Federal Court  Cour fédérale

Date: 20250508

Docket: T-529-23

Citation: 2025 FC 842

Ottawa, Ontario, May 8, 2025

PRESENT: The Honourable Mr. Justice Southcott

PROPOSED CLASS PROCEEDING

BETWEEN:

PASCAL DUGAS and MARCO VACHON

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] This decision addresses two motions brought in the underlying proposed class action [the Action] in which the representative Plaintiffs, members of the Royal Canadian Mounted Police [RCMP], allege that their right to privacy has been violated by the RCMP and other agents of

His Majesty the King in right of Canada [Canada] and consequently claim damages and other relief against Canada.

[2] Specifically, the Action alleges that, between October 2017 and early 2020, Canada's agents recorded 557 days of audio conversations between the Plaintiffs and other members of the RCMP, without the consent of the Plaintiffs or other parties to the conversations and without the benefit of a court order, and subsequently shared those recordings with other authorities [the Alleged Privacy Breach]. The Plaintiffs assert various causes of action against Canada in relation to the Alleged Privacy Breach: the tort of intrusion upon seclusion, breach of fiduciary duty, negligence, and violation of the Plaintiffs' rights under section 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*], to be secure against unreasonable search and seizure by the state.

[3] The first motion now before the Court, brought pursuant to Rule 221(1)(a) of the *Federal Courts Rules,* SOR/98-106 by the Defendant, the Attorney General of Canada acting on behalf of Canada, seeks to strike the Plaintiffs' Amended Statement of Claim [the Claim] in its entirety, without leave to amend [the Motion to Strike].

[4] The second motion, brought by the proposed representative Plaintiffs, ask the Court to certify the Action as a class proceeding under Rule 334.16 [the Certification Motion], on behalf

of the members of a proposed class [the Class Members] that is defined in the Claim as follows (after parsing relevant definitions employed in the Claim) [the Proposed Class]:

> all members of the Royal Canadian Mounted Police who allege that their right to privacy, [*sic*] has been violated by the servants, contractors, officers and employees of the Defendant in this proceeding as represented by the Attorney General of Canada and the operators, managers, administrators, police officers, and other staff members at the various local Royal Canadian Mounted Police police stations and offices operated by the Defendant in this proceeding as represented by the Attorney General of Canada and were alive as of March 18, 2023

[5] Although not included in the definition of the Proposed Class, the Claim refers to "the period from April 17, 1982, to the present" [the Class Period] as the period during which the alleged actionable conduct took place. The Court understands that the April 1982 date was chosen as the date the *Charter* came into effect.

[6] As explained in greater detail below, the Motion to Strike will be granted and the Claim struck in its entirety, because the Claim discloses no reasonable cause of action. In relation to one of the Plaintiffs, Corporal Pascal Dugas, no amendment could salvage his claim, because it is barred by section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [CLPA], as the basis for his claim forms part of the factual foundation for a pension that he receives. I therefore decline to grant Cpl. Dugas leave to amend his claim (see *McMillan v Canada*, 2024 FCA 199 at para 109). However, the remaining Plaintiff, Sergeant Marco Vachon, will be granted leave to amend the Claim, because his claim is not barred by the CLPA, and this is not one of the clearest of cases in which there is no reason to suppose that a case could be improved by an amendment.

[7] As my Order will strike the Claim, and as the Plaintiffs have not satisfied the element of the test for certification that requires demonstration that the pleadings disclose a reasonable cause of action, the Certification Motion will also be dismissed.

II. **Background**

[8] The first-named Plaintiff, Corporal Pascal Dugas, is a regular member of the RCMP. Cpl. Dugas joined the RCMP in 2007 as a Constable and has held the rank of Corporal since 2011. In 2013, Cpl. Dugas became the supervisor of the Criminal Intelligence Section [CIS] in Moncton, New Brunswick. From 2017 to 2020, Cpl. Dugas was seconded to the Federal and Serious Organized Crime unit [FSOC] to assist with a major investigation into organized crime. Cpl. Dugas is currently the Non-Commissioned Officer in charge of the CIS in Moncton.

[9] The second-named Plaintiff, Sergeant Marco Vachon, is also a regular member of the RCMP. Sgt. Vachon joined the RCMP in 1993 as a Constable and has held the rank of Sergeant since 2010. In 2000, Sgt. Vachon joined the Moncton Drug Section, which evolved into the FSOC. In 2020, Sgt. Vachon returned to the CIS as an Acting Sergeant.

[10] The RCMP is Canada's national police force, organized under the authority of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*] and the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281 [*RCMP Regulations*].

[11] The Claim alleges that from October 2017 to early 2020, the RCMP and other agents of Canada recorded radio conversations [the Recordings] between the Plaintiffs and other RCMP

members working in the RCMP's division in New Brunswick [J-Division] while performing their duties in the course of an organized crime investigation [referred to in the Plaintiffs' materials filed in these motions as Project J-Trinity], without the participants' consent or other lawful justification. The Claim describes these as sensitive conversations including discussions of police operations and human resource information (which, as explained later in these Reasons, appears to be a reference to confidential informants). The Claim also asserts that the RCMP later provided the Recordings to the Public Prosecution Service of Canada [PPSC] and other RCMP members and public servant employees.

[12] The Court's understanding of the factual background to the Plaintiffs' allegations is assisted by a summary in the Defendant's Memorandum of Fact and Law filed in response to the Certification Motion, with which summary the Plaintiffs have indicated their agreement. The initial disclosure of the Recordings to the PPSC occurred in the context of the routine disclosure to the PPSC that takes place in the course of criminal investigations. However, the PPSC subsequently became concerned through reviewing the Recordings that they demonstrated that evidence may have been mishandled and not disclosed by the RCMP members in J-Division who were involved in the Project J-Trinity investigation. This concern resulted in an investigation by another division of the RCMP into the investigative practices of those RCMP members [Internal Investigation].

[13] On June 21, 2022, RCMP management advised the Plaintiffs as to the interim findings of the Internal Investigation and confirmed that the RCMP was not investigating any allegations of officer misconduct in connection with Project J-Trinity radio communications. As pleaded in the

Claim, the Internal Investigation did not find any fault on the part of the Plaintiffs. I do not understand the Defendant to contest this assertion.

[14] More generally, the Claim asserts that the Class Members communicate with other Class Members in the performance of their duties as RCMP officers, at various times and using various means of communication, and that Class Members had an expectation of privacy in such communications. The Claim alleges that, from time to time and over an extended period, the Defendant intentionally recorded such communications without the consent of the Class Members and without lawful justification, representing an invasion of privacy that resulted in the Class Members suffering extreme stress, distress, humiliation, and/or anguish, and negatively affected their home and work life.

[15] Based on these allegations, the Claim asserts various causes of action on behalf of the Proposed Class against the Defendant. While their articulation in the Claim is somewhat lacking in precision, I interpret those causes of action (with the benefit of the parties' submissions in these motions) to be the following:

A. negligence or systemic negligence, involving breach of a common law duty of care;

B. breach of a fiduciary duty;

C. the tort of intrusion upon seclusion; and

D. breach of the protection against unreasonable search and seizure under section 8 of the *Charter*.

[16] The Claim seeks various categories of relief including declaratory relief, common law damages including punitive and exemplary damages, and damages under subsection 24(1) of the *Charter*.

[17] By way of additional background relevant to the Defendant's arguments in these motions, each of the Plaintiffs applied for and receives a disability pension pursuant to the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11 [*Superannuation Act*] and the *Pension Act*, RSC 1985, c P-6 [*Pension Act*], including in relation to post-traumatic stress disorder [PTSD].

[18] On February 29, 2024, the Plaintiffs filed the Certification Motion, arguing that the Action is appropriate for certification as a class proceeding under Rule 334.16. On May 15, 2024, the Defendant filed the Motion to Strike, asserting that the Action is barred by section 9 of the CLPA, due to the availability to the Plaintiffs and the Proposed Class of compensation under the *Superannuation Act* and the *Pension Act*, and that the pleadings fail to disclose a viable cause of action. Both motions were heard on April 14 to 15, 2025.

