

Court File No. T-2210-14

FEDERAL COURT

BETWEEN:

THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

PLAINTIFF

- and -

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

STATEMENT OF CLAIM TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. 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 plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, 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: OCT 27 2014

Issued by: 
[Registry Officer]

JULIA ORCHARD
REGISTRY OFFICER
AGENT DU GREFFE



Address of local office: Federal Court of Canada
Pacific Centre, PO Box 10065
3rd Floor, 701 West Georgia Street
Vancouver BC V7Y 1B6

TO: The Attorney General of Canada
900 – 840 Howe Street
Vancouver BC V6Z 2S9
Attention: William F. Pentney, Deputy Attorney General of Canada

CLAIM

1. The plaintiff claims:
 - a. a declaration that ss. 273.65 and 273.68 (the “impugned provisions”) of the *National Defence Act*, R.S.C. 1985, c. N-5 (the “Act”) unjustifiably infringe s. 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;
 - b. a declaration that the Authorizations (as defined below) unjustifiably infringe s. 8 of the *Charter*;
 - c. a declaration that the Directives (as defined below) unjustifiably infringe s. 8 of the *Charter*;
 - d. a declaration that the impugned provisions unjustifiably infringe s. 2(b) of the *Charter* and are of no force and effect;
 - e. a declaration that the Authorizations unjustifiably infringe s. 2(b) of the *Charter*;
 - f. a declaration that the Directives unjustifiably infringe s. 2(b) of the *Charter*;
 - g. such just and appropriate remedy as may be ordered pursuant to s. 24 of the *Charter*;
 - h. special costs or alternatively costs, and applicable taxes on those costs; and
 - i. such further and other relief as this Honourable Court deems meet and just.

THE PLAINTIFF

2. The plaintiff, the British Columbia Civil Liberties Association (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, Vancouver, British Columbia, V6Z 1B3.

THE DEFENDANT

3. The defendant, the Attorney General of Canada (“Canada”), has an address for service at 900 - 840 Howe Street, Vancouver, British Columbia, V6Z 2S9.

DEFINITIONS

“impugned provisions”

4. This claim challenges, *inter alia*, the constitutional validity of the provisions of the *National Defence Act*, R.S.C. 1985, c. N-5 (the “*Act*”) that permit the interception, retention and use of the private communications of persons in Canada. Those provisions are ss. 273.65 and 273.68 of the *Act* (as defined above, the “impugned provisions”).

“private communications”

5. For the purposes of this claim, “private communications” 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*.
6. Private communications include, *inter alia*, 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”

7. For the purposes of this claim, “Authorization” means a written authorization issued by the Minister of National Defence under s. 273.65 of the *Act* permitting the Communications Security Establishment Canada (“CSEC”) to intercept private communications.

“Directive”

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

“metadata”

9. 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.
10. Metadata includes, *inter alia*:
 - 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.

“telecommunication”

11. For the purpose of this claim, “telecommunication” 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.

THE IMPUGNED PROVISIONS

12. The impugned provisions came into force in or about December 2001 as a consequence of amendments to the *Act* resulting from the *Anti-Terrorism Act*, S.C. 2001, c. 41.
13. Section 273.65 of the *Act* provides that the Minister of National Defence (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.
14. 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.
15. 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.
16. Under s. 273.68 of the *Act*, an Authorization can be valid for up to 12 months and may be renewed without limit.

OPERATIONS OF CSEC

17. CSEC is Canada’s national electronic intelligence gathering agency and is charged with collecting signals intelligence, which includes the covert acquisition and processing of foreign electronic communications for the purpose of advancing Canadian interests in defence, security and international affairs.
18. Since the enactment of the *Anti-Terrorism Act* in December 2001, CSEC has derived its statutory authority from Part V. 1 of the *Act* and has operated as a department within the portfolio of the Minister.
19. 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.
20. CSEC shares information it collects or acquires with foreign intelligence entities in the United States, the United Kingdom, New Zealand and Australia.
21. CSEC shares information it collects with government departments and agencies in Canada, including the Canadian Security Intelligence Service (“CSIS”), Foreign Affairs Canada and the Royal Canadian Mounted Police (“RCMP”).
22. Section 273.63(2) of the *Act* sets out the duties of the Office of CSEC Commissioner:
- a. to review the activities of CSEC to ensure that CSEC is in compliance with the law;
 - b. in response to a complaint, to undertake any investigation that the Commissioner considers necessary; and
 - c. to inform the Minister and the Attorney General of Canada of any activity of CSEC that the Commissioner believes may not be in compliance with the law.
23. The Office of CSEC Commissioner reports annually to the Minister.
24. The Office of CSEC Commissioner is accountable to the Minister; CSEC is accountable to the Minister.
25. Since the enactment of the *Anti-Terrorism Act* in December 2001, the Office of CSEC Commissioner has repeatedly recommended to the Minister and to Canada that amendments be made to the impugned provisions to clarify the legal requirements to issue an authorization. No such amendments have been enacted.

AUTHORIZATIONS

26. The Minister issued at least 78 Authorizations between 2002 and 2012.

27. CSEC collected private communications in accordance with the Authorizations issued by the Minister and set out in paragraph 26 above.

DIRECTIVES

28. 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.
29. CSEC collected, analyzed, retained and/or used metadata associated with or produced by persons in Canada in accordance with the Directives issued by the Minister and set out in paragraph 28 above.
30. 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 persons in Canada.

CHARTER, SECTION 8

31. The plaintiff relies on s. 8 of the *Charter*, which states as follows:
- Everyone has the right to be secure against unreasonable search or seizure.
32. The impugned provisions breach s. 8 of the *Charter* in that the Authorizations which purport to provide CSEC with legal authority to intercept the private communications of persons in Canada 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. without adequate safeguards to ensure the accountability of CSEC in the course of its collection of private communications;
 - f. without prohibiting the distribution and use of private communications to entities or authorities outside of Canada;

- g. with no stated limit on, or criteria for, renewal; and
 - h. for such other reasons to be advanced.
33. Further, and in reference to the Directives set out at paragraph 28 above, persons in Canada 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.
34. 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 36.

CHARTER, SECTION 2(b)

35. The plaintiff relies 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;

36. The private communications of persons in Canada constitute expressive content that is protected under s. 2(b) of the *Charter*.
37. The metadata that is associated with or produced by persons in Canada constitutes expressive content that is protected under s. 2(b) of the *Charter*.
38. The impugned provisions and Authorizations that purport to provide CSEC with legal authority to intercept the private communications of persons in Canada are an infringement of s. 2(b) of the *Charter*.
39. 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 persons in Canada constitute an infringement of s. 2(b) of the *Charter*.

CHARTER, SECTION 1

40. 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.

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

The plaintiff proposes that this action be tried at Vancouver, British Columbia.

October 27, 2014



**Joseph J. Arvay, Q.C., Ludmila B. Herbst
and Alexander Boland**
Farris, Vaughan, Wills & Murphy LLP
PO Box 10026, Pacific Centre South
25th Floor, 700 West Georgia Street
Vancouver BC V7Y 1B3
Tel: 604.684.9151
Fax: 604.661.9349
Email: jarvay@farris.com

 

**David J. Martin, Tamara Duncan
and Casey Leggett**
Martin & Associates
863 Hamilton Street
Vancouver BC V6B 2R7
Tel: 604.682.4200
Fax: 604.682.4209
Email: dm@martinandassociates.ca