



S=137827

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

PLAINTIFF

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

NOTICE

under section 8(2)(a) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68

Name of applicant: The British Columbia Civil Liberties Association (the "Plaintiff")

TO: Minister of Justice and Attorney General of British Columbia
1001 Douglas Street
Victoria BC V8W 2C5

AND TO: Attorney General of Canada
900 - 840 Howe Street
Vancouver BC V6Z 2S9

TAKE NOTICE, pursuant to s. 8(2)(a) of the *Constitutional Question Act*, an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on a date and time to be set, questioning the constitutional validity of:

1. 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, being ss. 273.65 and 273.68 of the Act (the "impugned provisions");
2. the written authorizations issued by the Minister of National Defence under the impugned provisions and permitting the Communications Security Establishment Canada ("CSEC") to intercept private communications; and

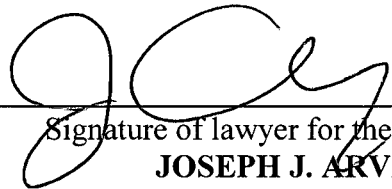
3. the ministerial directives issued by the Minister of National Defence directing CSEC to collect, retain, analyze and/or use metadata associated with or produced by persons in Canada, being the 2005 Collection and Use of Metadata Ministerial Directive and the 2011 Collection and Use of Metadata Ministerial Directive.

And seeking a remedy pursuant to s. 24 of the *Charter of Rights and Freedoms* and s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, as set out in the Notice of Civil Claim attached to this Notice of Constitutional Question as Schedule A.

AND FURTHER TAKE NOTICE THAT the material facts giving rise to this application are as set out in the Notice of Civil Claim attached to this Notice of Constitutional Question as Schedule A.

AND FURTHER TAKE NOTICE THAT at the hearing the Plaintiff will make argument on the legal basis as set out in the Notice of Civil Claim attached to this Notice of Constitutional Question as Schedule A.

Dated: 22 Oct 2013



Signature of lawyer for the applicant
JOSEPH J. ARVAY, Q.C.

This Notice of Application is prepared by Solicitors for the Plaintiff, Arvay Finlay, Barristers, whose place of business and address for service is 1320 – 355 Burrard Street, Vancouver, British Columbia, V6C 2G8. Telephone: 604.689.4421 / Fax: 1.888.575.3281.

Schedule A

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Plaintiff

AND:

THE ATTORNEY GENERAL OF CANADA

Defendant

NOTICE OF CIVIL CLAIM

Name and address of each Plaintiff:

The British Columbia Civil Liberties Association
c/o Arvay Finlay
1320 – 355 Burrard Street
Vancouver BC V6C 2G8

Name and address of each Defendant:

The Attorney General of Canada
900 – 840 Howe Street
Vancouver BC V6Z 2S9

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. 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.
2. 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"

3. 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* (the "impugned provisions").

"private communications"

4. For the purposes of this claim, "private communications" has the same definition as is set out in s. 183 of the *Criminal Code* 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*.

5. 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”

6. 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”

7. 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”

8. 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.
9. 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”

10. 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

11. 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.
12. 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.
13. 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.
14. 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.
15. 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

16. 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.
17. 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.
18. 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.
19. CSEC shares information it collects or acquires with foreign intelligence entities in the United States, the United Kingdom, New Zealand and Australia.
20. 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").
21. 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.
22. The Office of CSEC Commissioner reports annually to the Minister.
23. The Office of CSEC Commissioner is accountable to the Minister; CSEC is accountable to the Minister.

24. 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

25. The Minister issued or renewed the following:
- a. twenty-three (23) authorizations between January 2002 and March 2005;
 - b. six (6) authorizations between 2005 and 2006;
 - c. three (3) authorizations between 2006 and 2007;
 - d. three (3) authorizations between 2007 and 2008;
 - e. three (3) authorizations between 2008 and 2009;
 - f. five (5) authorizations between 2009 and 2010;
 - g. eight (8) authorizations between 2010 and 2011; and
 - h. eight (8) authorizations between 2011 and 2012.
26. CSEC collected private communications in accordance with the Authorizations issued by the Minister and set out in paragraph 25 above.

