

**SUPREME COURT OF CANADA**

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| **Citation:** Imperial Oil v. Jacques,2014 SCC 66, [2014] 3 S.C.R. 287 | **Date:** 20141017  **Docket:** 35226, 35231 |

Between:

Imperial Oil

Appellant

and

Simon Jacques, Marcel Lafontaine, Automobile Protection Association, Attorney General of Quebec and Director of Public Prosecutions of Canada

Respondents

- and -

Attorney General of Ontario, Couche-Tard Inc., Alimentation Couche-Tard Inc., Dépan-Escompte Couche-Tard Inc., Céline Bonin, Richard Bédard, Carole Aubut, Ultramar Ltd, Luc Forget, Jacques Ouellet, Pétroles Therrien Inc., Distributions Pétrolières Therrien Inc., Irving Oil Inc./Irving Oil Operations Ltd., Olco Petroleum Group Inc., Coop fédérée, Robert Murphy, Gary Neiderer, 9142-0935 Québec Inc., 9131-4716 Québec Inc., Groupe Denis Mongeau Inc., France Benoît, Richard Michaud, Luc Couturier, Guy Angers, Philippe Gosselin & Associés Ltd., André Bilodeau, Carol Lehoux, Claude Bédard, Stéphane Grant, Pétroles Cadrin Inc., Daniel Drouin, Pétroles Global inc./Global Fuels Inc., Pétroles Global (Québec) inc./Global Fuels (Quebec) Inc., Provigo Distribution Inc., Christian Payette, Pierre Bourassa, Daniel Leblond, Dépanneur Magog-Orford Inc, 2944-4841 Québec Inc., Société coopérative agricole des Bois-Francs, Gestion Astral Inc., Lise Delisle, 134553 Canada Inc., Garage Luc Fecteau et fils Inc., Station-Service Jacques Blais Inc., 9029-6815 Québec Inc., Garage Jacques Robert Inc., Gérald Groulx Station Service Inc., Services Autogarde D.D. Inc., 9010-1460 Québec Inc., Armand Pouliot, Julie Roberge, Station-Service Pouliot et Roberge s.e.n.c., 9038-6095 Québec Inc., 9083-0670 Québec Inc., Gestion Ghislain Lallier Inc., 2429-7822 Québec Inc., 2627-3458 Québec Inc., 9098-0111 Québec Inc., 2311-5959 Québec Inc., Gaz-O-Pneus Inc., C. Lagrandeur et fils Inc., Universy Galt Service Inc., Valérie Houde, Sylvie Fréchette, Robert Beaurivage, 9011-4653 Québec Inc., Pétroles Remay Inc., Variétés Jean Yves Plourde Inc. and 9016-8360 Québec Inc.

Interveners

And Between:

Couche-Tard Inc., Alimentation Couche-Tard Inc., Dépan-Escompte Couche-Tard Inc., Céline Bonin, Richard Bédard, Ultramar Ltd, Pétroles Therrien Inc., Distributions Pétrolières Therrien Inc, Irving Oil Operations Ltd., Olco Petroleum Group Inc., Coop fédérée, Robert Murphy, Gary Neiderer, 9142-0935 Québec Inc., 9131-4716 Québec Inc. and Groupe Denis Mongeau Inc.

Appellants

and

Simon Jacques, Marcel Lafontaine, Automobile Protection Association, Attorney General of Quebec, Director of Public Prosecutions of Canada, France Benoît, Richard Michaud, Luc Couturier, Guy Angers, Philippe Gosselin & Associés ltée, André Bilodeau, Carol Lehoux, Claude Bédard, Stéphane Grant, Pétroles Cadrin Inc., Daniel Drouin, Pétroles Global inc./Global Fuels Inc., Pétroles Global (Québec) inc./Global Fuels (Quebec) Inc., Provigo Distribution Inc., Christian Payette, Pierre Bourassa, Daniel Leblond, Dépanneur Magog-Orford Inc., 2944-4841 Québec Inc., Société coopérative agricole des Bois-Francs, Gestion Astral Inc., Lise Delisle, 134553 Canada Inc., Garage Luc Fecteau et fils Inc., Station-Service Jacques Blais Inc., 9029-6815 Québec Inc,, Garage Jacques Robert Inc., Gérald Groulx Station-Service Inc., Services Autogarde D.D. Inc., 9010-1460 Québec Inc., Armand Pouliot, Julie Roberge, Station-Service Pouliot et Roberge s.e.n.c., 9038-6095 Québec Inc., 9083-0670 Québec Inc., Gestion Ghislain Lallier Inc., 2627-3458 Québec Inc., 2429-7822 Québec Inc., Universy Galt Service Inc., 9098-0111 Québec Inc., 2311-5959 Québec Inc., Gaz-O-Pneus Inc., C. Lagrandeur et fils Inc., Valérie Houde, Sylvie Fréchette, Robert Beaurivage, 9011-4653 Québec Inc., Pétroles Remay Inc., Variétés Jean-Yves Plourde Inc., 9016-8360 Québec Inc., Carole Aubut, Luc Forget and Jacques Ouellet

Respondents

- and -

Attorney General of Ontario

Intervener

**Official English Translation:** Joint reasons of LeBel and Wagner JJ.

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

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| **Joint Reasons for Judgment:**  (paras. 1 to 88)  **Concurring Reasons:**  (paras. 89 to 91)  **Dissenting Reasons:**  (paras. 92 to 107) | LeBel and Wagner JJ. (Rothstein, Cromwell and Moldaver JJ. concurring)  McLachlin C.J.  Abella J. |

imperial oil *v.* jacques, 2014 SCC 66, [2014] 3 S.C.R. 287

Imperial Oil Appellant

v.

Simon Jacques, Marcel Lafontaine, Automobile Protection

Association, Attorney General of Quebec and Director of

Public Prosecutions of Canada Respondents

and

Attorney General of Ontario, Couche-Tard Inc., Alimentation

Couche-Tard Inc., Dépan-Escompte Couche-Tard Inc., Céline

Bonin, Richard Bédard, Carole Aubut, Ultramar Ltd., Luc Forget,

Jacques Ouellet, Pétroles Therrien Inc., Distributions Pétrolières

Therrien Inc., Irving Oil Inc./Irving Oil Operations Ltd., Olco

Petroleum Group Inc., Coop fédérée, Robert Murphy, Gary

Neiderer, 9142-0935 Québec Inc., 9131-4716 Québec Inc., Groupe

Denis Mongeau Inc., France Benoît, Richard Michaud, Luc

Couturier, Guy Angers, Philippe Gosselin & Associés ltée, André

Bilodeau, Carol Lehoux, Claude Bédard, Stéphane Grant, Pétroles

Cadrin Inc., Daniel Drouin, Pétroles Global inc./Global Fuels Inc.,

Pétroles Global (Québec) inc./Global Fuels (Québec) Inc., Provigo

Distribution Inc., Christian Payette, Pierre Bourassa, Daniel

Leblond, Dépanneur Magog-Orford Inc., 2944-4841 Québec Inc.,

Société coopérative agricole des Bois-Francs, Gestion Astral Inc.,

Lise Delisle, 134553 Canada Inc., Garage Luc Fecteau et fils Inc.,

Station-Service Jacques Blais Inc., 9029-6815 Québec Inc., Garage

Jacques Robert Inc., Gérald Groulx Station Service Inc., Services

Autogarde D.D. Inc., 9010-1460 Québec Inc., Armand Pouliot,

Julie Roberge, Station-Service Pouliot et Roberge s.e.n.c., 9038-6095

Québec Inc., 9083-0670 Québec Inc., Gestion Ghislain Lallier Inc.,

2429-7822 Québec Inc., 2627-3458 Québec Inc., 9098-0111 Québec

Inc., 2311-5959 Québec Inc., Gaz-O-Pneus Inc., C. Lagrandeur et

fils Inc., Universy Galt Service Inc., Valérie Houde, Sylvie Fréchette,

Robert Beaurivage, 9011-4653 Québec Inc., Pétroles Remay Inc.,

Variétés Jean-Yves Plourde Inc. and 9016-8360 Québec Inc. Interveners

- and -

Couche-Tard Inc., Alimentation Couche-Tard Inc., Dépan-Escompte

Couche-Tard Inc., Céline Bonin, Richard Bédard, Ultramar Ltd.,

Pétroles Therrien Inc., Distributions Pétrolières Therrien Inc.,

Irving Oil Operations Ltd., Olco Petroleum Group Inc., Coop

fédérée, Robert Murphy, Gary Neiderer, 9142-0935 Québec Inc.,

9131-4716 Québec Inc. and Groupe Denis Mongeau Inc. Appellants

v.