III. **Issues**

A. *Motion to Strike*

[19] Following some refinement through the exchange of the parties' Memoranda of Fact and Law, their submissions in the Motion to Strike raise the following issues for the Court's determination:

A. Is the Claim barred by section 9 of the CLPA?

B. Should the claim for breach of section 8 of the *Charter* be struck?

C. Should the claim for breach of fiduciary duty be struck?

D. Should the claim for the tort of intrusion upon seclusion be struck?

E. Should the claim for negligence be struck?

F. If the Court determines that the Claim should be struck, should the Plaintiffs be granted leave to amend the Claim?

B. *Certification Motion*

[20] The only issue for the Court's adjudication in the Certification Motion is whether the Action is suitable for certification as a class proceeding. This determination is governed by the test set out in Rule 334.16(1), the individual requirements of which will be identified later in these Reasons.

IV. **Law**

A. ***Motion to Strike***

[21] Pursuant to Rule 221, on motion the Court may order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the grounds enumerated under Rule 221(1)(a)–(f). The Defendant brings the Motion to Strike under Rule 221(1)(a), arguing that the Claim discloses no reasonable cause of action. Rule 221(2) states that no evidence shall be heard on a motion under Rule 221(1)(a), although there is an exception to this prohibition where the Court's jurisdiction is contested (*Canada v Greenwood*, 2021 FCA 186 [*Greenwood*] at para 95, leave to appeal to SCC refused, 39885 (17 March 2022)).

[22] The test applicable on a motion to strike under Rule 221(1)(a) is whether it is plain and obvious, assuming the facts pleaded are true, that the claim has no reasonable prospect of success (*McMillan v Canada*, 2024 FCA 199 [*McMillan*] at para 74).

[23] Pursuant to Rules 174 and 181, pleadings must include all materials facts and sufficient particulars, taking into account the causes of action asserted and the damages sought. What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA *227* [*Mancuso*] at paras 16–20, leave to appeal to SCC refused, 36889 (23 June 2016); *McMillan* at paras 63, 66–67). However, pleadings should be read generously such that inadequacies in the claim that are merely the result of drafting deficiencies should be accommodated (*McMillan* at para 76).

[24] The rules of pleadings continue to apply in the context of *Charter* claims and class action proceedings (*Mancuso* at para 21; *McMillan* at para 71; *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 40).

B. *Certification of a Class Proceeding*

[25] Rule 334.16(1) provides the conjunctive criteria for certifying a proceeding as a class proceeding as follows:

Conditions	**Conditions**
334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies:
(a) the pleadings disclose a reasonable cause of action;	**a)** les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	**b)** il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	**c)** les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	**d)** le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who	**e)** il existe un représentant demandeur qui :
(i) would fairly and adequately represent the interests of the class,	**(i)** représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,	**(ii)** a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	**(iii)** n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	**(iv)** communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[26] The Plaintiffs bear the onus to establish "some basis in fact" for each of the certification requirements, except for the reasonable cause of action requirement (Rule 334.16(1)(a)), which is assessed on the "plain and obvious" standard relied on in motions to strike pleadings (*McQuade v Canada (Attorney General)*, 2023 FC 1083 at para 33; *Canada v John Doe*, 2016 FCA 191 [*John Doe*] at paras 23–24). A motion for certification is focused on form and whether the action can properly proceed as a class action, rather than upon the merits of the action (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 99).

V. **Analysis**

A. *Motion to Strike*

(1) Is the Claim barred by section 9 of the CLPA?

[27] As will be explained in more detail shortly, each of the Plaintiffs receives a disability pension pursuant to the *Superannuation Act* and the *Pension Act*, including in relation to PTSD. The Defendant argues that the Plaintiffs receive or are entitled to disability pension benefits for mental health injuries caused or aggravated by the Alleged Privacy Breach and that the Claim is therefore statute-barred by section 9 of the CLPA, which provides as follows:

No proceedings lie where pension payable	**Incompatibilité entre recours et droit à une pension ou indemnité**
9 No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.	**9** Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

[28] In *Sarvanis v Canada*, 2002 SCC 28 [*Sarvanis*], the Supreme Court of Canada explained that section 9 of the CLPA establishes Crown immunity where the event of death, injury, damage, or loss that forms the basis of a claim is the same event that formed the basis of a pension or compensation award (at para 38). The purpose of this protection is to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof (at para 28).

[29] The application of section 9 is not governed by the characterization of the damages claimed in an action but rather by the characterization of the event giving rise to it (*Lafrenière v Canada (Attorney General)*, 2020 FCA 110 at para 47, leave to appeal to SCC refused, 39404 (18 March 2021)). The Court is required to consider whether the pension or compensation paid or payable is made on the same factual basis as that of the action that the Crown seeks to bar. If

the same factual foundation is established, there is no Crown liability under ancillary heads of damages for the event already compensated, notwithstanding that the pension or compensation does not relate to those heads of damages (*Sarvanis* at paras 28–29; *Lebrasseur v Canada*, 2006 FC 852 [*Lebrasseur*] at paras 28–29, aff'd 2007 FCA 330).

[30] Where section 9 applies, the Court is without jurisdiction to adjudicate a claim. Because the parties' arguments related to section 9 raise a matter of jurisdiction, they may adduce evidence on that issue (*Lebrasseur* at para 16). In the case at hand, the Defendant relies on documentary evidence related to the Plaintiffs' applications for pension benefits, as well as the Plaintiffs' affidavit evidence and cross-examination testimony in this proceeding. The Defendant has filed an affidavit sworn by Ms. Meghan Clark, the acting manager of the Disability Benefits Program Management Section within the Service Delivery Branch of Veterans Affairs Canada [VAC], which provides an overview of benefits available to members of the RCMP generally, provides information with respect to benefits being provided or available to the Plaintiffs, and attaches as exhibits the documentary evidence related to the Plaintiffs' pension applications [the Clark Affidavit].

[31] Before turning to that evidence, I note that the Plaintiffs argue that section 9 of the CLPA has no application to the case at hand, because the benefits that the Plaintiffs receive from VAC were awarded in relation to disabilities, not in relation to incidents such as breaches of privacy. The Plaintiffs also seek to distinguish their PTSD, a diagnosed mental health disorder for which they receive benefits, from the embarrassment, humiliation, and mental anguish that they claim related to the Alleged Privacy Breach. The Plaintiffs argue that, while mental anguish might be a feature of mental health disorders, it is not itself a diagnosable disorder.

[32] I agree with the Defendant's response that, consistent with the jurisprudence canvassed above, it matters not how the Plaintiffs characterize the allegedly actionable conduct or its impact upon them. Rather, what the Court must determine is whether the factual foundation of the causes of action asserted in the Claim is the same as that for which the Plaintiffs are receiving pension compensation. The evidence is clear that both Plaintiffs are in receipt of compensation in relation to PTSD. If the evidence further demonstrates that the Alleged Privacy Breach forms part of the factual foundation for the Plaintiffs' pension claims, for which that compensation "… has been paid or is payable …" within the meaning of section 9 of the CLPA, then the statutory bar afforded by that section will be engaged.

[33] The "paid or is payable" language will require further consideration when I come to the evidence related to Sgt. Vachon's pension. This is because the Defendant acknowledges that, while Sgt. Vachon's benefits include compensation for a pension claim related to PTSD, the timing of that pension claim (effectively preceding the Alleged Privacy Breach) is such that it cannot be characterized as related to the Alleged Privacy Breach. Therefore, it cannot be said that Sgt. Vachon "has been paid" compensation in relation to a factual foundation that includes the Alleged Privacy Breach.

[34] However, in relation to Cpl. Dugas, the timing of his pension claim is such that the Defendant argues that he has been paid (and continues to be paid) compensation for PTSD resulting from events that include the Alleged Privacy Breach.

[35] In his affidavit sworn on February 12, 2024, in support of the Certification Motion [the Dugas Certification Affidavit], Cpl. Dugas explains that on March 25, 2021, he, Sgt. Vachon,

and other members of Moncton FSOC started receiving emails from the team that was reviewing the Recordings as part of the Internal Investigation, which confirmed that the Recordings had been shared without the knowledge or consent of those whose conversations had been recorded. As such, it is clear that, by March 25, 2021, Cpl. Dugas was aware of the Alleged Privacy Breach.

