

CANADA / JUDGMENT

Philip v. Canada (Attorney General)

2024 FC 1907

COURT

Federal Court

DECIDED

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Philip v. Canada (Attorney General)

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Dockets: T-1360-18

T-703-21

T-702-21

Citation: 2024 FC 1907

Ottawa, Ontario, November 27, 2024

PRESENT: The Honourable Mr. Justice Fothergill

Docket: T-1360-18

PROPOSED CLASS PROCEEDING

BETWEEN:

ADRIAN PHILIP

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-703-21

PROPOSED CLASS PROCEEDING

AND BETWEEN:

BLAKE RANDALL WRIGHT

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-702-21

PROPOSED CLASS PROCEEDING

AND BETWEEN:

SERENA GRAY

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

- [1] The Plaintiffs Adrian Philip and Blake Wright are inmates of federal penitentiaries operated by the Correctional Service of Canada [CSC]. The Plaintiff Selena Gray is Mr. Wright's wife.
- [2] The Plaintiffs allege that their private communications have been unlawfully intercepted by CSC. These include communications with legal counsel that were subject to solicitor-client privilege.

- [3] The motion to consolidate these proceedings and certify them as a class action was scheduled to be heard in Vancouver, British Columbia from May 27 to June 4, 2024. On the fourth day of the hearing, counsel for the parties informed the Court that they had reached an agreement in principle respecting certification. The parties concluded a Memorandum of Agreement on June 3, 2024. They submitted an Amended Memorandum of Agreement to the Court on July 8, 2024, and a Litigation Plan on August 15, 2024.
- [4] For the reasons that follow, the proceedings are consolidated and certified as a class action in accordance with the parties' Amended Memorandum of Agreement.

II. Background

A. Inmate Communications and Interceptions

- [5] Inmates of CSC institutions may communicate with non-inmates by mail, facsimile, telephone, and during in-person visits. Pursuant to s 96(z.7) of the Corrections and Conditional Release Act, SC 1992, c 20, the Governor in Council may make regulations authorizing the interception of communications between inmates and members of the public in "prescribed circumstances".
- [6] The Corrections and Conditional Release Regulations, SOR/92-620 [CCRR] provide in s 94(1):
- Subject to subsection (2), the institutional head or a staff member designated by the institutional head may authorize, in writing, that communications between an inmate and a member of the public, including letters, telephone conversations and communications in the course of a visit, be opened, read, listened to or otherwise intercepted by a staff member or a mechanical device, where the institutional head or staff member believes on reasonable grounds
- (a) that the communications contain or will contain evidence of
 - (i) an act that would jeopardize the security of the penitentiary or the safety of any person, or
 - (ii) a criminal offence or a plan to commit a criminal offence; and
 - (b) that interception of the communications is the least restrictive measure available in the circumstances.
- (2) No institutional head or staff member designated by the institutional head shall authorize the opening of, reading of, listening to or otherwise intercepting of communications between an inmate and a person set out in the schedule, by a staff member or a mechanical device, unless the institutional head or staff member believes on reasonable grounds
- (a) that the grounds referred to in subsection (1) exist; and
 - (b) that the communications are not or will not be the subject of a privilege.

- (3) Where a communication is intercepted under subsection (1) or (2), the institutional head or staff member designated by the institutional head shall promptly inform the inmate, in writing, of the reasons for the interception and shall give the inmate an opportunity to make representations with respect thereto, unless the information would adversely affect an ongoing investigation, in which case the inmate shall be informed of the reasons and given an opportunity to make representations with respect thereto on completion of the investigation.

Sous réserve du paragraphe (2), le directeur du pénitencier ou l'agent désigné par lui peut autoriser par écrit que des communications entre le détenu et un membre du public soient interceptées de quelque manière que ce soit par un agent ou avec un moyen technique, notamment que des lettres soient ouvertes et lues et que des conversations faites par téléphone ou pendant les visites soient écoutées, lorsqu'il a des motifs raisonnables de croire :

- a) d'une part, que la communication contient ou contiendra des éléments de preuve relatifs :
 - (i) soit à un acte qui compromettrait la sécurité du pénitencier ou de quiconque,
 - (ii) soit à une infraction criminelle ou à un plan en vue de commettre une infraction criminelle;
 - b) d'autre part, que l'interception des communications est la solution la moins restrictive dans les circonstances.
- (2) Ni le directeur du pénitencier ni l'agent désigné par lui ne peuvent autoriser l'interception de communications entre le détenu et une personne désignée à l'annexe par un agent ou par un moyen technique, notamment l'ouverture, la lecture ou l'écoute, à moins qu'ils n'aient des motifs raisonnables de croire :
- a) d'une part, que les motifs mentionnés au paragraphe (1) existent;
 - b) d'autre part, que les communications n'ont pas ou n'auront pas un caractère privilégié.
- (3) Lorsqu'une communication est interceptée en application des paragraphes (1) ou (2), le directeur du pénitencier ou l'agent désigné par lui doit aviser le détenu, promptement et par écrit, des motifs de cette mesure et lui donner la possibilité de présenter ses observations à ce sujet, à moins que cet avis ne risque de nuire à une enquête en cours, auquel cas l'avis au détenu et la possibilité de présenter ses observations doivent être donnés à la conclusion de l'enquête.
- [7] Further guidance is provided in Commissioner's Directive [CD] 568-10, "Interception of Inmate Communications". CD 568-10 has undergone numerous revisions over the years, and some provisions now appear as guidelines (GL 568-10-1), but the substance of these directives has remained largely consistent. Inmates are informed upon admission that their communications may be intercepted in accordance with the CCRR. Only the Institutional Head may authorize interceptions, save in exceptional circumstances when the Deputy Warden may exercise this authority.