Simon Jacques, Marcel Lafontaine, Automobile Protection

Association, Attorney General of Quebec, Director of Public

Prosecutions of Canada, France Benoît, Richard Michaud, Luc

Couturier, Guy Angers, Philippe Gosselin & Associés ltée,

André Bilodeau, Carol Lehoux, Claude Bédard, Stéphane

Grant, Pétroles Cadrin Inc., Daniel Drouin, Pétroles Global inc./

Global Fuels Inc., Pétroles Global (Québec) inc./Global Fuels

(Québec) Inc., Provigo Distribution Inc., Christian Payette,

Pierre Bourassa, Daniel Leblond, Dépanneur Magog-Orford

Inc., 2944-4841 Québec Inc., Société coopérative agricole des

Bois-Francs, Gestion Astral Inc., Lise Delisle, 134553 Canada Inc.,

Garage Luc Fecteau et fils Inc., Station-Service Jacques Blais Inc.,

9029-6815 Québec Inc., Garage Jacques Robert Inc., Gérald Groulx

Station-Service Inc., Services Autogarde D.D. Inc., 9010-1460

Québec Inc., Armand Pouliot, Julie Roberge, Station-Service

Pouliot et Roberge s.e.n.c., 9038-6095 Québec Inc., 9083-0670

Québec Inc., Gestion Ghislain Lallier Inc., 2627-3458 Québec Inc.,

2429-7822 Québec Inc., Universy Galt Service Inc., 9098-0111

Québec Inc., 2311-5959 Québec Inc., Gaz-O-Pneus Inc.,

C. Lagrandeur et fils Inc., Valérie Houde, Sylvie Fréchette,

Robert Beaurivage, 9011-4653 Québec Inc., Pétroles Remay Inc.,

Variétés Jean-Yves Plourde Inc., 9016-8360 Québec Inc., Carole

Aubut, Luc Forget and Jacques Ouellet Respondents

and

Attorney General of Ontario Intervener

**Indexed as:** Imperial Oil ***v.*** Jacques

2014 SCC 66

File Nos.: 35226, 35231.

2014: April 24; 2014: October 17.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

on appeal from the court of appeal for quebec

*Evidence — Civil procedure — Disclosure — Plaintiffs in class action filing motion for disclosure of documents in which they requested disclosure by third party of recordings of private communications intercepted in course of criminal investigation — Defendants to class action objecting to disclosure on basis of immunities from disclosure provided for in legislation or established by courts — Whether party to civil proceeding can request disclosure of recordings of private communications intercepted by state in course of criminal investigation — How conditions for and limits on disclosure are to be set — Code of Civil Procedure, CQLR, c. C-25, art. 402 — Criminal Code, R.S.C. 1985, c. C-46, s. 193(2)(a) — Competition Act, R.S.C. 1985, c. C-34, ss. 29, 36.*

To carry out the “Octane” investigation into allegations of a conspiracy to fix gasoline pump prices in certain regions of Quebec, the Competition Bureau of Canada obtained judicial authorizations under Part VI of the *Criminal Code* that enabled it to intercept and record more than 220,000 private communications. As a result of the investigation, charges were laid against 54 persons, including certain of the appellants. In parallel with the criminal proceedings, the respondents instituted a class action against a number of persons, including the appellants, alleging that they had engaged in anti-competitive practices in breach of the duties imposed by art. 1457 of the *Civil Code of Québec* (“*C.C.Q.*”) and s. 36 of the *Competition Act*. In support of their action, they filed, under art. 402 of the *Code of Civil Procedure* (“*C.C.P.*”), a motion in which they sought disclosure by the federal Director of Public Prosecutions and the Competition Bureau of the recordings that had already been disclosed to the accused in the parallel criminal proceedings. The appellants contested the motion.

The Superior Court, being of the opinion that the evidence requested by the respondents was relevant and that neither the *Competition Act* nor the *Criminal Code* created an immunity from disclosure, granted the motion. To control the disclosure process and the scope of the disclosure, it ordered that the Director of Public Prosecutions and the Competition Bureau disclose the requested recordings solely to the lawyers and experts participating in the civil proceedings, and that they screen the recordings to protect the privacy of third parties having nothing whatsoever to do with the proceedings. The Court of Appeal refused leave to appeal that decision.

*Held* (Abella J. dissenting): The appeals should be dismissed.

*Per* LeBel, Rothstein, Cromwell, Moldaver and Wagner JJ.: A party to a civil proceeding can request the disclosure of recordings of private communications intercepted by the state in the course of a criminal investigation. Although s. 29 of the *Competition Act* provides for confidentiality of the Competition Bureau’s record of investigation, it does not prohibit the disclosure of private communications intercepted under Part VI of the *Criminal Code*, as such communications are not among the types of information referred to in s. 29(1)(*a*) to (*e*). Moreover, even though s. 193(1) of the *Criminal Code* lays down the principle that it is unlawful to disclose or use an intercepted private communication without the consent of the originator or the intended recipient of the communication, this general prohibition is tempered by some exemptions. Section 193(2)(*a*) provides that a disclosure is not an offence under s. 193(1) if it is made “in the course of or for the purpose of giving evidence in any civil . . . proceedings”. Nothing in the words of this provision justifies limiting its application to the time when evidence is being given. The documents requested at the exploratory stage of any civil proceeding may be requested “for the purpose” of testifying at the hearing. The provision’s object and context admit of no other conclusion. Section 193(2)(*a*) does not have facilitating the fight against crime as its sole purpose; rather, its object is to ensure that courts will have access to all information relevant to the proceedings before them. Similarly, the case law and the academic literature support a broad interpretation of s. 193(2)(*a*). Finally, the admissibility in evidence of recordings of private communications is governed by s. 24(2) of the *Charter* and the various applicable provincial statutes.

Section 193 of the *Criminal Code* creates neither an actual disclosure mechanism nor a right of access. Since this case involves civil proceedings brought under s. 36 of the *Competition Act* and art. 1457 *C.C.Q.*, the procedure for seeking accessto the recordings is the one provided for in art. 402 *C.C.P.* The first paragraph of art. 402 *C.C.P.* empowers a judge to order the disclosure of documents relating to the issues between the parties that are in the possession of a third party. Judges have great discretion, but will generally favour disclosure. Nevertheless, a judge must deny a request for disclosure in the face of an immunity from disclosure that is either provided for in legislation or established by the courts. In exercising his or her discretion, the judge may consider, *inter alia*, 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. The concept of relevance is generally interpreted broadly at the exploratory stage of the proceedings. The impact of disclosure on the rights of innocent persons requires that care be taken in considering motions for disclosure, although it cannot constitute a cause why evidence should not be disclosed in all circumstances. The scope of the protection of the right of the innocent to privacy must always be assessed in light of the various interests at stake. Finally, by giving judges the power to refuse to order disclosure where a barrier to disclosure is provided for in legislation or has been established by the courts, art. 402, para. 1 already provides that, where necessary, the principle of disclosure it codifies will yield to any applicable federal provision that prohibits disclosure.

Judges also have great discretion to control the process of disclosing evidence at the exploratory stage of proceedings, and to set conditions for and limits on disclosure. In doing so, they must weigh the interests involved, but must at the same time limit the potential for invasion of privacy and avoid unduly limiting access to relevant documents so as to ensure that the proceedings remain fair, the search for truth is not obstructed and the proceedings are not unjustifiably delayed. Where the requested documents result from a criminal investigation, the judge must also consider the impact of disclosure on the efficient conduct of the criminal proceedings and on the right of the accused to a fair trial. However, at the exploratory stage of a proceeding, the right to privacy, the efficient conduct of criminal proceedings and the right to make full answer and defence are, to some degree, protected by the duty of confidentiality imposed on the parties, their counsel and their experts. Nevertheless, judges have the powers they need to impose other conditions. In every case, the judge must, bearing in mind the proportionality principle that is inherent in art. 402 *C.C.P.* and is also spelled out in art. 4.2 *C.C.P.*, consider the financial and administrative impact of the conditions being imposed and how they will affect the general conduct of the proceedings.

The order of the Superior Court in this case is consistent with these principles. There is no factual or legal impediment to disclosure of the documents requested by the respondents under art. 402 *C.C.P.* Nor is there anything to cast doubt on the Superior Court’s finding that the requested evidence is relevant. Furthermore, the scope of the disclosure order is limited so as to protect the right to privacy of all those whose communications were intercepted. The limits also ensure that disclosure of the information will not hinder the efficient conduct of the criminal proceedings or violate the right of the parties still facing criminal charges to a fair trial. There is no indication that the order imposes an undue financial and administrative burden on the third party in question in this case.