[36] As explained in the Clark Affidavit, Cpl. Dugas applied to VAC for disability benefits on May 26, 2021, including for a claim related to PTSD. By letter dated December 1, 2021, VAC granted him disability entitlement, effective May 26, 2021, for PTSD assessed at 39%. (The Clark Affidavit explains that the amount paid pursuant to a disability pension is determined in part by an assessment of the extent of disability, expressed as a percentage from 0% to 100%.).

[37] The Clark Affidavit attaches as an exhibit Cpl. Dugas' application form and supporting documentation [Dugas Application] including a report prepared by Cpl. Dugas to support his claim related to PTSD. This report, dated and signed on October 18, 2021, and indicated to have been drafted between May 21 and July 30, 2021, provides a narrative detailing 22 years of incidents and investigations that Cpl. Dugas explains has had an impact on his mental health [Dugas Narrative]. This document includes an explanation of Project J-Trinity, including the Internal Investigation surrounding allegations that RCMP officers were hiding and destroying evidence. The Defendant emphasizes that the Dugas Narrative references the Recordings, which Cpl. Dugas describes as "… radio communication between members that was illegally recorded as we never gave the RCMP consent to record us", and that Cpl. Dugas later explains the resulting stress that he experienced.

[38] The Defendant also refers the Court to evidence in the Dugas Certification Affidavit and the resulting cross-examination. In his affidavit, Cpl. Dugas states that since the occurrence of "this high-stress incident", which I interpret to be a reference to the Alleged Privacy Breach, he has been diagnosed with several conditions including PTSD. However, he also states that, while his VAC pension is in part earmarked for addressing PTSD, VAC's assessment linked the origin of his PTSD to his overall RCMP service, emphasizing that its roots extend far beyond the scope of the Alleged Privacy Breach.

[39] The Defendant's counsel explored this issue in its cross-examination on the Dugas Certification Affidavit. In cross-examination, Cpl. Dugas disagreed with counsel's assertion that the Alleged Privacy Breach contributed to his PTSD. Cpl. Dugas stated that he had been diagnosed with PTSD prior to that event. He stated that the Alleged Privacy Breach had a large impact on his mental health, resulting in more anguish and isolation, but that it did not really have an impact on his PTSD diagnosis. Counsel then referred Cpl. Dugas to the Dugas Narrative, which included reference to the Alleged Privacy Breach. In response to counsel's questioning, Cpl. Dugas testified that this document described important negative events, because VAC need to know what had happened to him to develop PTSD.

[40] The Court is unclear as to the basis for Cpl. Dugas' evidence that he had been diagnosed with PTSD before the Alleged Privacy Breach, as the Dugas Application includes a psychologist's report dated September 20, 2021, based on clinical interviews conducted between April 28 and August 31, 2021, which concludes that Cpl. Dugas suffers from a diagnosable mental heath disorder meeting the diagnostic criteria for PTSD. Regardless, the Court accepts

Cpl. Dugas' assertion that his PTSD resulted from his overall RCMP service, much of which preceded the Alleged Privacy Breach.

[41] Nevertheless, I agree with the Defendant's position that the evidence canvassed above supports a conclusion that the Alleged Privacy Breach formed part of the factual foundation for Cpl. Dugas' pension application and the resulting payment of benefits as compensation for his development of PTSD. In these circumstances, section 9 of the CLPA applies, notwithstanding that there were many other events that contributed to his PTSD, and notwithstanding that the heads of damages that Cpl. Dugas seeks to recover in this Action may extend beyond those for which he is being compensated through his pension benefits. As section 9 affords the Crown immunity from the claim Cpl. Dugas is advancing in the Action, the allegations he is advancing in the Claim should be struck.

[42] Turning to the claim of Sgt. Vachon, as previously noted, the Defendant acknowledges that the pension that Sgt. Vachon currently receives for PTSD does not relate to the Alleged Privacy Breach.

[43] Like Cpl. Dugas, Sgt. Vachon swore an affidavit on February 12, 2024, in support of the Certification Motion [the Vachon Certification Affidavit] that includes an explanation that in March 2021, he and other members of Moncton FSOC started receiving emails from the team that was reviewing the Recordings as part of the Internal Investigation, which confirmed that the Recordings had been shared without the knowledge or consent of those whose conversations had been recorded. However, the pension application materials attached to the Clark Affidavit, related to Sgt. Vachon's mental health including PTSD, date to October 30, 2017, which is

around the start of Project J-Trinity and well before Sgt. Vachon became aware of the Alleged Privacy Breach.

[44] The Clark Affidavit indicates that Sgt. Vachon applied on November 14, 2023, for an Exceptional Incapacity Allowance and provided a supporting psychologist report dated February 7, 2024, which application remained in progress as of the date of the affidavit. The Defendant has not indicated whether it considers such application to be linked to the Alleged Privacy Breach.

[45] Regardless, the Defendant acknowledges, in reference to the "has been paid or is payable" language of section 9 of the CLPA, that Sgt. Vachon has not been paid compensation in relation to a factual foundation that includes the Alleged Privacy Breach. However, the Defendant notes that the language of section 9 captures not only a situation where compensation has been paid, but also where compensation is payable, and argues that compensation is payable in relation to the relevant factual foundation, because Sgt. Vachon's evidence establishes that the Alleged Privacy Breach caused significant aggravation of his PTSD.

[46] The Defendant relies on the Vachon Certification Affidavit, in which Sgt. Vachon details the effect that the Alleged Privacy breach has had upon his mental health. He refers to the number of health issues he has experienced, including PTSD and other negative impacts upon his state of mind, describing "this high-stress incident" (which I interpret to mean the Alleged Privacy Breach) as having caused his PTSD to escalate to an overwhelming extent. Sgt. Vachon also describes resulting adverse impacts upon his personal and professional life, including him relying on medication that he had not previously required.

[47] As previously noted, the amount paid pursuant to a disability pension is determined in part by an assessment of the extent of disability, expressed as a percentage from 0% to 100%. The Clark Affidavit explains that, if a disability (for which a disability benefit entitlement has been granted) worsens, the extent of the disability may be reassessed at any time. The monthly benefits may then be increased up to a maximum of 100% for all conditions for which a disability pension is being paid. The Clark Affidavit indicates that on August 20, 2018, Sgt. Vachon was granted a disability entitlement based on his diagnosis of PTSD, which was assessed at 61%. The Defendant notes that there is no indication in the record that Sgt. Vachon has applied for an increase in this assessment and that the documentary evidence exhibited to the Clark Affidavit demonstrates that, in relation to all conditions for which Sgt. Vachon is receiving pension benefits, his benefits have not reached the 100% maximum.

[48] The Defendant therefore argues that Sgt. Vachon is entitled to apply for an increase in his pension benefits related to PTSD, as a result of the aggravation of his condition caused by the Alleged Privacy Breach. Based on the fact that he has already been granted entitlement to compensation for PTSD, in combination with the evidence of the extent to which his PTSD has been exacerbated by the Alleged Privacy Breach, the Defendant submits that the Court is in a position to determine that Sgt. Vachon would succeed in establishing his entitlement to increased benefits. The Defendant submits that the Court can therefore conclude that compensation is "payable" to Sgt. Vachon (within the meaning of section 9 of the CLPA) in relation to a factual foundation that includes the Alleged Privacy Breach.

[49] Regardless of how compelling Sgt. Vachon's case for an increase in his PTSD benefits entitlement may be, the Defendant has not convinced me that the term "payable" in section 9

contemplates the Court adjudicating that entitlement or its likelihood. Clearly that adjudication is the purview of the VAC, as the responsible administrative decision-maker under the relevant pension benefits legislation.

[50] I appreciate that the term "payable" in section 9 must have meaning and that there must therefore be some scope for section 9 to apply in circumstances where benefits have not yet been paid. Neither party was able to identify any jurisprudence in which a court has been tasked with interpreting the meaning of "payable" in section 9. However, I consider the decision of the Ontario Superior Court of Justice in *Sherbanowski v Canada*, 2011 ONSC 177 [*Sherbanowski*], to be instructive. That case involved an action against the federal Crown by a member of the Canadian Armed Forces, seeking damages for injuries including mental health conditions that the member alleged he suffered during his time with the Forces. As in the case at hand, the defendant moved to strike the action as barred by section 9 of the CLPA, because the plaintiff was entitled to pension benefits related to the same injuries.