- [8] Security Information Officers [SIOs] are expected to complete an “Authorization to Intercept Inmate Communications”. This form must contain sufficient information to demonstrate “reasonable grounds to believe” that the requirements of s 94(1) of the CCRR have been met. Only then may the Institutional Head authorize the interception.
- [9] “Privileged Communicants” are listed in the Schedule to the CCRR, and include the Information Commissioner, the Privacy Commissioner, Persons within CSC responsible for internal audits and investigations, the Correctional Investigator of Canada, legal counsel, and others. Inmate communications with Privileged Communicants are presumptively ineligible for interception. Exceptions include: (1) where the Institutional Head has reasonable grounds to believe that “the communications contain, or will contain, evidence of an act that would jeopardize the security of the penitentiary or the safety of any person”; and (2) where “the interception of the communications is the least restrictive measure available in the circumstances”.
- [10] CD 568-10 and GL 568-10-1 place restrictions on the period of interception and require that parties be subsequently informed of the interception. A period of authorized interception continues for 30 days, and may be extended by two additional periods of 15 days. An inmate must be informed promptly in writing of the reasons for the interception. The inmate may make representations regarding the interception unless this would interfere with an ongoing investigation, in which case the inmate is notified only once the investigation is completed.
- [11] CD 568-10 requires that intercepted communications be used only for the purpose for which they were collected. Participation in interceptions is limited to authorized individuals whose duties require access on a “need-to-know” basis.
- [12] CD 228, “Information Management”, requires that “transitory information” be regularly disposed of in order to safeguard privacy and security. This includes intercepted communications that the SIO considers not to be useful.
- (1) The Inmate Telephone System [13] The Inmate Telephone System [ITS] is the primary means by which inmates make telephone calls. Before using the ITS, inmates must submit the name, address, telephone number, and relationship (e.g., mother, friend) of the proposed communicant for approval. Approved communicants are placed on a Personal Call List. Inmates may also call persons on a Common Call List, such as the Privacy Commissioner or the Correctional Investigator.
- [14] To place calls through the ITS, inmates must use a unique personal identification number which allows CSC to identify both them and their communicants. Interception of ITS calls is achieved through a Voice Logger, which automatically records communications based on specified criteria.

- [15] Voice Logger parameters include the name of the inmate targeted for interception, specified communicants, the timeframe of interception, and any telephone number for which recording should be suppressed. The CCRR require that recording criteria in the Voice Logger be kept up to date.
- [16] As an alternative to the ITS, inmates are sometimes given access to government telephone lines, known as “Black Phones”, which are made available in emergencies or other special circumstances.
- (2) The Inmate Mail System [17] CSC controls all inmate mail coming into and going out of its facilities. Pursuant to CD 085, all mail sent or received through the inmate mail system [IMS] “shall be opened and the content ... inspected by a staff member”. Inspection does not include reading, as this would constitute interception. CSC staff may read the content of inmate mail only in accordance with a written authorization to do so. A primary purpose of inspecting mail entering a CSC facility is to detect and prevent contraband.
- (3) The Inmate Visit System [18] Inmates may communicate with non-inmates during in-person visits. Videoconferencing is sometimes used instead. This became common during the COVID-19 pandemic. The physical settings of visits are controlled by CSC, and visitors are vetted and searched before they enter CSC institutions.
- [19] There are two kinds of visits: contact and non-contact. During a contact visit, no physical barriers separate an inmate from his or her visitor. Non-contact visits are conducted by video or behind a glass or similar barrier.
- [20] In-person communications between inmates and visitors are intended to be private. Pursuant to CD 669, supervision is to be “carried out in the least obtrusive manner necessary”. In the case of privileged communicants, CD 559 stipulates that visits “will be held in an area where the inmate may communicate with the visitor in private”.

B. Adrian Philip

- [21] When he swore his affidavit, Mr. Philip was an inmate of Beaver Creek Institution [Beaver Creek], a medium security penitentiary in Gravenhurst, Ontario.
- [22] Mr. Philip has been incarcerated since February 19, 2016. He has used the ITS on numerous occasions to communicate with counsel regarding his criminal charges. He has also used the ITS to have personal conversations with others.
- [23] Around April 2016, Mr. Philip was charged with additional offences, including possession of marijuana and heroin for the purposes of trafficking, which he allegedly committed while incarcerated. Following these charges, CSC no longer allowed him to use the ITS for personal conversations.

- [24] Around August 2017, Mr. Philip was informed by his legal counsel that CSC had listened to and recorded his personal conversations before the additional charges were laid. CSC also intercepted his privileged conversations, and disclosed the content of those conversations to third parties, including for the purpose of charging him in April 2016.
- [25] Three authorizations were granted to intercept Mr. Philip's communications. The first was from February 23 to March 23, 2016. The authorization was based on information received from provincial authorities that Mr. Philip intended to smuggle drugs into Millhaven Institution. Subsequent events proved this information to be accurate.
- [26] The second period of interception was from June 14 until July 13, 2016. This followed an incident at the Napanee Courthouse where a correctional officer escorting Mr. Philip found two packages of contraband hidden in a toilet cubicle. Mr. Philip asked to use a toilet on his arrival at the courthouse. Counsel for the Plaintiffs in this proceeding notes that he could not have known in advance which toilet he would be allowed to use.
- [27] The third period of interception was from November 10 until December 10, 2017, while Mr. Philip was incarcerated at Collins Bay Institution. A Justice of the Peace issued a search warrant authorizing the interception of Mr. Philip's telephone calls, including those with his legal counsel. This occurred in the context of a criminal investigation by the Ontario Provincial Police concerning the offences of possession of controlled substances for the purpose of trafficking and possession of a weapon for a dangerous purpose. This third authorization followed Mr. Philip's assault of another inmate.
- [28] Crystal Thompson swore an affidavit on behalf of the Defendant. At the time she swore the affidavit, she was Warden of Millhaven Institution, a CSC facility in Bath, Ontario. She acknowledges that at least some of Mr. Philip's communications with his counsel were improperly intercepted by CSC.
- [29] Following the commencement of this proposed class proceeding, CSC sent letters to several inmates regarding the interception of their private communications. One example reads as follows:

An audit of CSC's Interception of Inmate Communication activities was conduct [sic] by Internal Audit, which revealed that three calls with a lawyer during the period of 2018-02-27 – 2018-03-29 at Kent Institution were intercepted without authorization, one of which was accessed. This constitutes a breach of your personal information.

