency and the Canadian Border Services Agency.
27. Section 273.65 of the *Act* provides that the Minister may authorize CSEC to intercept private communications for two purposes: for obtaining foreign intelligence or for protecting the computer systems or networks of the Government of Canada from mischief, unauthorized use or interference.
28. If the Authorization is issued for the purpose of obtaining foreign intelligence, s. 273.65(2) of the *Act* requires the Minister be satisfied that:
- a. the interception will be “directed at foreign entities”;

- b. the information could not reasonably be obtained by other means;
 - c. the expected foreign intelligence value of the information justifies the interception; and
 - d. satisfactory measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to international affairs, defence or security.
29. If the Authorization is issued for the purpose of protecting the computer systems or networks of the Government of Canada from mischief, unauthorized use or interference, s. 273.65(4) of the *Act* requires that the Minister be satisfied that:
- a. the interception is necessary to “identify, isolate or prevent harm to the Government of Canada computer system or networks”;
 - b. the information could not reasonably be obtained by other means;
 - c. the consent of persons whose private communications may be intercepted cannot reasonably be obtained;
 - d. satisfactory measures are in place to ensure that only information that is essential to identify, isolate or prevent harm to the Government of Canada computer systems or networks will be used or retained; and
 - e. satisfactory measures are in place to protect the privacy of Canadians in the use or retention of that information.
30. Under s. 273.68 of the *Act*, an Authorization can be valid for up to 12 months and may be renewed without limit.
31. The Minister issued at least 78 Authorizations between 2002 and 2012.
32. CSEC collected private communications of Class Members in accordance with the Authorizations set out in paragraph 31 above. As noted above in the definition of “private communication”, they are by definition communications made by a person in Canada, or intended to be received by a person in Canada.
33. Further, the Minister issued the following:
- a. a directive referred to as the 2005 Collection and Use of Metadata Ministerial Directive; and
 - b. a directive referred to as the 2011 Collection and Use of Metadata Ministerial Directive.

34. CSEC collected, analyzed, retained and/or used metadata associated with or produced by Class Members in accordance with the Directives issued by the Minister and set out in paragraph 33 above.
35. Without limitation, in or about 2012, CSEC obtained the metadata of Class Members who accessed Wi-Fi networks at one or more Canadian airports and other public spaces.
36. CSEC's collection, analysis, retention and/or use of metadata in accordance with the Directives issued by the Minister revealed private and confidential information about Class Members.
37. In this case, the Minister and CSEC proceeded without "judicial warrant":
 - a. contrary to the universally accepted constitutional principle that such prior judicial authorization is required by s. 8 of the *Charter*;
 - b. after the Office of CSEC Commissioner warned CSEC that its practices could violate the *Charter*;
 - c. after repeated but failed attempts by the government to have Parliament enact legislation that would have purported to allow law enforcement and national security agencies to intercept private communications and metadata of the kind being gathered by CSEC without prior "judicial warrant"; and
 - d. notwithstanding that even the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, expressly requires the Director of CSIS to make an application to a "judge" for a judicial "warrant" under Part II of that statute, which is itself entitled "Judicial Control". Like CSIS, CSEC is an organization whose mandate is to protect the national security of Canada.

CHARTER, SECTION 8

38. The plaintiffs rely on s. 8 of the *Charter*, which states as follows:

Everyone has the right to be secure against unreasonable search or seizure.
39. Section 273.65 and 273.68 breach s. 8 of the *Charter* in that the Authorizations which purport to provide CSEC with legal authority to intercept the private communications of Class Members are issued:
 - a. without prior authorization by a neutral and impartial arbiter capable of acting judicially;
 - b. without application of the reasonable and probable grounds standard or, in the alternative, without application of any clear and articulable legal standard;
 - c. without restriction on the breadth of communications to be collected;

- d. without a reasonable time limit;
 - e. with no stated limit on, or criteria for, renewal;
 - f. without adequate safeguards to ensure the accountability of CSEC in the course of its collection of private communications;
 - g. without prohibiting the distribution and use of private communications to entities or authorities outside of Canada; and
 - h. for such other reasons to be advanced.
40. Further, and in reference to the Directives set out at paragraph 33 above, Class Members have a reasonable expectation that Canada will not collect, analyze, retain, use, and/or distribute internationally metadata associated with or produced by them as such reveals private and confidential information about them.
41. CSEC's collection, analysis, retention and/or use of metadata in accordance with the Directives is not authorized by law and constitutes a breach of s. 8 of the *Charter* for the same reasons set out above in paragraph 39.
42. The defendant, through CSEC, has routinely violated the privacy rights of Class Members in a methodical and systematic manner. The particulars of these violations are known to the defendant and should be produced.

CHARTER, SECTION 2(B)

43. The plaintiffs rely on s. 2(b) of the *Charter*, which states as follows:

Everyone has the following fundamental freedoms:

...

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

44. The private communications of Class Members constitute expressive content that is protected under s. 2(b) of the *Charter*.
45. The metadata that is associated with or produced by Class Members constitutes expressive content that is protected under s. 2(b) of the *Charter*.
46. Sections 273.65 and 273.68 of the *Act* and the Authorizations that purport to provide CSEC with legal authority to intercept the private communications of Class Members are an infringement of s. 2(b) of the *Charter*.
47. The Directives that purport to provide CSEC with legal authority to collect, analyze, retain, use and/or distribute internationally metadata that is associated with or produced by Class Members constitute an infringement of s. 2(b) of the *Charter*.

CHARTER, SECTION 1

48. Section 1 of the *Charter* reads as follows:

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

49. The said infringements of s. 8 cannot be justified pursuant to the criteria of s. 1, the burden of proof of which lies on the defendant.

50. The said infringements of s. 2(b) cannot be justified pursuant to the criteria of s. 1, the burden of proof of which lies on the defendant.

SECTION 273.7 OF THE ACT

51. As Canada is a constitutional democracy, it cannot purport to exempt itself from liability for an “appropriate and just” damages award pursuant to s. 24(1) of the *Charter*.

DAMAGES

52. The infringements described above have caused Class Members to suffer loss and damage, and have also entitled them to the statutory damages provided for in ss. 17-18 of the *Crown Liability and Proceedings Act*.

53. The damages payable under s. 24 of the *Charter* would be to compensate the Class Members, to vindicate their rights, and to deter further infringements.

GENERAL

54. The plaintiffs propose that this action be tried at Vancouver, British Columbia.

DATED at the City of Vancouver, in the Province of British Columbia, this 1st day of April, 2014.



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