*Per* McLachlin C.J.: The power to obtain disclosure of intercepted private communications in this case arises solely from art. 402 *C.C.P.*, not s. 193(2)(*a*) of the *Criminal Code*. Where the state is otherwise empowered or required to disclose intercepted private communications in civil proceedings, s. 193(2)(*a*) protects the authorities from criminal sanction.

*Per* Abella J. (dissenting): It is not legally permissible in Canada to authorize electronic surveillance for the purpose of gathering evidence in civil proceedings. Electronic surveillance can only be authorized in the limited circumstances set out in Part VI of the *Criminal Code* for the investigation of serious crimes, or under the *Canadian Security Intelligence Service Act* for the investigation of threats to national security. Part VI recognizes the uniquely intrusive character of electronic surveillance by permitting state interception of private communications *only* if express safeguards are followed. Until a determination has been made as to the legality of a challenged interception, the communication is not admissible in a criminal proceeding.

Section 193(2)(*a*) should not be interpreted in a way that overrides the privacy protections in Part VI. Section 193(2)(*a*) does not create a right to access intercepted communications and is not available to pre-empt a judicial determination about the validity of an interception. Until those interceptions have been found, or are conceded to be, lawful and admitted into evidence in a criminal proceeding, they retain their private character for all purposes and are not available to the public. Using s. 193(2)(*a*) to permit litigants in a civil case to get disclosure of communications intercepted in the course of a criminal investigation before a challenged interception is found to be lawful, allows those litigants to benefit indirectly from an extraordinary investigative technique they are otherwise not legally entitled to.

The general right to privacy and the specific right not to have confidential information disclosed are expressly protected in Quebec’s *Charter of human rights and freedoms*. The discretion in art. 402 of the *Code of Civil Procedure* to order disclosure should therefore not be so interpreted as to extinguish the scrupulous protection for the non-disclosure of intercepted communications found in other parts of the law. This provision gives significant discretion to a trial judge, but it does not give him or her *carte blanche* to order disclosure of communications protected by an almost impermeable legal coating like a privileged communication. Evidence gathered through electronic surveillance is entitled to the same protection and, as a result, is not amenable to a balancing exercise.

**Cases Cited**

By LeBel and Wagner JJ.

**Considered:** *Tide Shore Logging* *Ltd. v. Commonwealth Insurance Co.* (1979), 13 B.C.L.R. 316; *Ault v. Canada (Attorney General)* (2007), 88 O.R. (3d) 541; *Canada (Procureur général) v. Charbonneau*, 2012 QCCS 1701 (CanLII); **distinguished:** *Michaud* *v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3; **referred to:** *Jacques v.* *Petro-Canada*, 2009 QCCS 5603 (CanLII); *Glegg* *v.* *Smith & Nephew Inc.*, 2005 SCC 31, [2005] 1 S.C.R. 724; *P. (D.) v. Wagg* (2004), 71 O.R. (3d) 229; *R*. *v.* *Nikolovski*, [1996] 3 S.C.R. 1197; *Frenette* *v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647; *Jones* *v.* *National Coal Board*, [1957] 2 Q.B. 55; *Technologie Labtronix Inc.* *v. Technologie Micro Contrôle Inc.*, [1998] R.J.Q. 2312; *Blaikie* *v.* *Commission des valeurs mobilières du Québec*, [1990] R.D.J. 473; *Autorité des marchés financiers v.* *Panju*, 2008 QCCA 832, [2008] R.J.Q. 1233; *Fédération des infirmières et infirmiers du Québec v.* *Hôpital Laval*, 2006 QCCA 1345, [2006] R.J.Q. 2384; *Westfalia Surge Canada Co. v. Ferme Hamelon (JFD) et Fils*, 2005 QCCA 514 (CanLII); *Westinghouse Canada Inc. v. Arkwright Boston Manufacturers Mutual Insurance Co.*, [1993] R.J.Q. 2735; *Lac d’Amiante du Québec Ltée v.* *2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *Communauté urbaine de Montréal* *v.* *Chubb du Canada compagnie d’assurances*, [1998] R.J.Q. 759; *Kruger Inc.* *v.* *Kruger*, [1987] R.D.J. 11; *Industries GDS inc.* *v.* *Carbotech inc.*, 2005 QCCA 655 (CanLII); *Corporation de financement commercial Transamérica Canada v. Beaudoin*, [1995] R.D.J. 633; *Union Canadienne, compagnie d’assurance* *v.* *St-Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340; *Goulet* *v.* *Lussier*, [1989] R.J.Q. 2085; *M. (A.)* *v.* *Ryan*, [1997] 1 S.C.R. 157; *R.* *v.* *Corbett*, [1988] 1 S.C.R. 670; *R.* *v.* *Seaboyer*, [1991] 2 S.C.R. 577; *Lyons v. The Queen*, [1984] 2 S.C.R. 633; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3; *R. v. Welsh* (1977), 15 O.R. (2d) 1; *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Centre Ltd.*, [1973] S.C.R. 596; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581; *Law Society of Upper Canada v. Canada (Attorney General)* (2008), 89 O.R. (3d) 209; *Re Board of Commissioners of Police for City of Thunder Bay and Sundell* (1984), 15 C.C.C. (3d) 574; *Children’s Aid Society of Thunder Bay (District) v. D. (S.)*, 2011 ONCJ 100, 2 R.F.L. (7th) 202; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *R. v. Durette*, [1994] 1 S.C.R. 469; *Vickery* *v.* *Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671; *Phillips* *v. Vancouver Sun*, 2004 BCCA 14, 27 B.C.L.R. (4th) 27; *Marché Lionel Coudry inc.* *v. Métro inc.*, 2004 CanLII 73143; *Southam* *Inc. v. Landry*, 2003 CanLII 71970; *Daishowa inc.* *v.* *Commission de la santé et de la sécurité du travail*, [1993] R.J.Q. 175, aff’d [1993] AZ-50072356; *S.M.* *v.* *S.G.*, [1986] R.D.J. 617.

By Abella J. (dissenting)

*R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Commisso*, [1983] 2 S.C.R. 121; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *National Broadcasting Co. v. United States Department of Justice*, 735 F.2d 51 (1984); *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015 (1993).

**Statutes and Regulations Cited**

*Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 10(1).

*Canadian Bill of Rights*, R.S.C. 1985, App. III, s. 2(*e*).

*Canadian Charter of Rights and Freedoms*, ss. 8, 24(2).

*Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, ss. 12, 21.

*Charter of human rights and freedoms*, CQLR, c. C-12, ss. 5, 9.

*Civil Code of Québec*, arts. 35, 36, 1457, 2803, 2858.

*Code of Civil Procedure*, CQLR, c. C-25, arts. 2, 4.2, 20, 29, 46, 76, 77, 395, 402, 1045.

*Competition Act*, R.S.C. 1985, c. C-34, ss. 29, 36.

*Constitution Act, 1867*, s. 91(27).

*Criminal Code*, R.S.C. 1970, c. C-34, ss. 178.16, 178.2(2).

*Criminal Code*, R.S.C. 1985, c. C-46, Part VI, ss. 183 “offence”, 184, 186(1)(*b*), 187(1)(*a*)(ii) [rep. & sub. 1993, c. 40, s. 7], (1.3), 189, 190, 193, 196.

*Regulation of Investigatory Powers Act 2000* (U.K.), 2000, c. 23, ss. 17, 18.

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1).

*Supreme Court Rules*, B.C. Reg. 310/76, r. 26(11).

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APPEAL from a judgment of the Quebec Court of Appeal (Morin, Rochon and Vézina JJ.A.), 2012 QCCA 2265, [2012] AZ-50922387, [2012] J.Q. no 16661 (QL), 2012 CarswellQue 13421, refusing leave to appeal a decision of Bélanger J., 2012 QCCS 2954, [2012] AZ-50869641, [2012] J.Q. no 6264 (QL), 2012 CarswellQue 6715. Appeal dismissed, Abella J. dissenting.

APPEAL from a judgment of the Quebec Court of Appeal (Morin, Rochon and Vézina JJ.A.), 2012 QCCA 2266, [2012] AZ-50922388, [2012] J.Q. no 16662 (QL), 2012 CarswellQue 13424, refusing leave to appeal a decision of Bélanger J., 2012 QCCS 2954, [2012] AZ-50869641, [2012] J.Q. no 6264 (QL), 2012 CarswellQue 6715. Appeal dismissed, Abella J. dissenting.