- [30] The letters described the measures CSC had taken to protect against further breaches of inmates' privacy rights, and expressed regret for any inconvenience or ongoing concern.

C. Blake Wright

- [31] When he swore his affidavit, Mr. Wright was an inmate of Mission Medium Security Institution [Mission Institution] in Mission, British Columbia. In or around November 2020, he began communicating with his counsel via facsimile. Faxes are not sent by inmates themselves. Rather, Mr. Wright had to hand his correspondence to a guard on his unit who carried it to the appropriate department for transmittal.
- [32] Mr. Wright did not enclose his correspondence in an envelope, trusting that his communications would be intercepted only if CSC had reasonable grounds to suspect the correspondence was not the subject of privilege. Mr. Wright indicated on an Inmate Request Form affixed to his correspondence that his communications were with legal counsel. Mr. Wright continued to correspond with his counsel in this manner well into 2022.
- [33] On November 9, 2022, Mr. Wright was informed by letter from the Chief of Administrative Services at Mission Institution that CSC had made copies of his fax correspondence with legal counsel, and these had been retained on his case management file. A lawyer with the Department of Justice also informed counsel for the Plaintiffs in this proceeding of the interception of the faxes. The Defendant notes that only the cover pages of Mr. Wright's faxes were retained, as these confirmed the faxes had been sent.
- [34] Mr. Wright's communications with his wife Ms. Gray took place primarily through the ITS or during in-person visits. He says that while the couple were speaking on the telephone, they would sometimes hear a "click" followed by a change in call quality. They speculate that this may have indicated CSC was listening to or recording their conversations.
- [35] During the COVID-19 pandemic, when in-person visits were suspended, Ms. Gray communicated with Mr. Wright by mail. Occasionally CSC returned mail to Ms. Gray, instead of delivering it to Mr. Wright. He complained to CSC, and was told that the mail was not delivered because it was not consistent with his correctional plan and/or family support objectives. Mr. Wright says CSC could not have made this assessment without reading his mail.

D. Serena Gray

- [36] Serena Gray lives and works in British Columbia. She and Mr. Wright married in 2007, roughly six years prior to his incarceration.
- [37] Before the COVID-19 pandemic, Ms. Gray spoke regularly with Mr. Wright during in-person visits and via the ITS. At the time she swore her affidavit, there had been only one in-person visit with Mr. Wright since the pandemic began. Telephone calls were also subject to pandemic-related restrictions, because CSC "lockdowns" substantially curtailed inmates' access to the ITS.

- [38] On one occasion, Ms. Gray sent Mr. Wright a letter containing twelve photographs. CSC returned the correspondence because the limit on photographs was ten. She says that CSC could not have known there were twelve photographs unless the letter was opened and its content examined.
- [39] On another occasion, Ms. Gray sent Mr. Wright a document printed from a website that criticized CSC's handling of the pandemic, together with an article written by the mother of another inmate concerning prison conditions. There was also an article about the Spanish Flu. All of these were returned to Ms. Gray. This also happened when Ms. Gray sent Mr. Wright other articles printed from the internet.

E. Frank Kim

- [40] When he swore his affidavit, Frank Kim was an inmate at La Macaza Institution in La Macaza, Quebec. He has been incarcerated in five different CSC institutions since 2000.
- [41] Mr. Kim sent facsimile transmissions to his lawyer with the words "Privileged Correspondence" written at the top of the first page. He says that CSC would send faxes one page at a time, and he could not seal them in envelopes. He trusted that CSC staff would not read them.
- [42] In or around September 2002, Mr. Kim was sent a fax by a Privileged Communicant via his parole officer. The fax was accompanied by a cover page indicating its privileged contents. Despite this, the parole officer copied the fax and retained it on his case management file. Mr. Kim says this happened a second time approximately one week later.
- [43] Mr. Kim also provided his parole officer with documents addressed to the Correctional Investigator, a Privileged Communicant. The parole officer sent the documents, but also kept a copy on his case management file and forwarded the correspondence to the warden of his institution.
- [44] In May 2011, Mr. Kim requested and received a full copy of his case management file. Following his review of the file, he commenced a lawsuit against CSC alleging, inter alia, negligence, breach of privacy, and misfeasance in public office. He was not assisted by counsel.
- [45] Mr. Kim's mother sent him photocopies of case law to assist him with the litigation. These were rejected by CSC for violation of copyright. Mr. Kim maintains that CSC could not have known these documents violated copyright without reading them.
- [46] Mr. Kim's lawsuit was dismissed by this Court (*Kim v Canada*, 2017 FC 848). Prothonotary Mireille Tabib (as she then was) found that CSC had violated provisions of the CCRR, as well as CD 085, but concluded that Mr. Kim had failed to demonstrate any compensable harm. Counsel for the Plaintiffs in this proceeding say this illustrates the danger of advancing legal claims without adequate legal representation.

F. The 1999 Audit

- [47] In 1999, the Performance Assurance Sector of CSC published its Report on the Audit of Interception of Communications [1999 Audit]. It found instances where “interception was still being conducted after the period of authorization had elapsed”. In some cases, this was due to inadvertent error, but in others it was deliberate and involved active listening.
- [48] The 1999 Audit recommended that: (1) a “Visitor Application Form” be modified to inform visitors that their communications with inmates may be subject to interception; (2) limits be established for the initial and subsequent periods of authorized interception; and (3) institutions ensure the availability of private phones for inmates for privileged telephone conversations.

