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As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

Disclosure of Wiretap Communications in a Civil Proceeding

THE SUPREME COURT OF CANADA HAS HELD THAT A PARTY IN A CIVIL PROCEEDING CAN REQUEST DISCLOSURE OF WIRETAP COMMUNICATIONS INTERCEPTED BY THE STATE DURING A CRIMINAL INVESTIGATION.

In *Imperial Oil v. Jacques*, 2014 SCC 66, the Competition Bureau of Canada (the "Bureau") started an investigation into allegations of a conspiracy to fix gasoline pump prices in Québec. As part of its investigation, the Bureau obtained judicial authorizations under the *Criminal Code* from the Court of Québec to intercept and record over 220,000 private communications. A series of charges were laid as a result of the Bureau's investigation, alleging that the accused conspired to fix gas pump prices.

At the same time that criminal proceedings took place, the respondents brought a civil class action in the Québec Superior Court alleging that a number of persons, including the appellants, had engaged in anti-competitive

practices as set out in the *Civil Code of Québec* and the federal *Competition Act*. As part of their civil action, the respondents brought a motion for disclosure of all the private communications that had been intercepted by the Bureau in the course of its investigation. The scope of the motion was eventually narrowed to limit it to recordings that had already been disclosed to the accused in parallel criminal proceedings.

The majority of the Supreme Court of Canada, per LeBel and Wagner JJ., held that a party to a civil action can request the disclosure of recordings of private communications intercepted by the State during a criminal investigation.

The Court recognized that while the right to disclosure in civil

litigation had to be given a broad interpretation, it was not unlimited. The scope of disclosure had to be limited at times to avoid harming the interests of third parties. Moreover, in exercising its discretion, the Court could consider the relevance of the documents to the issues between the parties, the extent to which the privacy of a party or of a third party to the proceedings is invaded, and the importance of remaining sensitive to the duty to protect a person's privacy. In the instant case, the Court upheld the finding that the evidence requested by the respondents was relevant.

The Court devoted much of its analysis to whether the appellant's objection to disclosure could be upheld by an immunity from disclosure set out in the *Criminal Code*. In particular, section 193 of the *Criminal Code* makes it an offence to disclose or use an intercepted private communication without the consent of the originator or the intended recipient of the communication. At first glance, section 193 appears to prevent the disclosure of documents resulting from electronic surveillance. However, because the right to privacy is not absolute, section

193 is "tempered by a series of exemptions". Specifically, under section 193(2)(a) of the *Criminal Code*, the prohibition in section 193 does not apply to a person who discloses a private communication "in the course of or for the purpose of giving evidence in any civil or criminal proceedings...".

The Court held that the words "for the purpose of giving evidence in any civil proceeding" under section 193(2)(a) must include an intention to give the exemption "a generous scope that encompasses the exploratory stage of civil proceedings". Accordingly, wiretap information may be disclosed at the exploratory stage of a civil proceeding. The documents requested at this stage of the proceeding, in the words of the Court, "may very well be requested for the purpose of testifying at the hearing". The object of the exception set out in section 193(2)(a) was to ensure that Courts will have access to all information relevant to the proceedings. On this basis, the Court concluded that s.193(2)(a) applied in this case. Litigants are allowed to obtain disclosure of wiretap information for the purpose of a civil proceeding.

The Court further held that in allowing such disclosure, the judge could establish limits, i.e. the judge can limit the number of persons authorized to consult the requested documents and specify in what capacity and for how long they may do so. The judge can also establish the circumstances of access, for example, by ordering that disclosure be made in a specific manner and, if necessary, at a specific time and place. The judge can also order that the information in a requested document be "screened".

While this case was decided under the *Civil Code of Québec*, it arguably has significant implications for the common law in other provinces, including Ontario. In its analysis, the Court relied on an Ontario case which recognized that s.193(2)(a) of the *Criminal Code* provided for the introduction of wiretap information obtained in a criminal investigation in a civil proceeding under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Accordingly, *Imperial Oil* has opened the door to the disclosure of intercepted private communications authorized as part of a criminal investigation in the discovery process of a civil action.