Billy Katelanos, Paule Hamelin and *Guy Régimbald*, for the appellant Imperial Oil.

Jean-Philippe Groleau, Louis-Martin O’Neill, Louis Belleau, Julie Chenette, Sylvain Lussier, Elizabeth Meloche, Sidney Elbaz, Rachel April Giguère, Marie-Geneviève Masson, Pascale Cloutier and Fadi Amine, for the appellants Couche-Tard Inc. et al.

Louis P. Bélanger and Julie Girard, for the appellant Ultramar Ltd.

Pierre LeBel, Guy Paquette, Nicolas Guimond and Claudia Lalancette, for the respondents Simon Jacques et al.

Dominique A. Jobin, Patricia Blair, Émilie-Annick Landry-Therriault and Jean-Vincent Lacroix, for the respondent the Attorney General of Quebec.

François Lacasse and Stéphane Hould, for the respondent the Director of Public Prosecutions of Canada.

Deborah Calderwood and Megan Stephens, for the intervener the Attorney General of Ontario.

English version of the judgment of LeBel, Rothstein, Cromwell, Moldaver and Wagner JJ. delivered by

LeBel and Wagner JJ. —

1. Introduction
2. The question raised by the appeals before the Court is whether a party to a civil proceeding can request the disclosure of recordings of private communications intercepted by the state in the course of a criminal investigation.
3. Origin of the Case
4. In the early summer of 2004, the Competition Bureau of Canada began an investigation (“the Octane investigation”) into allegations of a conspiracy to fix gasoline pump prices in certain regions of Quebec. To carry out the investigation, the Competition Bureau obtained from the Court of Québec, under Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), seven judicial authorizations that enabled it to intercept and record more than 220,000 private communications.
5. In 2008, as a result of the Octane investigation, a series of charges were laid against 13 natural persons and 11 legal persons. The Crown alleged that they had conspired to fix pump prices in several cities in the following regions: Estrie, Chaudière-Appalaches and Centre-du-Québec. In July 2010 and September 2012, other charges for the same offences were laid against another 30 persons, bringing the total number of accused to 54. Some of the appellants in this Court were or still are among the accused.
6. In parallel with the criminal proceedings, the respondents Simon Jacques, Marcel Lafontaine and Automobile Protection Association (“Jacques et al.”) instituted a class action in the Quebec Superior Court against a number of persons, including the appellants, alleging that they had breached the duties imposed on them by art. 1457 of the *Civil Code of Québec* (“*C.C.Q.*”) and s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, by engaging in anti-competitive practices. On November 30, 2009, the Superior Court authorized the bringing of the class action (*Jacques v.* *Petro-Canada*, 2009 QCCS 5603 (CanLII)), which would subsequently be amended.
7. On December 8, 2011, in support of their action, the respondents filed a motion for the disclosure of documents under art. 402 of the *Code of Civil Procedure*, CQLR, c. C-25 (“*C.C.P.*”). They requested that the federal Director of Public Prosecutions (“DPP”) and the Competition Bureau disclose to them all the private communications that had been intercepted in the course of the Octane investigation. Shortly before the motion was heard, the respondents narrowed its scope, limiting it to the recordings that had already been disclosed to the accused in the parallel criminal proceedings. The appellants contested the motion.
8. Judicial History
   1. Decision of the Superior Court (2012 QCCS 2954 (CanLII))
9. On June 28, 2012, Bélanger J., as she then was, granted the respondents’ motion. She ordered that the Competition Bureau and the DPP disclose the requested recordings solely to the lawyers and experts participating in the civil proceedings, and that they screen the recordings to protect the privacy of [translation] “third parties having nothing whatsoever to do with the proceedings” (para. 98).
10. In support of her decision, Bélanger J. began by noting that the courts have the power to order the disclosure of evidence in the possession of a third party as long as it is relevant (arts. 402 and 1045 *C.C.P.*). However, that power is limited if the evidence in question is subject to immunity from disclosure. Belanger J. found that no such immunity applies in this case. Contrary to what the appellants were arguing, neither the *Competition Act* nor the *Criminal Code* provides for one. Section 29 of the *Competition Act* expressly provides that evidence obtained may be disclosed “for the purposes of the administration or enforcement” of that Act, which is what was at issue in this case. And under s. 193(2)(*a*) *Cr. C.*, a person may disclose a private communication in the course of or for the purpose of giving evidence in any civil proceedings. In this regard, Bélanger J. stated that this Court’s decision in *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3, does not limit the application of s. 193(2)(*a*) to situations in which the plaintiff in the civil proceedings is also the “target” of the wiretap. As a result, there was no impediment to disclosing the wiretap information in the case at bar.
11. Bélanger J. then stated that, because of the exceptional nature of the interception of private communications, the disclosure of such information must be subject to proper controls. Relying on this Court’s decision in *Glegg v.* *Smith & Nephew Inc.*, 2005 SCC 31, [2005] 1 S.C.R. 724, she indicated that the courts have the powers they need to control the disclosure process and the scope of the disclosure. In her view, the right of access to information obtained from wiretaps must be weighed so as to strike an appropriate balance between the rights of the parties and ensure the proper administration of justice.
12. After listing the various factors to be considered in this weighing exercise, Bélanger J. concluded that the motion should be granted except for communications involving [translation] “third parties having nothing whatsoever to do with the proceedings” (para. 98). Various factors weighed in favour of disclosing the evidence in this case, including the principles of expeditious conduct of proceedings and equality of the parties, the importance and reliability of the audio evidence in the search for truth, and the low risk of a violation of the rights to privacy and to a fair trial that were protected by the implied duty of confidentiality and by the terms of the order. However, the disclosure was to be limited to the lawyers and experts participating in the civil proceedings in order to avoid influencing the conduct of the criminal cases.
13. Belanger J. also briefly discussed, and rejected, the alternative argument that s. 193 *Cr. C.* was of no force or effect. She noted that the disclosure order was based not on that section, but on the *Competition Act* and the *Code of Civil Procedure*. The application of s. 193 *Cr. C.* therefore did not result in an infringement of s. 8 of the *Canadian Charter of Rights and Freedoms* or s. 2(*e*) of the *Canadian Bill of Rights*, R.S.C. 1985, App. III.
14. Finally, regarding the appellant Imperial Oil, Bélanger J. found that the fact that it was not involved in the criminal proceedings did not change its status for the purposes of the motion. It was not a third party to the civil proceedings, so it had the same rights and obligations as its co-defendants. As a result, the intercepted communications had to be disclosed if they were relevant. In any event, Bélanger J. added, Imperial Oil could object to the production of the evidence, if need be, at the proper time.
15. In the end, Bélanger J. ordered that the communications intercepted in the course of the Octane investigation that had already been disclosed to the accused in the criminal proceedings be disclosed to the lawyers and experts participating in the civil proceedings. These communications would have to be screened, however, to protect the privacy rights of third parties having nothing whatsoever to do with the proceedings.
    1. Decisions of the Court of Appeal (2012 QCCA 2265 (CanLII) and 2012 QCCA 2266 (CanLII))
16. In two separate judgments, Morin, Rochon and Vézina JJ.A. of the Court of Appeal declined to review the merits of the motion judge’s decision, finding that art. 29 *C.C.P.*, which provides for appeals from interlocutory decisions, did not apply in this case. Moreover, they noted, the courts have consistently held that a judgment dismissing an objection to evidence may not in principle be appealed, and the impugned order, which was based on the *Code of Civil Procedure*, the *Criminal Code* and the *Competition Act*, had been made at a stage prior to the presentation of evidence. The Court of Appeal accordingly dismissed the motions for leave to appeal.
17. Issues and Positions of the Parties
    1. Issues
18. The appeals before this Court raise two issues. First, the Court must rule on the validity of an order, made in the course of civil proceedings, for disclosure of a series of communications that had been intercepted for the purposes of a criminal investigation. More specifically, the Court must decide whether there is any reason why the communications intercepted by the state in the course of the Octane investigation should not be disclosed to the parties to the civil proceedings. Second, the Court must rule on the constitutionality of art. 402 *C.C.P.*, on which the motion judge’s order was based. In this regard, the Chief Justice stated the following question on September 23, 2013:

Does art. 402 of the *Code of Civil Procedure* . . . apply constitutionally having regard to the legislative authority of Parliament under s. 91(27) of the *Constitution Act, 1867*?