[51] After analysing the basis of the action and the history of the plaintiff's applications for disability benefits and enhancements thereto, the Court concluded that there was a complete identity between the losses claimed in the action, as a result of events to which the plaintiff had been subjected during his service, and the losses for which disability benefits had been granted to him, "… and for which he has received payment or which are payable to him" (at para 43). The Court explained that the plaintiff had received payment of disability awards in respect of certain medical conditions and, in respect of another condition, although the record did not disclose payment of an award, a decision by the Veterans Review and Appeal Board (which considers appeals of VAC decisions) made such compensation payable to him (at para 49).

[52] I do not read *Sherbanowski* as a case which turned on the meaning of the term "payable" in section 9, or in which the Court had the benefit of argument on that point. However, I interpret *Sherbanowski* as treating the term "payable" as contemplating the application of section 9 in circumstances where entitlement to payment has already been adjudicated by the relevant administrative body, even though the payment itself has not yet been made.

[53] I prefer this interpretation to that for which the Defendant advocates, which would involve the Court adjudicating entitlement and therefore encroaching on jurisdiction that Parliament has conferred upon an administrative decision-maker. I also consider the *Sherbanowski* interpretation to be consistent with achieving a cohesive relationship between section 9 of the CLPA and a related provision found in subsection 111(2) of the *Pension Act*, which provides as follows:

Stay of action against Crown until pension refused	**Suspension d'instance**
(2) An action that is not barred by virtue of section 9 of the *Crown Liability and Proceedings Act* shall, on application, be stayed until	**(2)** L'action non visée par l'article 9 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* fait, sur demande, l'objet d'une suspension jusqu'à ce que le demandeur, ou celui qui agit pour lui, fasse, de bonne foi, une demande de pension pour l'invalidité ou le décès en cause, et jusqu'à ce que l'inexistence du droit à la pension ait été constatée en dernier recours au titre de la *Loi sur le Tribunal des anciens combattants (révision et appel).*
(a) an application for a pension in respect of the same disability or death has been made and pursued in good faith by or on behalf of the person by whom, or on whose behalf, the action was brought; and	
(b) a decision to the effect that no pension may be paid to or in respect of that person in respect of the same disability or death has been confirmed by an appeal panel of the Veterans Review and Appeal Board in	

> accordance with the *Veterans Review and Appeal Board Act*.

[54] In *Dumont v Canada*, 2003 FCA 475, the Federal Court of Appeal provided the following explanation of the operation of this subsection (at para 26):

> Therefore, if the Court has a reasonable doubt about striking out a statement of claim under section 9 of the *Crown Liability and Proceedings Act*, it shall be stayed until " . . . an application for a pension in respect of the same disability or death has been made and pursued in good faith and . . . a decision to the effect that no pension may be paid to or in respect of that person in respect of the same disability or death has been confirmed by an appeal panel of the Veterans Review and Appeal Board in accordance with the *Veterans Review and Appeal Board Act*" (subsection 111(2) of the *Pension Act*).

[55] I emphasize that, in the matter at hand, the Defendant has not brought a motion for a stay under subsection 111(2) of the *Pension Act* and confirmed at the hearing that it is not at present seeking such relief. Rather, I reference this subsection because, in my view, the availability of the relief contemplated thereunder is inconsistent with interpreting section 9 of the CLPA as permitting the Court to form conclusions as to pension entitlements. Subsection 111(2) recognizes that, if a pension entitlement may serve to bar a legal action by operation of section 9 of the CLPA, but such entitlement has not yet been adjudicated through the administrative decision-making and appeal structure, then it is appropriate to afford an opportunity for such adjudication to take place (by the administrative structure) before the legal action proceeds.

[56] In conclusion, as Sgt. Vachon has not had the benefit of an assessment by VAC of his entitlement to pension compensation for exacerbation of his PTSD resulting from the Alleged Privacy Breach, there is currently no such compensation being paid or payable that might engage

the application of section 9 of the CLPA. As such, in relation to Sgt. Vachon, this basis for the Motion to Strike fails.

[57] Finally, before leaving this issue, I note that the Defendant raises the section 9 bar not only in relation to the two proposed representative Plaintiffs, but also in relation to the Proposed Class as a whole. The Defendant argues that, for service-related injuries, all RCMP members are in receipt of, or entitled to, pension compensation that would preclude them advancing claims in the Action.

[58] For reasons similar to the reason that the Defendant's section 9 argument has failed in relation to Sgt. Vachon, it must fail in relation to other as-yet-unidentified Class Members. For each individual RCMP member who may fall within the Proposed Class definition, the section 9 analysis would require an understanding of whether that individual is being paid benefits arising from the same factual foundation as the Alleged Privacy Breach. If no such benefits are being paid, and VAC has not adjudicated an entitlement on the part of the member to receive such benefits (such that they can be considered payable), then section 9 of the CLPA is not engaged. Of course, the Defendant could be in a position to move under subsection 111(2) of the *Pension Act* for a stay of the Action until each individual Class Member's entitlement has been adjudicated. However, that possibility and its result would be for another day.

(2) Should the claim for breach of section 8 of the *Charter* be struck?

[59] As the Defendant's arguments based on section 9 of the CLPA have prevailed only in relation to Cpl. Dugas, it is necessary for the Court to consider the other issues raised by the

Defendant, as to whether the Claim discloses a reasonable cause of action in relation to any of the causes of action pleaded. Logically, because Cpl. Dugas' allegations have not survived the section 9 analysis, the Defendant need only prevail in these issues in relation to Sgt. Vachon. However, as these issues represent alternative bases for striking the Claim as a whole, I will consider them in relation to both Plaintiffs.

[60] As a further introductory comment, I note that, as was discussed at the hearing of this matter, the Claim is somewhat lacking in precision in its articulation of the individual causes of action asserted. However, based on the overall complement of materials filed by the Plaintiffs in connection with the motions now before the Court, the Defendant has advanced its arguments on the basis that the Plaintiffs are advancing the following causes of action: (a) breach of section 8 of the *Charter*; (b) breach of fiduciary duty; (c) the tort of intrusion upon seclusion; and (d) the tort of negligence. The Plaintiffs' counsel confirmed at the hearing that these are the causes of action being advanced.

[61] Finally, in relation to each of the causes of action raised, I note that the Court's consideration of whether the Claim discloses a reasonable cause of action must be conducted based on the pleading itself, without the benefit of evidence (Rule 221(2)). Contrary to this requirement, the Plaintiffs' submissions in response to this aspect of the Motion to Strike rely on evidence contained in affidavits sworn by the Plaintiffs.

[62] As will be explained later in these Reasons, the Defendant submits that it may be appropriate to examine the evidence upon which the Plaintiffs wish to rely if the Court is considering whether to grant the Plaintiffs leave to amend the Claim. Otherwise, the Defendant

emphasizes that, as the remaining issues raised in the Motion to Strike do not involve matters of the Court's jurisdiction, the Court's analysis thereof must be conducted based on the Claim as currently pleaded, without recourse to evidence. I agree with this position.

[63] In connection with the first cause of action, the allegation of breach of section 8 of the *Charter*, the Defendant argues that no reasonable cause of action is disclosed, because the Claim does not identify a privacy interest at stake that is capable of giving rise to such a cause of action.

[64] Section 8 of the *Charter* guarantees individuals the right to be secure against unreasonable search or seizure by the state, the main purpose being to protect the right to privacy from unjustified state intrusion (*R v Campbell*, 2024 SCC 42 [*Campbell*] at para 36). The parties agree that examining whether a breach under section 8 of the *Charter* has occurred involves two distinct inquiries: (a) whether the individual had a reasonable expectation of privacy over the subject matter involved; and (b) if such an expectation exists so as to engender a right to privacy, whether the search or seizure by the state was an unreasonable intrusion on that right (*R v Edwards*, 1996 CanLII 255 at para 33 (SCC)).

