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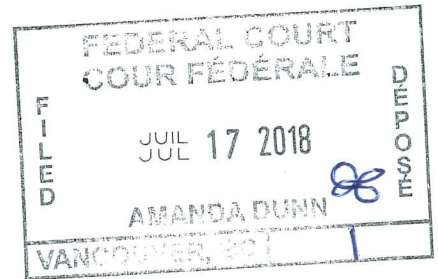
Court File No. T-1360-18

**FEDERAL COURT**

**PROPOSED CLASS PROCEEDING**

BETWEEN:

**ADRIAN PHILIP**



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 Courts 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: <sup>17</sup> July, 2018

ORIGINAL SIGNED BY  
JULIE A. GORDON  
SENIOR REGISTRY OFFICER

Issued by: \_\_\_\_\_ (Registry Officer)

Address of local office: Pacific Center, 3rd Floor      Centre Pacific, 3<sup>ème</sup> étage  
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TO:

**THE ATTORNEY GENERAL OF CANADA**  
Department of Justice Canada  
900-840 Howe Street  
Vancouver, British Columbia, V6Z 2S9

I HEREBY CERTIFY that the above document is a true copy of  
the original issued out of / filed in the Court on the \_\_\_\_\_

day of JUL 17 2018 A.D. 20 \_\_\_\_\_

Dated this \_\_\_\_\_ day of JUL 17 2018, 20 \_\_\_\_\_

## **CLAIM**

1. The plaintiff claims:
  - a) an order certifying this action as a class proceeding, and appointing the plaintiff as representative plaintiff;
  - b) a declaration that the defendant breached duties of care and fiduciary duties owed to the class, as well as the privacy rights of the class, and the rights of the class under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.1 (the "*Charter*");
  - c) aggregate damages for the defendant's breaches of its duties of care, fiduciary duties, privacy rights, and *Charter* rights in an amount exceeding \$50,000;
  - d) exemplary, punitive, and/or aggravated damages an amount exceeding \$50,000;
  - e) pre- and post-judgment interest;
  - f) costs of the action on an indemnity basis;
  - g) costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to R. 334.38 of the *Federal Court Rules*, SOR/98-106; and
  - h) such further and other relief that this Honourable Court may deem just.

## **FACTUAL BASIS**

### Overview

2. "A person confined to prison retains all civil rights, other than those taken away by law...": *Canada v. Solosky*, [1980] 1 S.C.R. 821.  
Canadian law recognizes each person's essential civil and legal right

to consult with a lawyer in confidence. This right, solicitor-client privilege, plays a fundamental role in the administration of justice in Canada. It extends beyond the law of evidence and the courtroom, protecting all communications between lawyer and client against access or disclosure by any other person, other than in narrowly-circumscribed situations; its aegis is nearly absolute. It is a right no less robust behind prison walls than it is beyond them.

3. The defendant through its agent, the Correctional Service of Canada ("CSC"), systematically, unlawfully, and/or without authorization intruded upon the privacy of current and former Federally-incarcerated inmates including the plaintiff (collectively, the "Inmates"), by listening to, recording, and divulging to third parties the contents of private telephone conversations between inmates and their respective lawyers (collectively, the "Privileged Conversations").
4. The protections, civil and criminal, afforded to the individual by our law are dependent upon the aid and guidance of those skilled in the law, untrammelled by any apprehension that the full and frank disclosure of all facts and thoughts to a legal advisor might somehow become available to third persons so as to be used against the individual. Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been said will be listened to or recorded by some third person, divulged to other parties, or used against the inmate.
5. By intercepting the Privileged Conversations, recording them, and divulging their contents to third parties, CSC interfered with the solicitor-client relationships that underpin the administration of justice in Canada. CSC's actions inflict a systemic insult against the sanctity

of solicitor-client communications, which are essential to the effective operation of the legal system.

6. Beyond the Privileged Conversations, CSC also listened to, recorded, and/or divulged to third parties the contents of personal, private telephone conversations between Inmates and members of the public (the "Personal Conversations").

The parties

7. The plaintiff, Mr. Adrian Philip, is an inmate at Collins Bay Institution, a Federal penitentiary located in Kingston, Ontario ("Collins Bay"). Mr. Philip has an address for service care of #400-535 Yates Street, Victoria, British Columbia.
8. Mr. Philip brings this action on his own behalf and on behalf of a proposed class (the "Class") with subclasses defined as follows:
  - a) All persons, alive on the date that this matter is certified, who were or are incarcerated at a Federal institution, and used the telephone system at the institution to communicate with a lawyer for the purpose of obtaining legal advice (the "Inmate/Client Subclass").  
  
