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## Supreme Court of Canada Allows Criminal Intercepts to be Disclosed in a Civil Context

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In the decision of *Imperial Oil v. Jacques*<sup>1</sup>, the Supreme Court of Canada determined that electronic interceptions of private communications gathered in a criminal process were disclosable in the context of a civil proceeding.

The case arose out of an investigation by the Competition Bureau of Canada (the “Bureau”) into price-fixing of the cost of gasoline in Quebec. During the investigation, the Bureau obtained judicial authorizations for interception of hundreds of thousands of private communications. The investigation resulted in charges laid against 54 individuals and business entities. While the criminal proceedings were still outstanding, some individuals and an association instituted a class action in Quebec against some of the criminal accused’s alleging anti-competitive practices violating the *Competition Act* and the *Civil Code of Quebec*. The plaintiffs in the civil matter sought disclosure of the intercepted private communications. A Quebec court ordered disclosure of the private communications, with some restrictions. The communications were to be disclosed solely to the lawyers and experts involved in the civil action, and the communications were to be screened to protect the privacy of innocent third parties.

The accused’s appealed, arguing that the *Criminal Code* strictly prohibited the disclosure of intercepted private communications, and that the general provisions of the rules of civil procedure in Quebec could not override the *Criminal Code* prohibitions. The appellants argued that the only exceptions in the *Criminal Code* allowing disclosure of intercepted private communications related to purposes of fighting crime. The respondents, on the other hand, took the position that there was no specific prohibition in federal law that prevented the application of provincial civil procedure law to intercepted private communications.

The Supreme Court of Canada noted that the section of the *Criminal Code* that prohibited disclosure of private communications specifically contained an exemption for disclosure “in the course of or for the purpose of giving evidence in any civil” proceeding. The Court acknowledged that the discovery process relating to civil proceedings was not “giving evidence” *per se*, but held that it could be considered to be “for the purpose of giving evidence”. The Court noted that the disclosure provisions relating to civil proceedings were interpreted very broadly and favored disclosure.

However, the Court did acknowledge that the interest of full disclosure must be weighed with other interests, such as the privacy rights of innocent third parties. The Court observed that no privacy right is absolute and the scope of the protection depends on the specific circumstances and all the interests at stake.



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<sup>1</sup> 2014 SCC 66

The Court concluded that there was no factual or legal impediment to the disclosure of intercepted private communications pursuant to the appropriate rules of procedure in Quebec. The Court held that the specific rule relating to disclosure did not impinge upon any constitutional protection.

However, given the interests at stake, the Court found it necessary to comment further on the proper approach to imposing the appropriate controls on disclosure. A judge considering ordering disclosure in the context of a civil proceeding must weigh the potential for an invasion of privacy and the interests of fairness and truth-seeking. Where documents obtained in a criminal proceeding are under consideration, the Court must also consider the impact of the disclosure on the proper conduct of the criminal proceeding, and the right of the accused to a fair trial. The Court stressed that there was a high societal interest in protecting the criminal process and the right of an accused to a fair trial. In some instances, these interests might warrant intervention by the Crown where the documents sought related to a criminal proceeding. The Crown could object to disclosure or request specific conditions be imposed upon disclosure.

The Court observed that the duty of confidentiality imposed upon parties, their counsel and their experts assured the right to privacy, the efficient conduct of a criminal proceeding and an accused's right to make full answer and defense to some degree. However, the Court did observe that, in some cases, the duty of confidentiality may not be enough to protect these other important interests. If necessary, a judge could limit the individuals entitled to access to the information, establish the circumstances under which access would occur, order disclosure be made in a particular manner, or order that the information being requested be screened to address other interests.

In addition to the privacy and fair trial rights described above, a judge should also have regard to the proportionality principle relating to the financial and administrative burden that would be imposed by a disclosure order on a party or on third parties in possession of the material. Such an order could require the requester to pay reasonable costs.

The Court was also clear that where the documents involved resulted from a criminal investigation, a judge could refuse disclosure, if the judge was satisfied that even the strictest conditions could not protect third party rights, the efficiency of criminal proceedings or the accused's rights to a fair trial.

Although this case arose in Quebec and specifically dealt with the Quebec rule for disclosure prior to a civil trial, the reasoning in the case would apply to any provincial or territorial rule of civil procedure that permitted broad disclosure from third parties. It is interesting that the Attorney General of Ontario raised the issue of the screening device usually used in Ontario with respect to the contents of a criminal brief (the "*Wagg*" principle<sup>2</sup>). Although the Supreme Court of Canada mentioned the Attorney General's argument, it did not further deal with the *Wagg* principle. It remains to be seen whether the *Imperial Oil v. Jacques* decision will be interpreted to have replaced the *Wagg* principle generally, or whether it will be limited to requests for interceptions of private communications.

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<sup>2</sup> P.(D.) v. Wagg (2004), 71 O.R. (3d) 229 (C.A.)

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