[65] The Defendant's arguments focus upon the first inquiry, whether the Plaintiffs had a reasonable expectation of privacy over the radio conversations that were the subject of the Recordings. In considering whether a reasonable expectation of privacy exists, *Campbell* identified four areas for consideration: (a) the subject matter of the alleged search or seizure; (b) whether the claimant had a direct interest in the subject matter; (c) whether the claimant had a subjective expectation of privacy in the subject matter; and (d) whether the claimant's subjective expectation of privacy was objectively reasonable, having regard to the totality of the

circumstances (at para 39). In connection with the text messages that were at issue in *Campbell*, the Supreme Court explained that the subject matter of the alleged search was properly characterized as the electronic conversation between two or more people, which included the existence of the conversation, the identities of the participants, the information shared, and any inferences about associations and activities that can be drawn from that information (at para 42).

[66] Relying on the Plaintiffs' pleading in the Claim, the Defendant characterizes the subject matter of the Alleged Privacy Breach as radio conversations between on-duty RCMP members during an organized crime investigation, discussing police operations and information related to confidential informants. I agree with this characterization. The Claim describes the conversations among the Plaintiffs and other RCMP members that were the subject of the Recordings as "… sensitive conversations discussing police operations and human resource information." Elsewhere, the Claim clarifies that these were radio conversations, and it is clear from the parties' respective submissions that the term "human resource information" is intended to refer to confidential informants.

[67] In relation to the next two areas for consideration, the Defendant acknowledges both that each Plaintiff had a direct interest in the radio conversations to which he was a party and that the Plaintiffs are asserting a subjective expectation of privacy in relation to those conversations. However, the Defendant argues that, given the nature of the subject matter, such expectation was not objectively reasonable. In relation to that question, *Campbell* provides the following guidance (at para 53):

> There is no closed or definitive list of factors relevant to whether a claimant's subjective expectation of privacy in the subject matter of a search is objectively reasonable (*Bykovets*, at para. 45; *Cole*, at

> para. 45; *Marakah*, at para. 24). The relevant factors include, but are not limited to:
>
> > (i) whether the information would tend to reveal intimate or biographical details of the lifestyle and personal choices of the individual subject to the alleged search;
> >
> > (ii) the place where the alleged search took place;
> >
> > (iii) whether the subject matter of the alleged search was in public view;
> >
> > (iv) whether the subject matter had been abandoned;
> >
> > (v) whether the information was already in the hands of third parties, and if so, whether it was subject to an obligation of confidentiality;
> >
> > (vi) whether the police technique was intrusive in relation to the privacy interest;
> >
> > (vii) whether the individual was present at the time of the alleged search;
> >
> > (viii) the possession, control, ownership, and historical use of the property or place said to have been searched; and
> >
> > (ix) the ability to regulate access to the place of the search, including the right to admit or exclude others from the place (*Plant*, at p. 293; *Tessling*, at para. 32; *Edwards*, at para. 45).

[68] I do not read *Campbell* as suggesting that all these factors must be considered in each case. In *Campbell*, the majority noted that the parties focused their submissions on three factors (at para 54), which it proceeded to consider.

[69] In the case at hand, the Defendant's submissions focus upon the first *Campbell* factor, whether the radio conversations that were the subject of the Recordings would tend to reveal intimate or biographical details of the lifestyle and personal choices of the Plaintiffs. The

Defendant argues that, while the Plaintiffs baldly assert that they had an expectation of privacy in their communications, similarly referring to the relevant radio communications as private communications, they have pled no facts to support those assertions. To the contrary, says the Defendant, the Claim's description of the communications as sensitive, because they involved discussion of police operations and information related to confidential informants, is inconsistent with a conclusion that the information that was the subject of the Recordings related to anything personal to the Plaintiffs.

[70] In addition to these arguments based on the Plaintiffs' pleading, the Defendant relies on jurisprudential principles surrounding Crown disclosure in the context of criminal prosecutions that the Defendant argues are inconsistent with the suggestion that the Plaintiffs have a privacy interest in the relevant radio communications. The Defendant points to the principles that police must disclose to Crown prosecutors for disclosure to the accused all investigative material, *i.e.*, the fruits of the police investigation (see *R v Stinchcombe*, 1991 CanLII 45 (SCC) [*Stinchcombe*]) and indeed that any relevant police misconduct information that could impact the case against the accused must similarly be disclosed (see *R v McNeil*, 2009 SCC 3 [*McNeil*]).

[71] The Plaintiffs' response to the Defendant's arguments do not engage expressly with particular *Campbell* factors or their application to the case at hand. The Plaintiffs' submissions focus significantly on their affidavit evidence which, as previously explained, is inadmissible on a motion under Rule 221(1)(a). In relation to the allegations in the Claim, the Plaintiffs disagree with the Defendant's position with respect to information related to police operations such as investigative techniques and confidential informants. While acknowledging that such information is not personal to the Plaintiffs, they nevertheless argue that it is subject to a

reasonable expectation of privacy. The Plaintiffs emphasize in particular the risks to confidential informants if information surrounding them were to fall into the wrong hands.

[72] I appreciate the Plaintiffs' point about the importance of protecting confidential informants in the context of criminal investigations. However, I am not convinced that this sort of information or other information related to police operations, which is the subject of the allegations in the Claim, is protected by section 8 of the *Charter*. The Plaintiffs have been unable to refer the Court to any authority for the proposition that information of this nature, not personal to the individual who seeks to assert section 8 rights, is subject to *Charter* protection.

[73] Rather, I agree with the Defendant that such information necessarily fails the test that the jurisprudence canvassed above prescribes for determining whether an individual has a reasonable expectation of privacy in particular subject matter. As explained in *Campbell*, the private nature of the subject matter is a critical factor in establishing a reasonable expectation of privacy, as the purpose of section 8 is to protect a biographical core of personal information that individuals in a free and democratic society would wish to maintain and control from dissemination to the state (at para 55). Communications of the sort that the Claim asserts were the subject of the Alleged Privacy Breach do not fall within this protection. I also find that the fact that disclosure obligations (per *Stinchcombe* and *McNeil*) may apply to the sort of information discussed in the radio conversations, although no doubt also requiring measures to protect confidential informants (details of which have not been the subject of argument before the Court in this matter), further support the Defendant's position that the Plaintiffs did not have a reasonable expectation of privacy surrounding these communications.

[74] In so concluding, I am conscious of the guidance in *Campbell* that in determining whether a subjective expectation of privacy is objectively reasonable, courts must employ a content-neutral approach. The focus is not on the actual contents of the communications at issue but rather on is whether the subject matter of the search or seizure has the potential or tendency to reveal personal or biographical information about of the party claiming protection under section 8 of the *Charter* (*Campbell* at paras 56-57). The Court must analyse whether the type of information at issue has the potential or tendency to reveal private information about the claimant, regardless of the actual contents of the conversation (*Campbell* at para 60).

[75] Applying that guidance to the case at hand, the Court must not focus upon what was actually said in the radio conversations that were the subject of the Recordings. However, the type of information at issue remains relevant. The Plaintiffs have expressly pleaded that such information involved discussion of police operations and information related to confidential informants, and they have advanced a legal theory that such information is subject to a reasonable expectation of privacy, notwithstanding that it is not personal to the Plaintiffs, because of attendant risks to confidential informants. In my view, these allegations do not engage section 8 of the *Charter*.

[76] I am therefore satisfied that the Claim does not disclose a reasonable cause of action under section 8 of the *Charter* and that the Plaintiffs' claims for relief under the *Charter* should be struck. However, before leaving my analysis of the role of the *Charter* in the Action, I wish to note that I also agree with the Defendant's argument that, independent of the viability of the cause of action under section 8, the Claim does not plead material facts that would support the Plaintiffs' claim for damages pursuant to subsection 24(1) of the *Charter*.