1. In the alternative, the appellants ask the Court to decide whether the Court of Appeal erred in refusing to grant them leave to appeal Bélanger J.’s decision. Since this Court has jurisdiction to hear the appeal on the merits under its enabling legislation (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1)), we are of the opinion that it is not necessary to answer this question (see H. S. Brown, *Supreme Court of Canada Practice 2014* (2013), at pp. 83-84).
   1. Positions of the Parties
2. The appellants generally argue that disclosure of the intercepted private communications would be inconsistent with the provisions of the *Criminal Code* and the *Competition Act* and that, as a result, art. 402 *C.C.P.* cannot serve as a basis for their disclosure.
3. The appellants Couche-Tard et al.state, first, that electronic surveillance is the most serious violation of the right to privacy and that such a violation is exacerbated if the recording is subsequently disclosed. According to them, s. 193 *Cr. C.* lays down a rule of strict confidentiality that is subject to a few exceptions, listed exhaustively in s. 193(2) and (3). In their view, the purpose of all these exceptions is to fight crime, which is the government objective that justified interception in the first place. Second, according to Couche-Tard et al., an interpretation consistent with the modern approach to statutory interpretation and with this Court’s decision in *Michaud* leads necessarily to the conclusion that Part VI *Cr. C.* does not give private litigants a right of access to information from wiretaps. Finally, the words of s. 29 of the *Competition Act* confirm the confidential nature of wiretap information and do not permit its disclosure.
4. As for the appellant Imperial Oil, it submits that the motion of the respondents Jacques *et al.* constitutes an unlawful application for authorization to intercept private communications that would enable them to put together evidence they could not have obtained otherwise. The class action based on art. 1457 *C.C.Q.* and s. 36 of the *Competition Act* is civil in nature. Its purpose is to obtain reparation for pecuniary damage, not to suppress crime as is the case with Part VI *Cr. C.* Moreover, Imperial Oil argues that s. 193(2)(*a*) applies only to parties that are lawfully in possession of intercepted private communications, which means that Part VI *Cr. C.* cannot have the purpose or effect of giving a party to civil proceedings a right of access to private communications intercepted by the state. Imperial Oil also argues that it is an “innocent person”, because no criminal charges have been laid against it. It adds that the public interest in protecting the innocent may preclude access to evidence in the context of civil proceedings. Finally, it submits that ss. 36(2) and 29 of the *Competition Act* cannot serve as a basis for compelling the Competition Bureau to disclose the wiretap information.
5. Generally speaking, the respondents counter that no rule of federal law prohibits the disclosure of intercepted communications that are considered relevant under provincial law. In this regard, the Attorney General of Quebec (“AGQ”) and the DPP, who are also respondents, essentially support the position taken by the respondents Jacques et al.However, the intervener Attorney General of Ontario (“AGO”) stresses the importance of regulating and controlling the disclosure process and the scope of any disclosure.
6. The respondents Jacques et al.note that Part VI *Cr. C.* protects privacy, but also provides that one’s privacy can be invaded if the invasion serves the public interest in ensuring that justice is done. In their view, although communications may be intercepted only in pursuit of the purpose of fighting crime, intercepted communications may be disclosed in a wider range of circumstances that are already specified in the *Criminal Code*. Moreover, they argue that s. 193(2)(*a*) *Cr. C.* and s. 29 of the *Competition Act* are not the source of a right to disclosure of wiretap information. Rather, the right in the instant case is provided for in art. 402 *C.C.P.* As to the violation relied on by the appellants, the respondents Jacques et al.state that action has been taken to limit disclosure and to preclude premature or unnecessary disclosure. Finally, concerning Imperial Oil’s argument that it is an innocent third party, they submit that the Superior Court did not err in refusing to grant it that status. As Bélanger J. stated, the third party concept must be interpreted in the context of the civil proceedings in which the disclosure of the documents is sought.
7. The DPP submits that, if interpreted applying the modern approach to statutory construction, s. 193(2)(*a*) *Cr. C.* allows for the disclosure of private communications to a litigant for the purpose of giving evidence in civil proceedings. He adds that s. 29 of the *Competition Act* does not preclude the disclosure of such communications either. Moreover, he considers it wrong to liken the disclosure of a private communication to a second interception under Part VI *Cr. C.*: interception and disclosure are distinct concepts. The DPP responds to the arguments of the appellant Imperial Oil by stating that, even if Imperial Oil could be considered an “innocent third party”, which is not the case, that would not make the exemption provided for in s. 193(2)(*a*) inapplicable, but would merely be one factor to consider in deciding whether to order disclosure. The DPP further notes that s. 193(2)(*a*) does not differentiate between an intercepted private communication that involves an “innocent” person and one that does not. Nor does the relevance of a private communication depend on the status of any of those involved in the communication.
8. The AGQ agrees with the DPP and the other respondents that a court hearing a civil case can authorize the disclosure of wiretap evidence. Article 402 *C.C.P.* allows this at the pretrial stage as long as the evidence is relevant and furthers the truth-seeking process. However, the AGQ points out that such a disclosure remains subject to the discretion of the court, which will determine the extent and conditions of the disclosure by considering the various interests at stake. Regarding s. 193(2)(*a*), the AGQ considers the interpretation proposed by the appellants to be unduly narrow. Although the interception of private communications must serve the purpose of fighting crime, the same is not true of the subsequent disclosure of information resulting from that interception. Furthermore, the AGQ submits that the motion judge’s order struck an appropriate balance between the right to privacy and the parties’ right to a fair trial. It also ensured proportionality between the purposes of the statutory provision and the protection of the values of the Canadian *Charter* and the *Charter of human rights and freedoms*, CQLR, c. C-12. Finally, the AGQ asserts that Bélanger J. was right to find that Imperial Oil is not an innocent third party and therefore does not have more rights than its co-defendants.
9. The AGO proposes a conservative interpretation of s. 193(2)(*a*) *Cr. C.* that takes into account not only the purpose of Part VI, but also the need for consistency with other important imperatives, including the search for truth. Section 193(2)(*a*) provides for the possibility of disclosing, at the exploratory stage of civil proceedings, communications intercepted by the state. However, the disclosure must be limited to situations contemplated in applicable legislation and common law rules, interpreted in a manner consistent with Part VI. Where intercepted communications are in the possession of a party to the proceedings — such as the defendants in this case who have also been charged in the criminal proceedings — the request for disclosure should be made directly to that party and should take place within the framework established by the Ontario Court of Appeal in *P. (D.) v. Wagg* (2004), 71 O.R. (3d) 229, in 2004. Where the state is in sole possession of the intercepted communications, on the other hand, the burden of justifying the application for disclosure should be much heavier.
10. Analysis
    1. Disclosure of Evidence at the Exploratory Stage
11. Nearly 20 years ago, Cory J. observed that “[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth” (*R*. *v.* *Nikolovski*, [1996] 3 S.C.R. 1197, at para. 13). Although the parallel objectives of proportionality and efficiency have become increasingly important in the civil procedure context, seeking the truth remains the cardinal principle in civil proceedings (see P. Tessier, “La vérité et la justice” (1988), 19 *R.G.D.* 29, at p. 32; C. Marseille, *La règle de la pertinence en droit de la preuve civile québécois* (2004), at p. 3). Informed by this objective, the rules of the law of evidence in civil matters allow judges “to find out the truth, and to do justice according to law” (*Frenette* *v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, at p. 666, quoting *Jones* *v.* *National Coal Board*, [1957] 2 Q.B. 55 (C.A.), at p. 63).
12. Although the power of judges to intervene in the conduct of civil proceedings has become increasingly broad, judges generally do not play an active part in the search for truth (L. Ducharme and C.-M. Panaccio, *L’administration de la preuve* (4th ed. 2010), at p. 7; *Technologie Labtronix Inc.* *v. Technologie Micro Contrôle Inc.*, [1998] R.J.Q. 2312 (C.A.), at p. 2325). In an accusatory and adversarial system, the delicate task of bringing the truth to light falls first and foremost to the parties (see art. 2803 *C.C.Q.*; arts. 76 and 77 *C.C.P.*). In this context in which the objective of seeking the truth remains the priority, the Quebec legislature has established general rules of evidence to govern and facilitate this process, which remains under the control of the parties (see L. Ducharme, “Rapports canadiens — première partie: la vérité et la législation sur la procédure civile en droit québécois”, in *Travaux de l’Association Henri Capitant des amis de la culture juridique française*, vol. 38, *La vérité et le droit — Journées canadiennes* (1987), 657).
13. The pre-trial “exploratory” stage, which is a key time for this search in court for the truth, facilitates the disclosure of evidence that might enable the parties to establish the truth of the facts they allege (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 485 and 493; J.-L. Baudouin, *Secret professionnel et droit au secret dans le droit de la preuve: Étude de Droit Québécois comparé au Droit Français et à la Common-Law* (1965), at p. 173; see also *Blaikie* *v.* *Commission des valeurs mobilières du Québec*, [1990] R.D.J. 473, at pp. 476-77). This stage enables each of the parties [translation] “to be better informed of the facts of the case and, more specifically, of the opposite party’s evidence” (Ducharme and Panaccio, at p. 365). In the early 2000s, the committee established to reform Quebec civil procedure gave a more precise description of the “communication of exhibits” stage, stating that it [translation] “favours the transparency of proceedings and the accountability of parties and counsel. It also favours admissions, allows the issues to be defined quickly and facilitates transactions” (Civil Procedure Review Committee, D. Ferland (Chair), *Rapport du Comité de révision de la procédure civile: une nouvelle culture judiciaire* (2001), at p. 138; see also *Frenette*, at pp. 679-80; *Glegg*, at para. 22).
14. The Quebec legislature, aware of the importance of the exploratory stage in the civil process, had already established a framework for it by enacting a series of rules of general application that empower judges to order the disclosure of documents relating to the issues between the parties. It is these rules, and not, as the appellants argue, the various federal statutes on which they rely, that the parties can use to request the disclosure of documents. In this sense, they form the basis for the “right of access” to information. The rules, which are now codified in c. III of Title V of the *Code of Civil Procedure*, include art. 402, the first paragraph of which reads as follows:

**402.** If, after defence filed, it appears from the record that a document relating to the issues between the parties is in the possession of a third party, he may, upon summons authorized by the court, be ordered to give communication of it to the parties, unless he shows cause why he should not do so.

1. The courts have given this article a large and liberal interpretation (Royer and Lavallée, at pp. 487-89; *Autorité des marchés financiers v.* *Panju*, 2008 QCCA 832, [2008] R.J.Q. 1233; *Fédération des infirmières et infirmiers du Québec v.* *Hôpital Laval*, 2006 QCCA 1345, [2006] R.J.Q. 2384; *Westfalia Surge Canada Co. v. Ferme Hamelon (JFD) et Fils*, 2005 QCCA 514 (CanLII)). As a result, although judges have great discretion in exercising their power to oversee the application of art. 402, they will generally favour disclosure. In this regard, Proulx J.A. noted in a leading Court of Appeal decision that, [translation] “at the stage of examination on discovery both before and after defence, the fullest possible disclosure of evidence should be favoured” (*Westinghouse Canada Inc. v. Arkwright Boston Manufacturers Mutual Insurance Co.*, [1993] R.J.Q. 2735 (“*Arkwright*”), at p. 2741; see also *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, at para. 60; *Frenette*, at p. 680; *Communauté urbaine de Montréal v. Chubb du Canada compagnie d’assurances*, [1998] R.J.Q. 759 (“*Chubb*”), at p. 764). With respect to the exploratory stage, these words still seem relevant.
2. Although the right to disclosure granted to each of the parties to a civil proceeding must be understood broadly, it is nevertheless not unlimited. First, as we will see below, the scope of disclosure must sometimes be limited to avoid harming the interests of third parties. Second, it should be mentioned that under art. 402, para. 1 *C.C.P.*, the court may refuse to order a third party to disclose documents in his or her possession if that party “shows cause why he should not do so”. In exercising its discretion, the court may consider, *inter alia*, 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 that flows from the *Charter of human rights and freedoms* (s. 5) and the *Civil Code of Québec* (arts. 35 and 36).
3. Thus, disclosure can be objected to if the documents sought in the motion are not relevant to the issues between the parties (D. Ferland and B. Emery, *Précis de procédure civile du Québec* (4th ed. 2003), vol. 1, at p. 629). Although the courts seem to be more cautious when assessing the relevance of confidential documents, the concept of relevance is generally interpreted broadly at the exploratory stage of the proceedings (*Glegg*, at para. 23; *Kruger Inc.* *v.* *Kruger*, [1987] R.D.J. 11 (C.A.), at p. 17; *Industries GDS inc.* *v.* *Carbotech inc.*, 2005 QCCA 655 (CanLII); see also Royer and Lavallée, at pp. 490-91; S. Grammond, “La justice secrète: information confidentielle et procès civil” (1996), 56 *R. du B.* 437, at pp. 457-58). To be relevant, the requested document must relate to the issues between the parties, be useful and be likely to contribute to resolving the issues (*Glegg*, at para. 23; *Arkwright*, at p. 2741; *Chubb*, at p. 762; *Westfalia Surge Canada Co.*; *Autorité des marchés financiers*; *Fédération des infirmières et infirmiers du Québec*).
4. This relevance requirement ensures that the parties do not conduct “fishing expeditions”. It also ensures that the conduct of the proceedings is not delayed, complicated or even jeopardized by the introduction of evidence that does not assist in establishing the rights being claimed (see Royer and Lavallée, at p. 487; Marseille, at pp. 1 and 21). In this sense, the relevance rule is a procedural balancing rule that ensures the efficiency of the judicial process while facilitating the search for truth.
5. In the instant case, Bélanger J. found that the evidence requested by the respondents was relevant. There is nothing in the record to cast doubt on that finding. It is clear that the recordings in question, whether transcribed or not, are indeed “document[s]” within the meaning of art. 402 *C.C.P.* (Ducharme and Panaccio, at pp. 428 and 455; see also *Corporation de financement commercial Transamérica Canada v.* *Beaudoin*, [1995] R.D.J. 633 (C.A.)). Moreover, and particularly to the extent that the plaintiffs in the action in the instant case are trying to show that there was collusion among the defendants, there is every reason to believe that the recordings sought in the motion will be useful for the conduct of the proceedings.
6. Under art. 402 *C.C.P.*, an objection to disclosure can also be based on an immunity from disclosure that is either provided for in legislation or established by the courts (see Ducharme and Panaccio, at pp. 426-27; *Union Canadienne, compagnie d’assurance* *v.* *St-Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340, at para. 21; *Goulet* *v.* *Lussier*, [1989] R.J.Q. 2085 (C.A.); see also *M. (A.)* *v.* *Ryan*, [1997] 1 S.C.R. 157; *R. v.* *Corbett*, [1988] 1 S.C.R. 670; *R.* *v.* *Seaboyer*, [1991] 2 S.C.R. 577). The appellants argue that such exceptions exist under the *Competition Act* and the *Criminal Code*. For the reasons that follow, we are not persuaded by this argument.
   1. The Provisions and Principles Relied On by the Appellants Are Not Valid Grounds for Objecting to Disclosure of the Recordings
7. The appellants submit that disclosure is precluded by ss. 29 and 36 of the *Competition Act*, and by s. 193 *Cr. C.* The appellant Imperial Oil adds that its “innocent third party” status prohibits any disclosure of recordings about it. We will now consider these various grounds for objecting to disclosure of the requested information.
   * 1. *Competition Act*
8. The appellants argue that s. 29 of the *Competition Act* confirms that the recordings of intercepted private communications are confidential, and that this section cannot be applied to require the Competition Bureau to disclose the results of its electronic surveillance. They add that s. 36 creates no right to disclosure. Finally, according to the appellant Imperial Oil, although s. 36(2) provides that evidence given in criminal proceedings that resulted in conviction can be evidence in an action under s. 36, Bélanger J.’s order should have drawn a distinction between the defendants in the civil action that had been convicted in the criminal proceedings and those that had not been.
9. These arguments must fail. As we explained above, disclosure of the intercepted private communications was ordered not under s. 36 of the *Competition Act* but under art. 402 *C.C.P.* As for s. 29, it provides for confidentiality of the Competition Bureau’s record of investigation, and in particular of the types of information referred to in s. 29(1)(*a*) to (*e*):

**29.** (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

(*a*) the identity of any person from whom information was obtained pursuant to this Act;

(*b*) any information obtained pursuant to section 11, 15, 16 or 114;

(*c*) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;

(*d*) any information obtained from a person requesting a certificate under section 102; or

(*e*) any information provided voluntarily pursuant to this Act.

