

Federal Court



Cour fédérale

Date: 20210608

**Dockets: T-1360-18
T-703-21
T-702-21**

Citation: 2021 FC 560

Ottawa, Ontario, June 8, 2021

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

[1] The Plaintiffs in these proposed class proceedings have brought motions in writing for orders pursuant to Rules 3, 4, 334.11 and 358-371 of the *Federal Courts Rules*, SOR/98-106, designating Acheson Sweeney Foley Sahota LLP as class counsel, and prohibiting any other proposed class proceeding from being commenced in this Court in respect of the same allegations without leave of the Court. The Plaintiffs also seek confidentiality orders pursuant to Rule 151. The Defendant Attorney General of Canada consents to the relief sought.

[2] The proposed class proceedings concern allegations of unlawful interception of communications by the Correctional Service of Canada [CSC]. The Plaintiffs have each retained Acheson Sweeney Foley Sahota LLP to represent them. The first of the actions was commenced on July 13, 2018. The two subsequent actions were both commenced on April 27, 2021.

[3] The timetable for the completion of steps preceding the certification motions has been adjusted a number of times to accommodate new evidence, the vagaries of the COVID-19 pandemic, and exploratory settlement discussions.

[4] The primary relief sought by the Plaintiffs is sometimes referred to as a “*Heyder* Order” (named after *Heyder v Canada (Attorney General)*, 2018 FC 432 [*Heyder*]). As Justice Michael Phelan held in *Walters v Canada*, 2020 FC 1012 [*Walters*], a *Heyder* Order at the pre-certification stage gives proposed class counsel an advantage by being designated as such before any real consideration is given to the merits of that proposition. In seeking such an order, counsel is in the awkward position of having a personal interest in the designation, similar to the position of counsel seeking approval of their fees (*Walters* at para 8).

[5] The granting of an unopposed *Heyder* Order is not automatic. The Court must carefully consider the interests of the proposed class members, as well as the interests of those excluded from membership, particularly those who arguably should or could be included. The Court must be wary of “tilting the playing field” in favour of counsel and an, as yet, unapproved class, and should be conscious of the possibility that it may be deprived of alternative or competing

positions on the nature and description of the class and myriad other aspects of certification (*Walters* at para 12).

[6] The non-exhaustive list of considerations identified in *Heyder* (at para 7) are:

- (a) whether the order is in the best interests of the plaintiffs, the class members and the defendants;
- (b) whether the order furthers the Federal Court's commitment to robust case management;
- (c) whether the order reflects the Federal Court's unique jurisdiction; and
- (d) whether the order promotes the objectives of judicial economy and avoiding a multiplicity of proceedings.

[7] To this list, particularly but not exclusively at the pre-certification stage, must be added the potential impact of the order on others, and the possible negative effects of such an exclusionary order (*Walters* at para 15).

[8] In this case, the Defendant consents to the relief sought. While no information has been provided regarding the reason for the Defendant's consent, it is reasonable to assume that the identification of a single class counsel and the removal of potential confusion caused by other potential proceedings benefits the Plaintiffs and the Defendant alike.

[9] The Plaintiffs say that a *Heyder* Order is necessary to protect settlement discussions against delay and disruption that may result from the commencement of overlapping proceedings. They say the risk has recently become acute due to correspondence delivered to certain members of the proposed class by CSC following an internal audit respecting the interception of communications. The results of the audit have also attracted media attention.

[10] In light of these circumstances, particularly the length of time that proposed class counsel have been engaged with the issues and the ongoing settlement discussions, I am satisfied that the relief sought by the Plaintiffs will promote judicial economy by helping to ensure a single forum in which to resolve the disputes. This should assist in reducing costs, avoiding multiple and overlapping proceedings, and preventing inconsistent decisions throughout the litigation process.

[11] The relief sought furthers the Court's commitment to robust case management, reflects this Court's unique jurisdiction as a national trial court, and is consistent with the national dimensions of the claims asserted and the proposed classes. The potential negative effects of the order requested may be addressed upon a certification motion, or upon review by the Court as circumstances may require (*Walters* at paras 20-22).

[12] The parties may submit public versions of the Motion Records dated June 2, 2021 with confidential information redacted. The Court will then consider the Plaintiffs' requests for confidentiality orders pursuant to Rule 151.

ORDER

THIS COURT ORDERS that:

1. The actions styled *Philip v The Attorney General of Canada* (Court File No T-1360-18), *Wright v The Attorney General of Canada* (Court File No T-703-21), and *Gray v The Attorney General of Canada* (Court File No T-702-21) shall proceed with Acheson Sweeney Foley Sahota LLP as class counsel in the proposed class proceedings.
2. No other proposed class proceeding may be commenced in this Court in respect of the allegations made in these proceedings except with leave of the Court.
3. This Order is issued *nunc pro tunc*, effective June 2, 2021, the date on which the Motions were filed.
4. This Order may be reviewed upon motion of either party, by a non-party with leave of the Court, or upon the Court's own motion.

"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

PLAINTIFFS' MOTION IN WRITING DATED JUNE 2, 2021

ORDER AND REASONS FOTHERGILL J.

DATED: JUNE 8, 2021

WRITTEN SUBMISSIONS BY:

Patrick Dudding
Rajinder Sahota

FOR THE PLAINTIFFS

SOLICITORS OF RECORD:

Acheson Sweeney Foley Sahota LLP
Victoria, B.C.

FOR THE PLAINTIFFS