[77] As summarized in *Vancouver (City) v Ward*, 2010 SCC 27 at paragraph 4, a party claiming *Charter* damages must show why such damages are a just and appropriate remedy, having regard to whether they would fulfil one or more of the related functions of compensation, vindication of a *Charter* right, and/or deterrence of future breaches of that right. However, such damages are not available where other private law claims based on the same allegations achieve those same functions (*Lockhart v Attorney General of Canada*, 2024 ONSC 6573 [*Lockhart*] at para 153). A claimant must demonstrate why the consequences of an alleged *Charter* breach differs from those of private law claims that are asserted (*Lockhart* at para 154), and a claim for *Charter* damages can be struck based on inadequate pleadings if lacking facts upon which such an award could be functionally justified (*Johnson v British Columbia (Attorney General)*, 2022 BCCA 82 at paras 56–57, leave to appeal to SCC refused, 40174 (16 February 2023)).

[78] In the case at hand, the Plaintiffs have not identified for the Court any allegations in the the Claim that, taking into account the above principles and the other causes of action asserted in the Claim, would support an award of *Charter* damages.

(3) Should the claim for breach of fiduciary duty be struck?

[79] Turning to the first of the private law remedies asserted in the Action, the Claim alleges that, through various acts and omissions related to the Alleged Privacy Breach, the Defendant breached its fiduciary duty to the Plaintiffs and the Class Members. While the Claim sets out the acts and omissions said to represent a breach of fiduciary duty, the Defendant argues that the Claim does not plead sufficient facts to identify the basis for such a duty arising.

[80] As described in *Canada (Attorney General) v Jost*, 2020 FCA 212 [*Jost*], fiduciary duty is a legal doctrine originating in trust law, which requires that one party (the fiduciary) act with absolute loyalty toward another party (the beneficiary) in managing the latter's affairs (at para 32).

[81] In *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*], the Supreme Court of Canada explained that, in addition to traditional categories of fiduciary relationship (such as trustee and solicitor-client relationships), a party may establish the existence of an *ad hoc* fiduciary duty. In addition to the existence of vulnerability arising from the relevant relationship, the party must demonstrate: (a) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (b) a defined person or class of persons (the beneficiary or beneficiaries) vulnerable to the fiduciary's control; and (c) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control (at paras 27, 36).

[82] However, a fiduciary duty will generally be imposed on the Crown only in limited and special circumstances (*Elder Advocates* at para 37). This is necessarily the case, because compelling a fiduciary to put the best interests of the beneficiary before their own is essential to such a relationship, and imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole (*Elder Advocates* at para 44).

[83] In support of the existence of a fiduciary duty on the part of the Defendant, the Claim pleads that: (a) the Defendant has exclusive power under what the Claim describes as the

Defendant's "Conduct Process", designated by the Commissioner's Standing Orders (Conduct), to conduct meetings and investigations; (b) by virtue of its Standing Orders, the Defendant has an ongoing obligation of disclosure, which would include the acknowledgement of a breach of privacy; (c) there is an express and implied undertaking by Canada to protect the Class Members' right to privacy; (d) the fiduciary obligation is an implied term of employment contracts that arises when the RCMP has the power or discretion to use information in a way that could negatively affect the Class Members' interests; and (e) the aim of the fiduciary obligation was to protect the Class Members in work relationships involving a high level of trust and confidentiality.

[84] If the undertaking required to support the existence of a fiduciary relationship is alleged to flow from statute, the language in the legislation must clearly support it (*Elder Advocat*es at para 45). To the extent the Plaintiffs rely on Standing Orders (described in the record as rules made by the Commissioner of the RCMP) to support the alleged fiduciary duty, I agree with the Defendant that the Plaintiffs have not identified any statutory language that clearly supports such a duty.

[85] In relation to the Plaintiffs' reliance on employment contracts between them (and the Class Members) and the RCMP, the Plaintiffs argue that *Jost* supports their position, as it recognized employers having fiduciary duties to employees. I appreciate that, in *Jost*, the Federal Court of Appeal referenced the existence of jurisprudence determining that the Crown owed a fiduciary duty to disabled military veterans when administering pension funds (at paras 41–44). However, I agree with the Defendant's response that this determination was based not upon the

existence of an employment relationship with the Crown but rather upon the Crown's role as the administrator of a governmental pension plan.

[86] The Defendant also emphasizes that RCMP members do not have a contract of employment. They are not employees, but rather are statutory office holders (*Greenwood* at para 156), appointed under the *RCMP Act*. The Defendant submits that *RCMP Act* does not contain express language that could represent the undertaking necessary to establish a fiduciary relationship. Again, the Plaintiffs have not identified any such language.

[87] In considering the responsibilities imposed upon members of the RCMP under section 37 of the *RCMP Act*, as well as the *Code of Conduct of the Royal Canadian Mounted Police* that forms a schedule to the *RCMP Regulations*, the Federal Court of Appeal confirmed in *Canada (Attorney General) v Nasogaluak*, 2023 FCA 61, leave to appeal to SCC refused, 40734 (14 December 2023) [*Nasogaluak*], that the duty of the RCMP is to act in the best interests of society as a whole. *Nasogaluak* addressed a class action that alleged the RCMP owed a fiduciary duty to a class defined in the statement of claim as "all Aboriginal Persons who allege they were assaulted at any time while being held in custody or detained by RCMP Officers in the Territories…". The Federal Court of Appeal concluded that it was very difficult to square the duties imposed upon the RCMP by statute, which applied in the interactions of members of the RCMP with all those with whom they come into contact, with an undertaking to act in the best interests of the putative class in priority to other interests (at paras 61–65).

[88] I find the reasoning of *Nasogaluak* instructive in the matter at hand and agree with the Defendant that, as in *Nasogaluak* (see para 65), the Plaintiffs have failed to plead facts capable of supporting the undertaking that would be required to impose a fiduciary duty in the circumstances alleged in the Action.

[89] I am satisfied that the Claim does not disclose a reasonable cause of action for breach of fiduciary duty and that the Plaintiffs' claims for relief under that cause of action should be struck.

(4) Should the claim for the tort of intrusion upon seclusion be struck?

[90] In *John Doe* at paragraph 52, the Federal Court of Appeal explained that, while Canadian courts have generally been reluctant to recognize a separate common law right of privacy, the Ontario Court of Appeal in *Jones v Tsige*, 2012 ONCA 32 [*Tsige*] recognized the existence of a tortious cause of action for intrusion upon seclusion.

[91] The essential elements of this tort are: (a) that the defendant's conduct must be intentional, including recklessness; (b) that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and (c) that a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish (*John Doe* at para 57, citing *Tsige* at para 71). *Tsige* describes this tort as concerned with intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive (at para 72).

[92] The Claim does not expressly reference the tort of intrusion upon seclusion or identify particular material facts linked to the tort's essential elements. In reference to the first element of the tort, the Defendant acknowledges that the Claim asserts the Recordings were deliberately made and shared. However, the Defendant argues that the remaining elements of the tort are missing. In particular, the Defendant submits that the facts pleaded in the Claim do not involve invasion of the Plaintiffs' private affairs or concerns.

[93] In my view, the Plaintiffs' efforts to invoke this tort fail for the same reasons as its claim under section 8 of the *Charter*. The Claim asserts that the Recordings involved radio conversations between on-duty RCMP members during an organized crime investigation, discussing police operations and information related to confidential informants. This subject matter cannot be characterized as involving the Plaintiffs' private affairs or concerns.

[94] I am satisfied that the Claim does not disclose a reasonable cause of action for intrusion upon seclusion and that the Plaintiffs' claims for relief under that cause of action should be struck.

(5) Should the claim for negligence be struck?

[95] The Claim alleges that, through various acts and omissions related to the Alleged Privacy Breach (the same acts and omissions as are alleged to represent a breach of fiduciary duty), the Defendant breached its common law duty of care to the Plaintiffs and to the Class Members. As contemplated by this allegation, it is trite law that the existence of a duty of care is an essential element of the tort of negligence. To disclose a reasonable cause of action in negligence, a

pleading must set out a factual basis on which a duty of care could be owed to the plaintiff (*Lockhart* at para 126).