All persons, alive on the date that this matter is certified, who were or are incarcerated at a Federal institution, and used the telephone system at the institution to communicate other than with a lawyer for the purpose of obtaining legal advice (the "Inmate/Personal Subclass").
9. Her Majesty the Queen in Right of Canada administers a system of carceral facilities across Canada through CSC, and both entities are represented in this matter by the named defendant, the Attorney General of Canada.

10. The defendant is liable for the acts or omissions of CSC, including the acts or omissions of CSC's employees, agents, and servants.

*The interception of Mr. Philip's Privileged Conversations by CSC*

11. At material times, lawyers from the firm of Rusonik, O'Connor, Robbins, Ross, Gorham & Angelini LLP ("RORRGA") represented Mr. Philip in relation to criminal proceedings against him.

12. At various times during his incarceration at Collins Bay, Mr. Philip contacted his lawyers at RORRGA using the inmate telephone system at the penitentiary (the "Telephone System").

13. In using the Telephone System to have discussions with his lawyers at RORRGA, Mr. Philip held Privileged Conversations, as he:

- a) made communications to lawyers, who were acting in their professional capacities at the time, in relation to criminal proceedings against him;
- b) received legal advice from lawyers, who were acting in their professional capacities at the time, in relation to criminal proceedings against him;
- c) intended for all of the foregoing communications to be confidential, private, and not disclosed to any other person;
- d) at no time provided lawful or any consent to any person to listen to, record, or divulge to a third party the contents of the discussions in question; and
- e) at no time sought to facilitate the commission of a crime or fraud or an act that would jeopardize the safety of the institution or any person.

14. Mr. Philip also used the Telephone System to hold Personal Conversations, as he:

- a) participated in discussions with persons other than for the purposes of obtaining legal advice;
- b) intended for all of the foregoing communications to be confidential, private, and not disclosed to any other person;
- c) at no time provided consent to any person to listen to, record, or divulge to a third party the contents of the discussions in question; and
- d) at no time sought to facilitate the commission of a crime or fraud or an act that would jeopardize the safety of the institution or any person.

15. Mr. Philip was charged with criminal offences, other than those he was imprisoned for, during his incarceration at Collins Bay (the "Additional Offences").

16. After being charged with the Additional Offences, CSC and its employees no longer permitted Mr. Philip to make calls using the Telephone System for Personal Conversations; from this time onward, his use of the Telephone System was limited to and exclusively for the purposes of Privileged Conversations.

17. In or around August 2017, Mr. Philip's became aware that CSC and its employees:

- a) listened to and recorded his Personal Conversations prior to the Additional Offences;
- b) listened to and recorded his Privileged Conversations both before and after the Additional Offences;
- c) divulged recordings of his Privileged Conversations and Personal Conversations to third parties, including for the purposes of prosecuting Mr. Philip for the Additional Offences.

*The systematic interception of Privileged Conversations and Personal Conversations by CSC*

18. When incarcerated, Inmates are only permitted to conduct telephone conversations through the Telephone System, regardless of whether the conversation in question is a Privileged Conversation or a Personal Conversation.
19. The selection, installation, and maintenance of the Telephone System is administered through CSC's National Headquarters in Ottawa.
20. To use the Telephone System, Inmates must provide CSC employees with a list of contacts (the "List"), which consists of each contact's respective name, telephone number, and relationship to the inmate in question.
21. CSC employees must examine and vet any List before the inmate who provided that List is permitted to make a call using the Telephone System.
22. To make a call using the Telephone System, Inmates must produce a card which is unique to that individual, provide the personal identification number associated with the card, and select a name from the individual inmate's List.
23. Inmates cannot place a call through the Telephone System unless CSC employees have approved the number in question and have added it to the List for the inmate in question.
24. Due to the manner in which the Telephone System operates, CSC and its employees know or ought to know beforehand whether each call made through the Telephone System will contain or comprise solicitor-client communications.



25. Despite that CSC and its employees knew or ought to know that the Privileged Conversations will contain or comprise solicitor-client communications, CSC and its employees persisted, deliberately or recklessly, in recording, listening to, and divulging to third parties the contents of Privileged Conversations between Inmates and their lawyers.
26. The Commissioner of the CSC (the "Commissioner") represented to Inmates, by way of Commissioner's Directive CD#085 and other means that telephone calls to legal counsel are normally confidential and subject to interception by CSC only in accordance with the criteria stipulated in s. 94(1) and (2) of the *Corrections and Conditional Release Regulations*, S.O.R. 92/620 (the "*Regulations*").
27. The Commissioner represented to Inmates, by way of Commissioner's Directive CD#085 and other means, that telephone calls to persons other than legal counsel are only to be intercepted by CSC only in accordance with the criteria stipulated in s. 94(1) of the *Regulations*.
28. Upon admission to a CSC institution, all Inmates are informed through a document entitled Statement Concerning Private Communications and other means that calls made through the Telephone System will only be intercepted by CSC where there are reasonable grounds to believe that the criteria in s. 94(1) are satisfied, and the communications are not or will not be the subject of a privilege.
29. At all material times:
- a) CSC and its employees knew or ought to know that the Privileged Communications are or would be the subject of a privilege; and
  - b) the Class maintained subjective and objectively reasonable expectations of privacy concerning the Privileged Conversations and the Personal Conversations.