1. Private communications intercepted under Part VI *Cr. C.* are not among the types of information referred to in s. 29(1)(*a*) to (*e*), so s. 29 does not prohibit their disclosure. In our opinion, the same is true of s. 193 *Cr. C.*
   * 1. *Criminal Code* — Section 193(2)(*a*)
2. Section 193 *Cr. C.* is found in Part VI, which is entitled “Invasion of Privacy”. This Court has already discussed Part VI in *Lyons v. The Queen*, [1984] 2 S.C.R. 633, *R. v. Duarte*, [1990] 1 S.C.R. 30, *Michaud*, *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 24, and, more recently, *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3 (particularly at paras. 22-31 and 73).
3. Part VI, which is a result of legislative amendments made to the *Criminal Code* in 1974 to fill a legal vacuum in privacy protection (*Tse*, at para. 24), “provides a scheme to protect private communications” (*TELUS*,at para. 3). Its purpose is “to offer broad protection for private communications from unauthorized interference by the state” (*ibid.*, at para. 35). Beyond this protection, the function of Part VI is to strike a balance between the protection of privacy and the suppression of crime: it “is directed both to protecting, and to invading, the privacy of the individual” (*Lyons*, at p. 652; *R. v. Welsh* (1977), 15 O.R. (2d) 1 (C.A.), at pp. 7-8). Understood in this way, Part VI is therefore intended to strike “a reasonable balance between the right of individuals to be left alone and the right of the state to intrude on privacy in the furtherance of its responsibilities for law enforcement” (*Duarte*, at p. 45).
4. The objective here is not to upset the balance made possible by Part VI by placing strict controls on the interception of private communications. Rather, it is to decide whether communications *already intercepted* by the state can be disclosed to individuals who are parties in civil trials in order to serve other legitimate purposes, such as truth-finding, procedural fairness and ensuring the efficiency of the judicial process.
   * + 1. Section 193: An Offence, Not a Disclosure Mechanism
5. Section 184(1) *Cr. C.*, which is found in Part VI, provides that every one who wilfully intercepts a private communication by means of any electro-magnetic, acoustic, mechanical or other device commits an offence. And s. 193(1) *Cr. C.* lays down the principle that it is unlawful to disclose or use an intercepted private communication without the consent of the originator or the intended recipient of the communication:

**193.** (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(*a*) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(*b*) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

The common purpose of these provisions is to protect the privacy of Canadians. As this Court stated in *Duarte*, it is hard to imagine a state activity that is more dangerous to privacy than electronic surveillance (p. 43).

1. At first glance, s. 193(1) *Cr. C.* therefore seems to preclude the disclosure of documents resulting from electronic surveillance. However, since the right to privacy is not absolute, the general prohibition provided for in s. 193(1) is tempered by a series of exemptions set out in s. 193(2) and (3). In particular, s. 193(2)(*a*) deals with the giving of evidence in civil and criminal proceedings:

(2) [Exemptions] Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

1. By excluding certain well-defined situations from the scope of the prohibition provided for in s. 193(1), these exemptions give a person the right to disclose recordings that otherwise could not be disclosed. But even though s. 193(2) and s. 193(3) allow for such a disclosure, they do not create an actual disclosure mechanism, let alone a right of access. The procedure for seeking *access* to the recordings must therefore derive from another source. Since this case involves civil proceedings brought under s. 36 of the *Competition Act* and art. 1457 *C.C.Q.*, that procedure is the one provided for in art. 402 *C.C.P.*
2. For this reason, *Michaud*, on which the appellants base their argument, can be distinguished from the case at bar. In that case, the Sûreté du Québec had placed Mr. Michaud under electronic surveillance because it suspected that he had disclosed to the media certain confidential documents concerning the constitutional negotiations leading up to the Charlottetown Accord. In the end, however, no criminal charges had been laid against him. Hoping to pursue an action in damages for an unlawful search, Mr. Michaud applied under s. 187(1)(*a*)(ii) (now s. 187(1.3)) *Cr. C.* for disclosure of the sealed packet containing the documents that had been filed in support of the application for judicial authorization. He also applied for disclosure of the recordings themselves. Section 187(1)(*a*)(ii) gave *accused persons* automatic access to the sealed packet in criminal proceedings, and the Court had to decide whether a target of electronic surveillance against whom criminal charges had not been laid was entitled to that same automatic access.
3. A majority of the Court held that a non-accused target could not claim automatic access to the sealed packet, but would have to make a preliminary showing that indicated that the initial authorization had been obtained in an unlawful manner. The Court added that, “outside a criminal proceeding, the *Code* does not provide a former surveillance target with any avenue for disclosure of the recording materials” (para. 62). The appellants rely heavily on this passage. However, unlike in the instant case, Mr. Michaud had not yet instituted a civil action when he filed his motion under s. 187(1)(*a*)(ii) *Cr. C.* Because his request was therefore based solely on the *Criminal Code*, which grants a right of access to wiretap information only in a criminal proceeding, there was no mechanism available to a court to order the requested disclosure. Far from absolutely ruling out the possibility of disclosure, however, the Court continued its analysis, stating that the recordings could be disclosed in an action for damages based on the *Charter* if they were *relevant* to determining the extent of the damage suffered by the target (*Michaud*, at paras. 63-65). In light of the context of that decision, it is of limited relevance to the case at bar.
4. As we explained above, art. 402 *C.C.P.* allows *prima facie* for access to wiretap information. Given the general prohibition laid down in s. 193(1), however, the question becomes whether one of the exemptions provided for in s. 193(2) applies in the instant case. More specifically, the respondents submit that s. 193(2)(*a*) allows for the disclosure of recordings of intercepted private communications without the consent of the originator of the communications or the person intended by the originator to receive them. They are right. The exemption set out in s. 193(2)(*a*) empowers a person who is in possession of such recordings to disclose them. However, the disclosure is made in the manner and to the extent provided for in the court order authorizing the disclosure.
   * + 1. The Exemption Provided for in Section 193(2)(a) Applies in This Case
5. The modern approach to statutory interpretation requires that the words of an Act be interpreted “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, reproduced in R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1). As we will see below, the ordinary sense of the words of s. 193(2)(*a*), the context of that provision and its object lead to the conclusion that the exemption applies in this case.
   * + - 1. Sense of the Words “For the Purpose of Giving Evidence in Any Civil . . . Proceedings”
6. Section 193(2)(*a*) provides that a disclosure is not an offence under s. 193(1) if it is made “in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person [who makes the disclosure] may be required to give evidence on oath”. “Civil proceedings”, whether in a traditional form or not, always include an exploratory stage. The word “purpose” means “something to be attained; a thing intended” (*The Canadian Oxford Dictionary* (2nd ed. 2004), at p. 1256), or “[a]n objective, goal, or end” (*Black’s Law Dictionary* (9th ed. 2009), at p. 1356). The word “*fin*” used in the French version is to the same effect. In this context, if Parliament had intended that the exemption would apply only at the time evidence is given, as the appellants argue, then it would not have included the words “or for the purpose”. Since it did include those words, we must assume that they are not redundant, must avoid depriving them of meaningful effect, or “effectivity”, and must recognize that they reflect an intention to give the exemption a generous scope that encompasses the exploratory stage of civil proceedings (on the rule of effectivity, see P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 295; *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Centre Ltd.*, [1973] S.C.R. 596, at p. 603; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 53).
7. In the alternative, the appellants argue that the words “for the purpose of giving evidence” refer only to incidental disclosure, that is, disclosure that takes place during the proceedings in order, for example, to have a witness identify recorded voices. This interpretation overlooks the fact that the incidental disclosure referred to by the appellants is, as we will see below, already covered by s. 193(3). Construing s. 193(2)(*a*) in this manner would therefore deprive s. 193(3) of meaningful effect, contrary to principles of interpretation that have long been recognized by this Court (see Côté, at p. 295).
8. This analysis of the language of s. 193(2)(*a*) *Cr. C.* satisfies us that wiretap information may be disclosed at the exploratory stage of any civil proceeding. As we have seen, the purpose of this stage is essentially to prepare for the hearing of the case. The documents requested at this stage may very well be requested for the purpose of testifying at the hearing. In the instant case, for example, it is easy to imagine counsel for the respondents wanting to examine a representative of the state, a third party in possession of recordings of intercepted communications, in order to meet the conditions for admission of such physical evidence.
9. We accordingly conclude that s. 193(2)(*a*) *Cr. C.* applies in this case. Nothing in its words justifies limiting its application to the time when evidence is being given. An analysis of the provision’s object and context admits of no other conclusion.
   * + - 1. Object and Context
10. In keeping with the general purpose of Part VI, the specific objective of s. 193 is to prevent the unauthorized disclosure of private communications. Despite its importance, this objective is not absolute. It must sometimes yield to other purposes to which Parliament has chosen to give priority (see *Lyons*, at p. 652). The exemption provided for in s. 193(2)(*a*) is the best example of this. According to the AGQ, the object of s. 193(2)(*a*) is [translation] “to ensure that courts of competent jurisdiction will have access to all information relevant to the proceedings before them, in a manner consistent with established rules of procedure” (R.F. AGQ, at para. 108). In our opinion, this view is consistent with the context of this provision.