[96] The Claim pleads that the Defendant owes a duty of care to the Class Members through the establishment, funding, oversight, operation, supervision, control, maintenance, and support of the RCMP. It refers to the Defendant and its agents as obliged under the *RCMP Regulations* to: (a) treat every person with respect and courtesy and not engage in discrimination or harassment; (b) respect the law and rights of all individuals; (c) act with integrity, fairness and impartiality, and not compromise or abuse its authority, power or position; and (d) behave in a manner that is not likely to discredit the RCMP.

[97] The Claim also pleads that the Defendant was in a relationship of proximity with the Class Members because of its operation of the RCMP, and that the Defendant knew or ought to have known that recording RCMP members' conversations without their consent or a court order would breach their right to privacy and this would result in harm to Class Members.

[98] I understand the Plaintiffs to be asserting the existence of a duty of care to protect the privacy of RCMP members in their communications with other members in the course of performing police duties. The Defendant submits that there is no existing jurisprudence recognizing such a duty of care. The Plaintiffs have not referenced any such jurisprudence. Rather, relying on authorities such as *Rumley v British Columbia*, 2001 SCC 69 at paragraph 34, the Plaintiffs refer to the Claim as pleading systemic negligence (*i.e.*, negligence that is not specific to any one victim but rather to a class of victims as a group), which the Plaintiffs

describe as a recognized cause of action that has been applied in the context of sexual, physical, and other forms of abuse.

[99] The Court accepts that systemic negligence is a recognized cause of action. However, the question for the Court's determination is whether the Plaintiffs' allegations of negligence (systemic or otherwise) are supported by the pleading of material facts that give rise to a duty of care in the particular context of the Alleged Privacy Breach. Having not been presented with any authority recognizing such a duty in a comparable context, the Court must have recourse to the so-called *Anns/Cooper* framework, applicable to determining whether a novel duty of care should be recognized. Explained as follows in *Nelson (City) v Marchi*, 2021 SCC 41, this framework involves a two-stage test, both stages of which must be satisfied in order to recognize such a duty (at paras 17–18):

> 17. In novel duty of care cases, the full two-stage *Anns/Cooper* framework applies. Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff" (*Rankin's Garage*, at para. 18). Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant" (*Cooper*, at paras. 32 and 34).
>
> 18. If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Cooper*, at para. 30). As stated in *Cooper*, at para. 37, the residual policy stage of the *Anns/Cooper* test raises questions relating to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally", such as:

> Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[100] At the hearing, I raised the question whether it was appropriate for the Court to adjudicate this argument on a motion to strike, as opposed to allowing the determination of the existence of a duty of care to be made at a more advanced stage of the proceeding, with the benefit of evidence that might better inform such determination. The Defendant emphasizes that leading authorities on whether a novel duty of care should be recognized have made that determination at the stage of a motion to strike (e.g., *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42; *Syl Apps Secure Treatment Centre v B.D.*, 2007 SCC 38 [*Syl Apps*]). As expressed in *Syl Apps* at paragraph 19:

> Both the majority and dissenting reasons [of the Ontario Court of Appeal] acknowledged that imposing such a duty of care would represent a novel duty at law. The benefit of making a determination on a Rule 21 motion about whether such a duty should be recognized, is obvious. If there is no legally recognized duty of care to the family owed by the defendants, there is no legal justification for a protracted and expensive trial. If, on the other hand, such a duty is accepted, a trial is necessary to determine whether, on the facts of this case, that duty has been breached.

[101] In relation to the first stage of the *Anns/Cooper* test, the Defendant recognizes a degree of proximity between the RCMP and the Plaintiffs and other proposed Class Members, but the Defendant argues that the proposed novel duty fails the first stage, because the required foreseeability is nevertheless absent. The Defendant submits that it is not foreseeable that, as alleged in the Claim, the Plaintiffs and proposed Class Members would suffer emotional and

psychological harm from the recording and sharing of communications that took place between police officers during their criminal investigation duties.

[102] As with other causes of action advanced in the Claim, the Defendant also reiterates its arguments related to disclosure obligations (per *Stinchcombe* and *McNeil*). The Defendant argues that the recognition of a duty of care as proposed by the Plaintiffs would conflict with these disclosure obligations. The Defendant submits that, if the analysis were to move to the second stage of the *Anns/Cooper* framework, this conflict would represent a policy reason not to recognize the novel duty of care. However, the Defendant argues that this conflict is also relevant to the first stage of the analysis, as the Plaintiffs and the Class Members must be aware of their disclosure obligations, and it is therefore not foreseeable that they would suffer emotional and psychological harm from the recording of information that may be subject to those obligations.

[103] In response to the Defendant's arguments, the Plaintiffs rely on authorities in which a duty of care has been found to exist in a privacy context. The Plaintiffs reference *John Doe* and a subsequent summary judgment decision in the same litigation (*John Doe v Canada*, 2023 FC 1636), as recognizing that Health Canada owed a duty of care to protect the personal information of individuals in the Marijuana Medical Access Program, as well as *Canada (Privacy Commissioner) v Facebook, Inc*, 2024 FCA 140 [*Facebook*], leave to appeal to SCC requested, which addressed obligations under the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

[104] *Facebook* is not of particular assistance, as it was not concerned with a duty of care in the context of a negligence claim. The litigation that was the subject of *John Doe* did involve such a claim. However, while both that litigation and the Action in the case at hand involve privacy-related allegations, the factual contexts are otherwise unrelated. *John Doe* involved personal information of the claimants in that case, being their association with a medical marijuana use program.

[105] In contrast, the Claim in the matter at hand asserts a duty of care to protect the privacy of RCMP members in their communications related to police operations and confidential informants. As previously discussed, the Claim does not plead any facts to establish that the Plaintiffs would have a reasonable expectation of privacy in the radio communications that were the subject of the Recordings. As such, the duty of care alleged by the Plaintiffs fails on the foreseeability component of the first stage of the *Anns/Cooper* test.

[106] Having considered both parties' arguments, I am persuaded by the Defendant's position that the allegations in the Claim do not satisfy the foreseeability component of the first stage of the *Anns/Cooper* test. As the two-stage test is conjunctive, it is not necessary for the Court to conduct an analysis under the second stage. I am satisfied that the Claim does not disclose a reasonable cause of action in negligence and that the Plaintiffs' claims for relief under that cause of action should be struck.

(6) If the Court determines that the Claim should be struck, should the Plaintiffs be granted leave to amend the Claim?

[107] While the Defendant has succeeded only in part in its arguments under section 9 of the CLPA, it has successfully argued that the Claim does not disclose a reasonable cause of action for any of the causes of action advanced in the Action. As a result, the Claim must be struck in its entirety. However, it remains necessary for the Court to consider whether, as contemplated by Rule 221(1), the Court should grant the Plaintiffs leave to amend the Claim.

[108] *McMillan* summarized as follows the approach to be taken by the Court when considering whether to grant leave to amend a pleading in a proposed class proceeding (at para 107):

> That said, leave to amend a statement of claim in a proposed class proceeding should only be denied in the clearest of cases. This would include cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment: *Brink*, above at para. 133; *Jost*, above at para. 49.

[109] Cpl. Dugas will not be granted leave to amend, as no amendment would remedy the fact that his claim is barred by section 9 of the CLPA (see *McMillan* at para 109).

[110] In relation to Sgt. Vachon, I note that the Plaintiffs have not requested leave to amend the Claim. However, the Defendant addressed the possibility of amendment in the course of oral submissions, including in response to questions from the Court about submissions advanced by the Plaintiffs to the effect that RCMP members use radio communications not only to further their investigative objectives, but also to share with each other details about their personal lives. The Plaintiffs' counsel made such submissions both in writing and in oral argument on both the

Motion to Strike and the Certification Motion. For example, the Plaintiffs' written submissions in response to the Motion to Strike include the following paragraphs:

> 51. Police officers, particularly in specialized investigative units, operate on secured radio channels that are restricted to members of the team. Each investigative unit has its own dedicated channels to preserve the privacy and integrity of the investigation. Members using these channels assume they are secure, providing a trusted environment for communication beyond strictly operational matters.
>
> 52. The surveillance team relies heavily on these radios for extended periods. Their primary role is to monitor and document the activities of subjects under investigation, often for long hours. While mobile, team members communicate observations and coordinate movements. However, during downtimes such as waiting for a subject to become active - team members frequently engage in personal conversations, sharing intimate details about their private lives or personal choice and biographical information including but not limited to family information, place of residence, schools their kids attend, where they stay when they travel etc.
>
> 53. Members often travel several hours to begin surveillance or return to their home units, during which conversations on the radio are not related to the investigation. These personal exchanges were recorded daily without the members' knowledge or consent.