30. At no time did the Class members waive, abandon, or extinguish their privacy, confidentiality, privilege or their privilege-founded expectations concerning the Privileged Conversations.

31. At no time did CSC or its employees:

- a) obtain consent to listen to, record, or divulge to third parties any of the Privileged Conversations or Personal Conversations;
- b) have reasonable or any grounds to believe that the Privileged Conversations or the Personal Conversations contained or would contain evidence of an act that would jeopardize the safety of the penitentiary or any person;
- c) have reasonable or any grounds to believe that the Privileged Conversations or the Personal Conversations contained or would contain evidence of a criminal offence or a plan to commit a criminal offence;
- d) have reasonable or any grounds to believe that interception of the Privileged Conversations or the Personal Conversations constituted the least restrictive measure available in the circumstances;
- e) obtain authorization in writing permitting the interception of the Privileged Conversations or the Personal Conversations; or
- f) inform, promptly or at all, in writing or otherwise, any member of the Inmate/Client Subclass or the Inmate/Personal Subclass of the reasons for listening to, recording, or divulging to third parties the contents of the Privileged Conversations or the Personal Conversations.

32. At no time were the requirements of s. 94(1) or (2) of the *Regulations* satisfied with respect to any of the Privileged Conversations.

33. At no time were the requirements of s. 94(1) of the *Regulations* satisfied with respect to any of the Personal Conversations.
34. In consequence of the actions of CSC and its employees, the Class suffered injuries, damages, and loss, as well as breaches of their rights.
35. CSC and its employees persisted in intercepting the Privileged Conversations, despite the negative impacts on the Inmate/Client Subclass, on the administration of justice, and on the public perception of the justice system. CSC persisted in this conduct in direct violation of its own directives as well as the representations made to the Inmates. CSC further covertly carried out a wide-scale and systemic intrusion into the privacy of the Class, also in violation of its own directives and the representations made to the Inmates. This is high-handed, reckless, and callous conduct which warrants the condemnation and rebuke of this Honourable Court.

### **LEGAL BASIS**

36. In recording, listening to, and divulging to third parties the contents of the Privileged Conversations, CSC and its employees violated:
- a) s. 184(1) of the Criminal Code, R.S.C. 1985, c. 46;
  - b) the *Regulations*, particularly s. 94;
  - c) CSC Commissioner's Directives CD#085 and CD#568-10;
  - d) the *Privacy Act*, R.S.C. 1985, c. P-21;
  - e) the *Civil Code of Quebec*, S.Q. 1991, c. 64, Art. 1457 and the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12.

### The Charter

37. CSC and its employees violated the rights of the Class under the *Charter* by recording, listening to, and/or divulging to third parties the contents of the Privileged Conversations and the Personal Conversations, as this conduct:
- a) interfered with solicitor-client relationships and the administration of justice in the face of proceedings, thereby depriving Inmate/Client Subclass members of their liberty in a manner out of accordance with the principles of fundamental justice, contrary to s. 7;
  - b) imposed serious psychological stress, thereby depriving Class members of the security of their persons in a manner out of accordance with the principles of fundamental justice, contrary to s. 7;
  - c) constituted an unreasonable, unlawful, unauthorized search and seizure, contrary to s. 8;
  - d) negated or undermined the right of the Inmate/Client Subclass to retain and instruct counsel, contrary to s. 10(b); and
  - e) amounted to cruel and unusual treatment of the Inmate/Client Subclass and Inmate/Personal Subclass, contrary to s. 12.
38. The *Charter*-violating actions of CSC and its employees are unlawful and do not engage s. 1 of the *Charter*, in the alternative, the acts and omissions of CSC and its employees are not reasonable limits and cannot be demonstrably justified.