G. The 2021 Audit

- [49] In 2018, CSC’s Internal Audit Sector undertook an “Audit of Interception of Inmate Communications”. The report was published in 2021 [2021 Audit]. The 2021 Audit reviewed the period from 2017 to 2020 in two phases.
- [50] Phase 1 assessed the interception of telephone, mail, and in-person inmate communications, while Phase 2 assessed CSC’s response to the Phase 1 findings. The communications considered in Phase 2 were limited to those conducted by telephone. CSC’s response to the 2021 Audit was implemented on June 30, 2021 through a Management Action Plan.
- (1) Phase 1 [51] The 2021 Audit stated: “it is essential that CSC has an adequate and effective framework in place to ensure that inmate communication is intercepted in a manner consistent with legislative requirements”. While it found in Phase 1 that there were “elements of a management framework in place”, it also noted that “improvements were required”.
- [52] The 2021 Audit found that a lack of proper guidance in the form of CDs and institution-specific Standing Orders [SOs] contributed to the interception of communication in a manner that was unlawful. Where SOs were in place, they tended to be inaccurate and sometimes permitted violations of the applicable CDs and the CCRR.
- [53] SIOs were expected to complete interception training within 12 months of assuming their duties, but as of September 2018, only half had done so. Compliance among Deputy Wardens was better, but still only 69%. Voice Logger training was to be provided to SIOs nationally, but CSC failed to inform institutional management about its availability. The overall result was inadequate training among those responsible for ensuring that interceptions were conducted lawfully.
- [54] Phase 1 of the 2021 Audit focused on three regions, comprising 11 institutions and review of 83 interception files. This represented less than 8% of all authorized interceptions in the preceding year. The 2021 Audit concluded that approximately 40% of interceptions were not

supported by “reasonable grounds to believe”, as required by s 94(1)(a) of the CCRR. At nine of the institutions audited, Deputy Wardens provided verbal authorization for interceptions before the written forms were completed. At two institutions, authorization forms were backdated to reflect the date of verbal approval.

- [55] Authorizations to intercept communications via the ITS were obtained in only 25% of the instances examined, and a determination of the usefulness of information obtained was made in only 13%. Recordings of ITS interceptions were kept in perpetuity, contrary to CD 228. At ten institutions, SIOs did not use the proper form to document mail and visit interceptions, with the result that there was no record of this activity.
- [56] In 60% of audited cases, the initial authorization for interception was granted for longer than the mandated 30 days. In 43% of cases, extensions were granted for longer than the permitted 15 days. 43% of extensions were granted after the expiry of the existing authorization, contrary to CD 568-10.
- [57] Of the 79 interceptions for which prior authorization had been granted, 10% resulted in the interception of privileged communications with lawyers. The 2021 Audit attributed this to the failure of SIOs to properly configure the Voice Logger, which should have suppressed recording of these calls. The 2021 Audit also revealed that CSC had failed to identify certain communicants on common call lists as privileged.
- [58] In many instances, CSC failed to notify inmates that their communications had been intercepted. In approximately 12% of the files reviewed, the proper form was not completed. In the remainder, there was no evidence that the completed form was provided to the inmate affected. Inmates rarely received copies of interception forms before they were discharged from CSC institutions.
- (2) Phase 2 [59] In Phase 2, the 2021 Audit noted “significant improvements in compliance”. But there was also room for improvement. Recommendations included: (1) clarifying CSC policies governing the interception of communications; (2) providing better training to CSC employees on the interception of communications; (3) implementing oversight and quality assurance to monitor compliance with law and policies concerning the interception of communications; (4) revising and updating SOs on intercepting communications to ensure compliance with national policies; and (5) identifying, analyzing, and addressing privacy issues resulting from the interception of communications to ensure compliance with applicable policy.
- [60] Following the 2021 Audit, the auditors discovered that Black Phones at two institutions were connected to the Voice Logger, causing the interception of all calls made using those devices. ITS phones at two institutions were configured to record all calls, without regard to the identity of the inmate or communicant, or whether interceptions had been authorized. Visitor recording equipment at 11 of the 20 CSC institutions visited was configured to record continuously.

- (3) CSC's Response to the 2021 Audit [61] CSC's response to the 2021 Audit included the following:

Management agrees with the audit findings and recommendations as presented in the audit report. Management has prepared a detailed Management Action Plan to address the issues raised in the audit and associated recommendations. The Management Action Plan is scheduled for full implementation by June 30, 2021.

[62] CSC issued an interim policy bulletin for CD 568-10 (Interception of Inmate Communication) to clarify procedures. CSC's national policy on inmate communication interceptions was revised to reflect Recommendation 1 of the 2021 Audit.

[63] In the fall of 2018, Wardens and Deputy Wardens of all CSC institutions received training on "reasonable grounds to believe". In March 2019, further training was provided to SIOs on the intercept system, and by January 2020 comprehensive Voice Logger training was in place. In May 2019, training was provided on the legal and policy framework of interceptions. A national standard was implemented in March 2021. As of January 27, 2022, compliance with training requirements was 95.5%.

[64] Consistent with Recommendations 3 and 4 of the 2021 Audit, CSC took steps to improve monitoring and quality assurance. A Preventive Security Bulletin reinforced the importance of not intercepting communications with the Privileged Communicants listed in the Schedule to the CCRR. Reviews were undertaken nationally to assess compliance with the "reasonable grounds to believe" standard for intercepting communications. The process for obtaining authorizations to intercept communications was revised to require approval by the Assistant Deputy Commissioner, Correctional Operations, of the relevant region.

[65] The intercept forms were revised to ensure compliance with law and policy, and a new form was introduced for requesting extensions of interception periods.

III. Issues

[66] The question before the Court is whether the Plaintiffs have satisfied the five-part test for certification of this proceeding as a class action (Rule 334.16(1)), namely:

Do the pleadings disclose a reasonable cause of action?

Is there an identifiable class of two or more persons?

Do the claims of the class members raise common questions of law or fact?

Is a class proceeding the preferable procedure?

Are the Plaintiffs suitable class representatives?