[111] The Defendant notes that these submissions are unsupported by any evidence in the record before the Court. As noted earlier in these Reasons, the Court's consideration of whether the Claim discloses a reasonable cause of action must be conducted based on the pleading itself, without the benefit of evidence (Rule 221(2)). As such, in the course of the above analyses of the causes of action asserted in the Action, the Court has not taken into account the evidence contained in affidavits sworn by the Plaintiffs. However, the Defendant submits that, in considering whether to grant leave to amend the Claim, the Court may consider the broader record before it, including the Plaintiffs' evidence. I accept this position.

[112] Taking into account the level of detail contained in the above paragraphs from the Plaintiffs' written submissions, I also agree with the Defendant that those submissions are not supported by evidence. However, focusing in particular upon Sgt. Vachon's evidence, it cannot be said that the record is devoid of evidence that RCMP members shared personal information in their radio communications. The Vachon Certification Affidavit describes the radio communications that were the subject of the Recordings as including not only police operations, police techniques, human source information, and locations where RCMP members meet police informants, but also locations where RCMP members are residing and unrelated private communication between police officers.

[113] Moreover, when the Court is considering whether to grant leave to amend a pleading that is impugned on a motion to strike, there is no requirement that an amendment that might cure a pleading defect be supported by evidence.

[114] To be clear, the Court is not concluding that an amendment to plead that the radio conversations that were the subject of the Recordings included personal information would necessarily make viable any or all of the causes of action upon which the Claim relies. The Defendant argues that an individual choosing to share personal information while at work, in a work-related communication channel, does not translate into the individual having an objective expectation of privacy. However, as is apparent from these Reasons' analyses of the various causes of action raised in the Claim, both the Defendant's arguments and the Court's resulting determination that the Claim disclosed no reasonable cause of action turned significantly on the nature of the communications pleaded. The Court has not at this stage been provided with a

pleading framework involving communication of more personal information, and comprehensive submissions on applicable authorities in the context of such a pleading, that would permit it to assess whether such an amendment would alter that determination. Rather, my conclusion at this stage is that this is not one of the clearest of cases in which there is no reason to suppose that the Action might be improved by such an amendment.

[115] As such, while my Order will strike the Claim, it will also grant the Plaintiff, Sgt. Vachon, leave to amend the Claim in accordance with these Reasons.

B. *Certification Motion*

[116] Given my decision to grant the Motion to Strike and to strike the Claim in its entirety, albeit with leave to amend, there is currently no Claim to form the basis of the Certification Motion, which must therefore necessarily be dismissed.

[117] To similar effect, the Certification Motion must be dismissed because the Plaintiffs have necessarily failed to satisfy the first of the conjunctive criteria for certifying a proceeding as a class proceeding, *i.e.*, the requirement that the pleadings disclose a reasonable cause of action (Rule 334.16(1)(a)).

[118] It is therefore unnecessary for the Court to consider the other certification criteria. Moreover, in the absence of an identified and viable cause of action, the Court is largely without a foundation for considering the other criteria and the parties' arguments thereon.

[119] However, before concluding these Reasons, I do wish to address one of the criteria, whether there is an identifiable class of two or more persons (Rule 334.16(1)(b)), in particular in relation to the breadth of the Proposed Class. I consider the following analysis to be available, independent of the identification of a viable cause of action.

[120] Recall that the Claim defines the Proposed Class as follows:

> all members of the Royal Canadian Mounted Police who allege that their right to privacy, [*sic*] has been violated by the servants, contractors, officers and employees of the Defendant in this proceeding as represented by the Attorney General of Canada and the operators, managers, administrators, police officers, and other staff members at the various local Royal Canadian Mounted Police police stations and offices operated by the Defendant in this proceeding as represented by the Attorney General of Canada and were alive as of March 18, 2023

[121] Also, although not included in the definition of the Proposed Class as arguably it should be, the Claim identifies a Class Period from April 17, 1982, to the present as the period during which the impugned conduct took place.

[122] As with all the certification criteria other than disclosing a reasonable cause of action, the identification of the class requires evidence establishing some basis in fact. In that context, the Defendant argues that the evidence filed in support of certification is limited to allegations of unauthorized recording and disclosure of conversations among RCMP members of J-Division (*i.e.*, New Brunswick), during Project J-Trinity between 2017 and 2020. Indeed, the Plaintiffs testified during cross-examination that the alleged conduct was, to their knowledge, unique to J-Division and Project J-Trinity.

[123] I agree with this characterization of the evidence. The Plaintiffs have sought to certify a Proposed Class involving alleged conduct extending geographically across the entire country and temporally in excess of 40 years, notwithstanding that the Alleged Privacy Breach appears to have involved RCMP members only in New Brunswick and only over the course of an approximately three-year period.

[124] I note that the Dugas Certification Affidavit and the Vachon Certification Affidavit also refer to an incident that occurred between 2002 and 2004 when a Staff Sergeant of J-Division was subjected to six weeks of surveillance by J-Division management, employing a GPS tracking device installed on his unmarked police vehicle.

[125] However, neither of the Plaintiffs provides any explanation of the basis of his knowledge of this alleged incident, other than referencing a related decision of the New Brunswick Court of Queen's Bench (*Smith v Att. Gen. of Canada*, 2006 NBQB 86, aff'd 2007 NBCA 58). The Plaintiffs' evidence is limited to a few paragraphs of hearsay in the context of the overall record before the Court, is considerably lacking in detail, and does not identify any relationship between this alleged incident and the Alleged Privacy Breach that is the subject of the Claim.

[126] The evidentiary threshold for establishing some basis in fact is lower than a balance of probabilities, as certification is not the appropriate stage to resolve conflicts in evidence (*John Doe* at para 24). Nevertheless, I am not convinced that the above evidence is sufficiently probative to provide a basis in fact for the identification of the class as extending beyond those who were subject to the Alleged Privacy Breach. Certainly, this evidence, related to events said

to have occurred in New Brunswick sometime between 2002 and 2004, does not support the geographic and temporal breadth of the Proposed Class definition advanced by the Plaintiffs.

[127] Finally, in the Dugas Certification Affidavit and the Vachon Certification Affidavit, each of the Plaintiffs also deposes that, since the commencement of the Action, he has been contacted by individuals from across the country who have made inquiries about how they may be involved. Neither of the Plaintiffs provides any further detail about those inquiries. This evidence does not provide a basis in fact to conclude that events similar to the Alleged Privacy Breach occurred in other parts of the country or other time periods.

[128] As explained in *Hollick v Toronto (City)*, 2001 SCC 68, the putative representative plaintiff in a class proceeding is obliged to demonstrate that the proposed class is not unnecessarily broad (at para 21). If it were necessary for the Court, in adjudicating the Certification Motion, to consider the certification criteria other than the existence of a reasonable cause of action, I would find that the Plaintiffs have not established any basis in fact to support their Proposed Class.

VI. **Costs**

[129] Consistent with Rule 334.39(1), neither party claimed costs of these motions, and no costs are awarded.

ORDER IN T-529-23

THIS COURT ORDERS that

1. The Motion to Strike is granted, and the Claim is struck in its entirety, with leave granted to the Plaintiff, Marco Vachon, to amend the Claim in accordance with the Court's Reasons.

2. The Certification Motion is dismissed.

3. There is no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-529-23
STYLE OF CAUSE:	PASCAL DUGAS, MARCO VACHON, AND LUC BELLIVEAU v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	MAY 8, 2025

WRITTEN REPRESENTATIONS BY:

Rodney J. Gillis, K.C.	FOR THE PLAINTIFFS
Angela Green Victor Ryan	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Gilbert McGloan Gillis Saint John, New Brunswick	FOR THE PLAINTIFFS
Attorney General of Canada Halifax, Nova Scotia	FOR THE DEFENDANT