### Privacy rights

39. In recording, listening to, and divulging to third parties the contents of the Privileged Conversations as well as the Personal Conversations, CSC and its employees intentionally or recklessly or wilfully, and

without claim of right, intruded upon the private affairs of the Class; a reasonable person would regard this intrusion as highly offensive and causing distress, humiliation or anguish: *Jones v. Tsige*, 2012 ONCA 32; *Privacy Act*, R.S.B.C. 1996, c. 373; *Privacy Act*, C.C.S.M. 1987, c. P125; *Privacy Act*, R.S.S. 1978. c. P-24; *Privacy Act*, R.S.N.L. 1990. c. P-22; and, *Ladas v. Apple Inc.*, 2014 BCSC 1821.

40. The plaintiff further pleads and relies on the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50.

#### Fiduciary duty

41. CSC and its employees owe non-delegable fiduciary obligations to the Inmate/Client Subclass and Inmate/Personal Subclass, since they:
- a) occupy positions of power and influence relative to Inmates, who were at all times vulnerable to the unilateral exercise of power by CSC and its employees;
  - b) exert control over the ability of Inmates to communicate with their lawyers, which is recognized as a fundamental civil and legal right, and thereby wield a discretionary power to affect the legal and vital practical interests of Inmates;
  - c) made representations to Inmates about the use of the discretionary power to control their communications, including the limits of that discretion and its objectives, thereby binding themselves to protect the Inmates' interests;
  - d) were at all time governed by statutory and quasi-statutory obligations in relation to the exercise of authority over Inmates; and
  - e) had a special responsibility to ensure the safety, well-being, and fair treatment of the Inmates, as well as to promote rehabilitation of Inmates.

42. The Inmate/Client Subclass and Inmate/Personal Subclass had a reasonable expectation that CSC and its employees would act in their best interests given the assumption of responsibility for the care of Inmates, which includes: the establishment and administration of the Federal carceral system; control over the Telephone System; the involuntary nature of incarceration; the hierarchical and authoritarian standards which govern interactions between Inmates and CSC, as well as its employees; the disparity in power which separates Inmates from the CSC and its employees; and, the dependence of Inmates on CSC and its employees.
43. CSC and its employees breached the fiduciary obligations owed to the Inmate/Client Subclass and the Inmate/Personal Subclass by recording, listening to, and/or divulging to third parties the contents of the Privileged Conversations and the Personal Conversations; this constitutes an unreasonable exercise of discretion and undermines the best interests of the Inmates.

Negligence

44. CSC and its employees owe a duty of care to the Inmates, who are closely and directly affected by the acts or omissions of CSC and its employees; are under the care and control of CSC and its employees while incarcerated; are subject to the discretion of CSC and its employees; and share a sufficient relationship in terms of proximity and neighbourhood such that the careless or unreasonable exercise of discretion would cause foreseeable harm to the Inmates.
45. CSC and its employees breached the duty of care owed to the Inmate/Client Subclass and the Inmate/Personal Subclass by recording, listening to, and divulging to third parties the contents of the Privileged Conversations and the Personal Conversations.

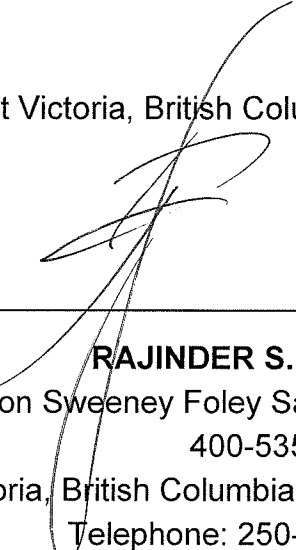
## **CONCLUSION**

46. By breaching duties owed to the Class and violating their rights, CSC and its employees:
- a) undermined solicitor-client relationships, thereby interfering with the ability of the Inmate/Client Subclass to engage the justice system, and increasing the jeopardy faced in criminal proceedings against these persons;
  - b) undermined Class members' confidence in the administration of justice;
  - c) insulted Class members' dignity and self-worth;
  - d) caused suffering distress, humiliation, and anguish to Class members;
  - e) caused serious psychological stress to Class members; and
  - f) placed Class members at risk through divulgence of highly-sensitive information; and
  - g) interfered with the ability of Inmate/Client Subclass and Inmate/Personal Subclass members to rehabilitate and re-integrate into the community.
47. In consequence of the foregoing, the Class suffered injury, damages, and loss, including:
- a) pain and suffering;
  - b) injury to dignity and self-worth;
  - c) serious psychological stress;
  - d) loss of earning capacity;
  - e) incurrence of treatment and support costs;

- f) damage to reputation;
- g) aggravated damages;
- h) out-of-pocket expenses;
- i) pre- and post-judgment interest; and
- j) such further and other damages as the plaintiff may advise and this Honourable Court may permit.

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

Date: 13 July 2018



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