IV. Analysis

A. Do the pleadings disclose a reasonable cause of action? [67] A plaintiff satisfies the reasonable cause of action requirement unless it is “plain and obvious” that no claim exists (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 979; *Hollick v Toronto (City)*, 2001 SCC 68 [Hollick] at para 25). The threshold is low, and the Court must read the pleading as generously as possible, and accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 88, citing *Operation Dismantle v The Queen*, [1985] 1 SCR 441 (SCC) at 451; *Canada v John Doe*, 2016 FCA 191 [John Doe] at para 51).

[68] The facts alleged are assumed to be true, but they must nevertheless be pleaded in support of each cause of action. Bald assertions of conclusions are not allegations of material fact and cannot support a cause of action (*John Doe* at para 23).

[69] In their Amended Memorandum of Agreement, the parties acknowledge that the Plaintiffs’ pleadings disclose reasonable causes of action pursuant to s 8 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter] and ss 17 and 18 of the Crown Liability and Proceedings Act, RSC, 1985, c C-50 [CLPA]. While the Statements of Claim assert numerous additional causes of action, further amendment of the pleadings will limit the causes of action to just two.

(1) Charter, s 8 [70] Section 8 of the Charter provides that “[e]veryone has the right to be secure against unreasonable search or seizure”. Its basic interpretive structure is well known and consists of two stages. First, the claimant must show that a state act constituted a search or seizure because it invaded his or her reasonable expectation of privacy in the subject matter of the search. Second, the claimant must show that the search or seizure was itself unreasonable (*R v Jones*, 2017 SCC 60 at para 11). For a search or seizure to be unreasonable, it must be established that the search or seizure was not authorized by law, that the law itself is unreasonable, or that the manner in which the search or seizure was carried out was unreasonable (*R v Collins*, [1987] 1 SCR 265 at para 23).

[71] The reasonable expectation of privacy regarding solicitor-client communication is invariably high (*Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 38). This principle is unaltered by the context of incarceration, and CD 568-10 confirms that solicitor-client communications are presumptively ineligible for interception.

[72] The Statements of Claim plead sufficient material facts to disclose a reasonable cause of action pursuant to s 8 of the Charter.

(2) CLPA, ss 17-18

[73] Section 17 of the CLPA states that the Crown is liable for all loss or damage caused by or attributable to the intentional interception by a servant of the Crown, in the course of that servant’s employment, by means of an electro-magnetic, acoustic, mechanical or other

device, of a private communication, and for punitive damages in an amount not exceeding five thousand dollars to each person who incurred that loss or damage. Pursuant to s 17(2) of the CLPA, the Crown is not liable where the interception (1) was lawfully made; (2) was made with the consent of a party to the communication; or (3) was made for the purpose of preventing the improper use of a frequency or transmission.

- [74] Section 18 of the CLPA prohibits the use or disclosure of information obtained pursuant to the improper interception of private communications described in s 17, and renders the Crown liable for all resulting loss or damage, and for punitive damages in an amount not exceeding five thousand dollars to each person who incurred that loss or damage. A number of exceptions are specified in s 18(2), including the consent of a party to the communications, the administration of justice, and radio frequency spectrum management.
- [75] The Statements of Claim plead sufficient material facts to disclose a reasonable cause of action pursuant to ss 17 and 18 of the CLPA.

B. Is there an identifiable class of two or more persons?

- [76] For the “identifiable class” condition to be met, the evidence must support some basis in fact for an objective class definition that bears a rational connection to the litigation and that is not dependent on the outcome of the litigation (*Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 [Nasogaluak] at para 84, citing *Canada v Greenwood*, 2021 FCA 186 [Greenwood] at para 168). The class must not be overinclusive or unnecessarily broad (*Paradis Honey Ltd v Canada*, 2017 FC 199 at para 24, citing *Hollick* at para 21).

- [77] The parties propose that the classes be defined in relation to four categories of claim: Section 94 Interceptions, Unapproved Recordings (Misconfigurations), Mail Interceptions, and Fax Interceptions. With the exception of Fax Interceptions, each claim includes an inmate and a non-inmate class, defined below:

1. Section 94 Interceptions

- i. Class Period: 29 October 1992 to 17 October 2021.

ii. Inmate Class: All persons alive on the date that this matter is certified, who were or are incarcerated at any CSC Institution, and who at any time during the Class Period were subject to an authorization to intercept communications through the ITS, IMS, or IVS pursuant to s 94 of the CCRR.

iii. Non-Inmate Class: All persons alive on the date that this matter is certified, excluding persons set out in the Schedule to s. 94(2) of the CCRR, who during the Class Period, communicated with a member of the Inmate Class through the ITS, IMS, or IVS at a CSC Institution.

2. Unapproved Recordings (Misconfigurations)

- i. Class Period: 23 May 2012 to the date this matter is certified as a class action.

ii. Inmate Class: All persons alive on the date that this matter is certified, who were or are incarcerated at any CSC Institution, and who at any time during the Class Period and while not subject to an authorization to intercept communications under s 94 of the CCRR, used the ITS, a Black Phone, or the IVS at a CSC Institution.

iii. Non-Inmate Class: All persons alive on the date that this matter is certified, excluding persons set out in the Schedule to s 94(2) of the CCRR, who during the Class Period, communicated with a member of the Inmate Class through the ITS, a Black Phone or the IVS, at a CSC Institution.

3. Mail Interceptions

i. Class Period: 27 April 2015 to the date this matter is certified as a class action.

ii. Inmate Class: All persons alive on the date that this matter is certified, who were or are incarcerated at any CSC Institution, and who during the Class Period, and while not subject to an authorization to intercept communications under s 94 of the CCRR, received privileged mail from a lawyer that was opened, or who allege that mail (excluding faxes) they received from any person was read.

iii. Non-Inmate Class: All persons alive on the date that this matter is certified, excluding persons set out in the Schedule to s 94(2) of the CCRR, who during the Class Period, sent mail to an Inmate at a CSC Institution, and allege that the mail was read.