Directives

27. 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.
28. 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 27 above.
29. 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.

The BCCLA

30. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. The objects of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. To that end, the BCCLA prepares position papers, engages in public education, assists individuals to address violations of their rights and takes legal action as a plaintiff.
31. The BCCLA has a long standing interest in matters of privacy and national security. The BCCLA has been extensively involved in advocacy and education in respect of national security legislation post-September 11, 2001 and has a robust policy portfolio addressing privacy concerns in Canada.
32. In addition, the BCCLA has consistently opposed secrecy and a lack of accountability in government.
33. The BCCLA has sufficient interest to be granted public interest standing, in that:
 - a. this claim raises a serious challenge to the constitutional validity and applicability of the impugned provisions and government conduct;
 - b. the BCCLA has a demonstrated, serious and genuine interest in the subject matter of this litigation;
 - c. the issue of the constitutional validity of the impugned provisions and government conduct is relevant to all Canadians;
 - d. the BCCLA is comprised of thousands of members, any of whom could have had their private communications intercepted under the impugned provisions;
 - e. the BCCLA is comprised of thousands of members, any of whom could have had their metadata collected, analyzed, retained and/or used by CSEC in accordance with a Directive;
 - f. persons in Canada whose private communications have been intercepted in accordance with an Authorization could not reasonably be expected to bring their own cases to court as the impugned provisions do not require Canada to provide notice to persons whose private communications have been intercepted and Canada has not provided such notice;
 - g. persons in Canada whose metadata has been collected, analyzed, retained and/or used by CSEC in accordance with a Directive could not reasonably be expected to bring their own cases to court as the Directives do not require Canada to provide notice to persons whose metadata has been collected, analyzed, retained and/or used and Canada has not provided such notice; and
 - h. the claim is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court.

Part 2: RELIEF SOUGHT

34. The Plaintiff seeks the following relief:

- a. a declaration that the impugned provisions 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 unjustifiably infringe s. 8 of the *Charter*;
- c. a declaration that the Directives 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. costs, including special costs and applicable taxes on those costs; and
- i. such further and other relief as this Honourable Court deems meet and just.

Part 3: LEGAL BASIS

Charter, Section 8

35. 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.

36. 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.
37. Further, and in reference to the Directives set out at paragraph 27 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.
38. 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)

39. 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;

40. The private communications of persons in Canada constitute expressive content that is protected under s. 2(b) of the *Charter*.
41. 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*.
42. 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*.
43. 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

44. 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.

45. 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.
46. 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.

Plaintiff's address for service: Arvay Finlay Barristers
1320 – 355 Burrard Street
Vancouver BC V6C 2G8

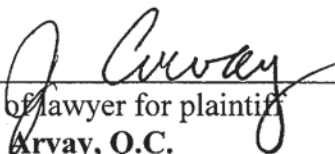
Fax number address for service (if any): 1.888.575.3281

E-mail address for service (if any): jarvay@arvayfinlay.com

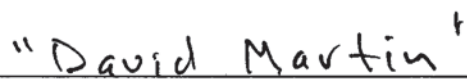
Place of trial: Vancouver, British Columbia

The address of the registry is: 800 Smithe Street
Vancouver BC V6Z 2C5

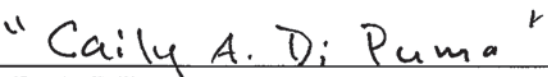
Dated: 22 Oct 2013



Signature of lawyer for plaintiff
Joseph J. Arvay, Q.C.
Arvay Finlay



David J. Martin
Martin & Associates



Caily A. DiPuma
The British Columbia Civil Liberties Association

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1. (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

- (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

Claim for declaratory and other relief arising from illegal activities of the Communications Security Establishment Canada

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[Check one box below for the case type that best describes this case.]

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[Check all boxes below that apply to this case]

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4: *[If an enactment is being relied on, specify. Do not list more than 3 enactments.]*

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

National Defence Act, R.S.C. 1985, c. N-5, Part V. 1