4. Fax Interceptions

i. Class period: 21 August 2006 to the date this matter is certified as a class action.

ii. Inmate Class: All persons alive on the date that this matter is certified, who were or are incarcerated at any CSC Institution, and who during the Class Period, communicated with a person set out in the CCRR schedule by fax, and allege that no covering sheet was used for the fax transmission.

[78] The proposed Class definitions are sufficiently objective and bear a sufficiently rational connection to the litigation to meet the “identifiable class” criterion.

C. Do the claims of the class members raise common questions of law or fact?

[79] In *Nasogaluak* at paragraph 100, the Federal Court of Appeal quoted from its earlier decision in *Greenwood* at paragraph 180:

Determining whether a proposed class proceeding displays the requisite commonality to justify certification is to be approached purposively to ascertain whether the common issue(s) are essential element(s) of each class member’s claim and whether addressing them commonly will avoid duplication of fact-finding or legal analysis. It is not necessary that the common issues predominate over individual issues, that answers to them settle liability or that class members be identically situated in respect of the common issues. Rather, the requisite commonality will exist if the common issue will meaningfully advance class members’ claims, which may be said to be the case unless individual issues are overwhelmingly more significant [...].

[80] The parties propose the following common questions of law or fact in respect of each claim:

1. Section 94 Interceptions

i. What are the reasonable expectations of privacy applicable to the Inmate Class members who were subject to authorizations under s 94 of the CCRR in relation to communications made or received through the ITS, IMS, and/or IVS with:

1. a lawyer for the purposes of obtaining legal advice; and
2. any other person?

ii. What are the reasonable expectations of privacy applicable to the Non-Inmate Class members who communicated with an Inmate Class member who was subject to authorizations under s 94 of the CCRR in relation to communications made or received through the ITS, IMS, and/or IVS?

iii. Did any of the acts or omissions alleged in the pleadings by the Plaintiffs with respect to CSC's: (a) process for issuing authorizations under s 94 of the CCRR, or (b) operation and management of the ITS, IMS, and IVS, result in a systemic breach of:

1. Inmate Class members' rights under s 8 of the Charter?
2. Non-Inmate Class members' rights under s 8 of the Charter?
3. Inmate Class members' rights under ss 17-18 of the CLPA?
4. Non-Inmate Class members' rights under ss 17-18 of the CLPA?

iv. If the answer to common issue "1(iii)(1)" or "1(b)(iii)(2)" or both above is "yes", were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?

v. If the answer to common issue "1(iii)(3)" or "1(b)(iii)(4)" or both above is "yes", do the saving provisions under s 17(2) or 18(2) of the CLPA apply?

vi. If the answer to common issue "1(iv)" or "1(v)" or both above is "no", are Inmate or Non-Inmate class members (or both) entitled to damages, including punitive damages?

2. Unapproved Recordings (Misconfigurations)

i. What are the reasonable expectations of privacy applicable to Inmate Class members in relation to communications made or received through the ITS, a "Black Phone", or the IVS (excluding interceptions under a s 94 CCRR authorization) with:

1. a lawyer for the purposes of obtaining legal advice; and
2. any other person?

ii. What are the reasonable expectations of privacy applicable to Non-Inmate Class members in relation to communications with Inmate Class members through the ITS, "Black Phones", or the IVS (excluding interceptions under a s 94 of the CCRR authorization)?

iii. Did any of the acts or omissions alleged in the pleadings by the Plaintiffs with respect to CSC's operation and management of the ITS, "Black Phones", or the IVS (excluding interceptions under a s 94 CCRR authorization), result in a systemic breach of:

1. Inmate or Non-Inmate Class members' (or both classes') rights under s 8 of the Charter? If so, were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?
2. Inmate or Non-Inmate Class members' (or both classes') rights under ss 17-18 of the CLPA? If so, do the saving provisions under s 17(2) or 18(2) of the CLPA apply?

iv. If answers to common issue "2(iii)(1)" or "2(iii)(2)" or both above are that there is an unjustified breach of s 8 of the Charter or that there is a breach of ss 17-18 of the CLPA that is not justified or saved, are Inmate or Non-Inmate Class members (or both) entitled to damages, including punitive damages?

3. Mail Interceptions

i. What are the reasonable expectations of privacy under s 8 of the Charter, applicable to Inmate Class members, with respect to CSC:

1. opening privileged mail to/from a lawyer sent/received through the IMS; and
2. reading mail received through the IMS (excluding faxes) from any person?

ii. What are the reasonable expectations of privacy under s 8 of the Charter applicable to Non-Inmate Class members with respect to CSC reading communications they send to Inmate Class members through the IMS?

iii. Did any of the acts or omissions alleged in the pleadings by the Plaintiffs with respect to CSC's operation and management of the IMS in relation to the: (a) opening of privileged mail to/from lawyers, or (b) reading of mail (excluding faxes) from any person without a s 94 of the CCRR authorization to intercept, result in a systemic breach of:

1. Inmate Class members' rights under s 8 of the Charter? If so, were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?
2. Non-Inmate Class members' rights under s 8 of the Charter? If so, were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?

iv. If answers to common issue "3(iii)(1)" or "3(iii)(2)" or both above are that there is a breach of s 8 of the Charter that is not justified, are Inmate or Non-Inmate Class members (or both) entitled to damages, including punitive damages?

4. Fax Interceptions

- i. What are the reasonable expectations of privacy under s 8 of the Charter applicable to Inmate Class members with respect to outgoing faxes sent through the IMS without a cover sheet to:
 1. a lawyer for the purpose of obtaining legal advice; and
 2. any other person set out in the CCRR schedule?
- ii. Did any of the acts or omissions alleged in the pleadings by the Plaintiffs with respect to CSC's operation and management of outgoing Inmates' faxes, result in a systemic breach of Inmate Class members' rights under s 8 of the Charter?
- iii. If the answer to common issue "4(ii)" above identifies a breach of s 8 of the Charter, were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?
- iv. If the answer to common issue "4(iii)" above is "no", are Inmate Class members entitled to damages, including punitive damages?

[81] The proposed common issues are essential elements of each class member's claim, and addressing them commonly will avoid duplication of fact-finding or legal analysis. Resolution of the proposed common issues will meaningfully advance class members' claims. The Plaintiffs have satisfied the criterion of raising common questions of law or fact.

D. Is a class proceeding the preferable procedure?

[82] The preferability analysis requires the Court to look to all reasonably available means of resolving the class members' claims, not just the possibility of individual actions. This entails consideration of other potential court procedures, and also non-court proceedings (AIC Limited v Fischer, 2013 SCC 69 [Fischer] at para 35).

[83] Once the alternative or alternatives to class proceedings have been identified, the Court must assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The Court should consider both the substantive and procedural aspects of access to justice, recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims, and to do so in a manner that accords suitable procedural rights (Fischer at para 37).

[84] The preferability inquiry is to be conducted through the lens of the three main goals of class proceedings: judicial economy, behaviour modification, and access to justice (Nasogaluak at para 116). A class action may "allow claimants to overcome psychological and social barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf" (Fischer at para 29).

- [85] The parties agree that the proposed class action is the preferable procedure. The Defendant has not identified any alternative means of resolving the class members' claims. The Plaintiffs reasonably characterize prison inmates as a vulnerable population. If this proposed class action is not certified, it is unlikely that individual class members will pursue alternative forms of redress on their own. To the extent that the allegations advanced in the Statements of Claim have merit, no remedy will be provided for the wrongs suffered by the proposed class except by way of a collective proceeding.
- [86] Considering the goals of judicial economy, behaviour modification, and access to justice, a class action is the preferable procedure for resolving the claims of the proposed class.

E. Are the Plaintiffs suitable class representatives?

- [87] The parties agree that Mr. Philip, Mr. Wright and Ms. Gray will adequately represent the interests of the class. They have confirmed their willingness to act as representative Plaintiffs, and that no conflict of interest exists between them and other proposed class members.
- [88] Similar to many representative plaintiffs in class proceedings, the Plaintiffs will rely on the advice of experienced counsel to navigate the applicable Rules of Court. Considering that the proposed class consists primarily of a vulnerable population, it may be unrealistic to expect a high degree of sophistication in the conduct of legal proceedings from individual Class members. If at some stage in the litigation it becomes apparent that Mr. Philip, Mr. Wright or Ms. Gray are unable to serve as representative Plaintiffs, they may be replaced by other members of the class.
- [89] Mr. Philip, Mr. Wright and Ms. Gray have demonstrated some basis in fact for their suitability as representative Plaintiffs.

V. Conclusion

- [90] The proceedings will be consolidated and certified as a class action in accordance with the parties' Amended Memorandum of Agreement.
- [91] Applying Rule 334.39, there will be no order as to costs.

ORDER

THIS COURT ORDERS that:

The motion to consolidate the proceedings and certify them as a class action is granted.

The class proceeding will continue as Court File No T-1360-18 with the style of cause Adrian Philip, Blake Wright and Selena Gray v The Attorney General of Canada.

The class is defined as follows:

1. Section 94 Interceptions

- i. Class Period: 29 October 1992 to 17 October 2021.
 - ii. Inmate Class: All persons alive on the date that this matter is certified, who were or are incarcerated at any CSC Institution, and who at any time during the Class Period were subject to an authorization to intercept communications through the ITS, IMS, or IVS pursuant to s 94 of the CCRR.
 - iii. Non-Inmate Class: All persons alive on the date that this matter is certified, excluding persons set out in the Schedule to s 94(2) of the CCRR, who during the Class Period, communicated with a member of the Inmate Class through the ITS, IMS, or IVS at a CSC Institution.
2. Unapproved Recordings (Misconfigurations)
 - i. Class Period: 23 May 2012 to the date this matter is certified as a class action.
 - ii. Inmate Class: All persons alive on the date that this matter is certified, who were or are incarcerated at any CSC Institution, and who at any time during the Class Period and while not subject to an authorization to intercept communications under s 94 of the CCRR, used the ITS, a Black Phone⁴, or the IVS at a CSC Institution.
 - iii. Non-Inmate Class: All persons alive on the date that this matter is certified, excluding persons set out in the Schedule to s 94(2) of the CCRR, who during the Class Period, communicated with a member of the Inmate Class through the ITS, a Black Phone or the IVS, at a CSC Institution.
3. Mail Interceptions
 - i. Class Period: 27 April 2015 to the date this matter is certified as a class action.
 - ii. Inmate Class: All persons alive on the date that this matter is certified, who were or are incarcerated at any CSC Institution, and who during the Class Period, and while not subject to an authorization to intercept communications under s 94 of the CCRR, received privileged mail from a lawyer that was opened, or who allege that mail (excluding faxes) they received from any person was read.
 - iii. Non-Inmate Class: All persons alive on the date that this matter is certified, excluding persons set out in the Schedule to s 94(2) of the CCRR, who during the Class Period, sent mail to an Inmate at a CSC Institution, and allege that the mail was read.
4. Fax Interceptions
 - i. Class period: 21 August 2006 to the date this matter is certified as a class action.
 - ii. Inmate Class: All persons alive on the date that this matter is certified, who were or are incarcerated at any CSC Institution, and who during the Class Period, communicated with a person set out in the CCRR schedule by fax, and allege that no covering sheet was used for the fax transmission.

Adrian Philip, Blake Wright and Selena Gray are appointed representative Plaintiffs.

The claims made on behalf of the Class are:

breach of ss 17-18 of the Crown Liability and Proceedings Act.

The relief claimed by the class is damages, including punitive damages, at common law and pursuant to s 24 of the Canadian Charter of Rights and Freedoms.

The common questions of law or fact for the Class are:

1. breach of s 8 of the Canadian Charter of Rights and Freedoms; and
1. Section 94 Interceptions
 - i. What are the reasonable expectations of privacy applicable to the Inmate Class members who were subject to authorizations under s 94 of the CCRR in relation to communications made or received through the ITS, IMS, and/or IVS with:
 1. a lawyer for the purposes of obtaining legal advice; and
 2. any other person?
 - ii. What are the reasonable expectations of privacy applicable to the Non-Inmate Class members who communicated with an Inmate Class member who was subject to authorizations under s 94 of the CCRR in relation to communications made or received through the ITS, IMS, and/or IVS?
 - iii. Did any of the acts or omissions alleged in the pleadings by the Plaintiffs with respect to CSC's:
 - (a) process for issuing authorizations under s 94 of the CCRR, or
 - (b) operation and management of the ITS, IMS, and IVS, result in a systemic breach of:
 1. Inmate Class members' rights under s 8 of the Charter?
 2. Non-Inmate Class members' rights under s 8 of the Charter?
 3. Inmate Class members' rights under ss 17-18 of the CLPA?
 - 4 Non-Inmate Class members' rights under ss 17-18 of the CLPA?
 - iv. If the answer to common issue "1(iii)(1)" or "1(b)(iii)(2)" or both above is "yes", were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?
 - v. If the answer to common issue "1(iii)(3)" or "1(b)(iii)(4)" or both above is "yes", do the saving provisions under s 17(2) or 18(2) of the CLPA apply?
 - vi. If the answer to common issue "1(iv)" or "1(v)" or both above is "no", are Inmate or Non-Inmate class members (or both) entitled to damages, including punitive damages?
2. Unapproved Recordings (Misconfigurations)

- i. What are the reasonable expectations of privacy applicable to Inmate Class members in relation to communications made or received through the ITS, a “Black Phone”, or the IVS (excluding interceptions under a s 94 CCRR authorization) with:
 1. a lawyer for the purposes of obtaining legal advice; and
 2. any other person?
 - ii. What are the reasonable expectations of privacy applicable to Non-Inmate Class members in relation to communications with Inmate Class members through the ITS, “Black Phones”, or the IVS (excluding interceptions under a s 94 of the CCRR authorization)?
 - iii. Did any of the acts or omissions alleged in the pleadings by the Plaintiffs with respect to CSC’s operation and management of the ITS, “Black Phones”, or the IVS (excluding interceptions under a s 94 CCRR authorization), result in a systemic breach of:
 1. Inmate or Non-Inmate Class members’ (or both classes’) rights under s 8 of the Charter? If so, were the Defendant’s actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?
 2. Inmate or Non-Inmate Class members’ (or both classes’) rights under ss 17-18 of the CLPA? If so, do the saving provisions under s 17(2) or 18(2) of the CLPA apply?
 - iv. If answers to common issue “2(iii)(1)” or “2(iii)(2)” or both above are that there is an unjustified breach of s 8 of the Charter or that there is a breach of ss 17-18 of the CLPA that is not justified or saved, are Inmate or Non-Inmate Class members (or both) entitled to damages, including punitive damages?
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 - i. What are the reasonable expectations of privacy under s 8 of the Charter, applicable to Inmate Class members, with respect to CSC:
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 2. reading mail received through the IMS (excluding faxes) from any person?
 - ii. What are the reasonable expectations of privacy under s 8 of the Charter applicable to Non-Inmate Class members with respect to CSC reading communications they send to Inmate Class members through the IMS?
 - iii. Did any of the acts or omissions alleged in the pleadings by the Plaintiffs with respect to CSC’s operation and management of the IMS in relation to the: (a) opening of privileged mail to/from lawyers, or (b) reading of mail (excluding faxes) from any person without a s 94 of the CCRR authorization to intercept, result in a systemic breach of:

1. Inmate Class members' rights under s 8 of the Charter? If so, were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?
2. Non-Inmate Class members' rights under s 8 of the Charter? If so, were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?
- iv. If answers to common issue "3(iii)(1)" or "3(iii)(2)" or both above are that there is a breach of s 8 of the Charter that is not justified, are Inmate or Non-Inmate Class members (or both) entitled to damages, including punitive damages?
4. Fax Interceptions
 - i. What are the reasonable expectations of privacy under s 8 of the Charter applicable to Inmate Class members with respect to outgoing faxes sent through the IMS without a cover sheet to:
 1. a lawyer for the purpose of obtaining legal advice; and
 2. any other person set out in the CCRR schedule?
 - ii. Did any of the acts or omissions alleged in the pleadings by the Plaintiffs with respect to CSC's operation and management of outgoing Inmates' faxes, result in a systemic breach of Inmate Class members' rights under s 8 of the Charter?
 - iii. If the answer to common issue "4(ii)" above identifies a breach of s 8 of the Charter, were the Defendant's actions justified under s 1 of the Charter, if applicable, or under the Doré framework analysis, if applicable?
 - iv. If the answer to common issue "4(iii)" above is "no", are Inmate Class members entitled to damages, including punitive damages?

The Litigation Plan jointly submitted by the parties and attached hereto is approved.

No costs are awarded.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-1360-18

STYLE OF CAUSE:

ADRIAN PHILIP v THE ATTORNEY GENERAL OF CANADA

AND DOCKET:

t-703-21

STYLE OF CAUSE:

BLAKE RANDALL WRIGHT v THE ATTORNEY GENERAL OF CANADA

AND DOCKET:

T-702-21

STYLE OF CAUSE:

SERENA GRAY v THE ATTORNEY GENERAL OF CANADA

CERTIFICATION ON CONSENT DATED jULY 8, 2024

ORDER AND REASONS

FOTHERGILL J.

DATED:

November 27, 2024

APPEARANCES:

Patrick Dudding Rajinder Sahota Emmanuela Bocancea

For The PLAINTIFFS

Éric Lafrenière

Laurent Brisebois

Kim Nguyen

Ami Assignon

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Acheson Sweeney Foley Sahota LLP Victoria, B.C.

For The PlaintiffS

Attorney General of Canada Montreal, Quebec

FOR THE DEFENDANT

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