a. Other Exemptions Set Out in Section 193(2)

1. Where context is concerned, an analysis of all the exemptions set out in s. 193(2) is relevant insofar as it helps determine the overall objective of the provision in a coherent manner. The appellants argue that all these exemptions have to do with fighting crime and that s. 193(2)(*a*) should therefore be interpreted in light of that objective. With respect, we disagree.
2. It is true that most of the exemptions set out in s. 193(2) relate to the fight against crime. This is the case for para. (2)(*b*) (disclosure in the course of or for the purpose of any criminal investigation), para. (2)(*c*) (disclosure in giving notice or furnishing further particulars under s. 189 or 190 *Cr. C.* in order to have intercepted communications admitted into evidence in criminal proceedings), and para. (2)(*e*) (disclosure to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences). Paragraph (2)(*f*) (disclosure to the Canadian Security Intelligence Service so it can perform its duties and functions under s. 12 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23) may also, generally speaking, be directed at fighting crime. However, not all the exemptions provided for in s. 193(2) have this as their purpose. For example, s. 193(2)(*d*) “exempts from criminal liability disclosures in the course of the operation of a communications or computer system, provided that the disclosure is necessarily incidental to the purposes which provide such operators with an exemption from the interception offence [provided for in s. 184(2)(*c*), (*d*) or (*e*)]” (*TELUS*, at para. 147, *per* Cromwell J., dissenting on another point). On its face, this paragraph does not have crime fighting as its objective.
3. Moreover, we consider it particularly important to point out that, unlike with paras. (*b*), (*c*), (*e*) and (*f*), a plain reading of which suffices to identify their objective, a more thorough analysis is required to identify the purpose of para. (*a*). Although the objective of fighting crime is apparent where recordings are requested “in the course of or for the purpose of giving evidence in any . . . criminal proceedings”, it seems difficult to arrive at the same interpretation if they are requested “in any civil . . . proceedings or in any other proceedings”. The fight against crime (in the strict sense of the term) primarily involves criminal investigations and proceedings. But if that had been the only function of para. (*a*), Parliament would have limited the codification to that possibility (as it did in the case of paras. (*b*) and (*e*)). Furthermore, Parliament adopted a much broader drafting style in it than in the other paragraphs. We therefore find it difficult to conclude that para. (*a*) has facilitating the fight against crime as its sole purpose.
4. In *TELUS*, this Court discussed the interpretation of the exemptions set out in s. 193. Comparing them to the exemptions relating to interception provided for in s. 184 *Cr. C.*, Cromwell J. (dissenting on another point) wrote the following:

The exemptions in s. 193 are far more permissive than those in s. 184, especially with respect to criminal investigations. Under s. 184, police can only intercept communications if they are authorized to do so (s. 184(2)(*b*)) or in certain exceptional circumstances (s. 184.4). By contrast, s. 193 includes broad exemptions that permit disclosure of intercepted communications in a range of circumstances including in the course of civil or criminal proceedings (s. 193(2)(*a*)), and “in the course of or for the purpose of any criminal investigation” (s. 193(2)(*b*)). [Emphasis added; para. 146.]

1. Thus, the language of s. 193(2)(*a*) requires that its objectives be defined broadly. It is clear that this provision does not apply solely to proceedings related to the fight against crime.

b. Section 193(3)

1. The appellants Couche-Tard et al.also argue that the interpretation given to s. 193(2)(*a*) *Cr. C.* by the courts below cannot be reconciled with s. 193(3), which reads as follows:

(3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(*a*).

1. In the appellants’ opinion, this subsection cannot be reconciled with the rest of the section unless the disclosure to which it refers occurs at the production of evidence stage. Since the evidence becomes public at that time as a result of the open court principle, there would, they submit, no longer be any reason to prohibit anyone from disclosing the content of evidence that is already known. On the contrary, they argue, it would [translation] “make no sense for Parliament to allow private litigants to publicly disclose wiretap information that has been disclosed to them solely in the context of the civil discovery process” (A.F. Couche-Tard et al., at para. 66).
2. This interpretation is wrong. First, it overlooks the possibility that Parliament in fact wished to avoid interfering with the open court principle by allowing, for that purpose, the disclosure of “the substance, meaning or purport” of a private communication that was, “prior to the disclosure, lawfully disclosed in the course of . . . giving evidence”. When interpreted in this way, the exemption would, for example, allow a journalist to disclose the substance of communications heard at a trial. Second, the appellants’ interpretation is unduly restrictive. It leaves out a series of specific possibilities. For example, an expert who is authorized during “civil proceedings” to listen to recordings of private communications disclosed “for the purpose of giving evidence” might have to “disclose” the content of the communications when giving evidence in court. Moreover, in the case at bar, counsel for the respondents will probably want to use the content of the recordings to cross-examine the appellants when they testify in court. In testifying, the appellants will be protected by the exemption set out in s. 193(3), since they will be disclosing that which “was, prior to the disclosure, lawfully disclosed . . . for the purpose of giving evidence”, as provided for in s. 193(2)(*a*).

c. History

1. The appellants also argue, on the basis of the previous versions of s. 193(2)(*a*), that this provision has never had the function of allowing litigants to obtain disclosure of wiretap information for the purpose of a civil proceeding. We see no merit in this argument either.
2. Section 178.2(2)(*a*) — the predecessor of s. 193(2)(*a*) — which was proclaimed in force in 1974, read as follows:

**178.2** . . .

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which he may be required to give evidence on oath where the private communication is admissible as evidence under section 178.16 or would be admissible under that section if it applied in respect of the proceedings;

1. Section 178.16 — to which s. 178.2(2)(*a*) referred— was enacted before the Canadian *Charter* came into force. This section established a rule that a communication intercepted by the state was, in principle, inadmissible as evidence against its originator or against the person intended to receive it unless it had been obtained lawfully or unless the persons in question consented to its being admitted:

**178.16** (1) A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

(*a*) the interception was lawfully made; or

(*b*) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.

1. The appellants, considering s. 178.2(2)(*a*) jointly with s. 178.16, submit that these provisions always governed the *production* of evidence, not its *disclosure*. According to this argument, since s. 178.16 required the state to prove that an interception was lawful at the admissibility stage, it should be concluded that Parliament’s intention was never that the exemption be used by litigants in private actions. It would have made no sense, in the appellants’ view, to impose a burden on the state to show that an interception of communications was lawful each time a litigant sought the disclosure of information resulting from such interceptions in a private action.
2. In our view, this interpretation is unduly narrow. First, concerning the possible burden imposed on the state, the appellants are overlooking the fact that, by allowing for the admission in evidence of an intercepted communication if one of the persons involved in the communication “expressly consented” to its being admitted (s. 178.16(1)(*b*)), Parliament had provided for a solution that relieved the state of any such burden. Second, although it is true that s. 178.16 had the function of determining whether evidence was admissible and could therefore be produced, it is wrong to argue that s. 178.2(2)(*a*) played the same role. The purpose of s. 178.2(2)(*a*) was [translation] “to grant immunity for disclosures made in the course of or for the purpose of any civil or criminal proceedings or any other proceedings” (D. A. Bellemare, *L’écoute électronique au Canada* (1981), at p. 153). Thus, the only difference between the former scheme and the current scheme is that disclosure could not be authorized without first either determining that the recording was lawful or obtaining the consent of one of the persons involved in the communication. It was therefore s. 178.16 that governed the production of evidence, not s. 178.2(2).
3. However, many subsections of s. 178.16 (which by then had become s. 189) were repealed in 1993 following the enactment of the Canadian *Charter*. As a result of that repeal, the admissibility in evidence of recordings of private communications would be governed by s. 24(2) of the *Charter* and the various applicable provincial statutes (see R. W. Hubbard, P. M. Brauti and S. K. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), vol. 1, at pp. 1-20 and 1-21; *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 10(1)). These legislative amendments thus removed from the *Criminal Code* the bulk of the process for determining whether the production of wiretap information in evidence is lawful.

d. Case Law

1. The case law and the academic literature support a broad interpretation of s. 193(2)(*a*) *Cr. C.* We will now discuss a few of the decisions on this subject.
2. One of these decisions is *Tide Shore Logging* *Ltd. v. Commonwealth Insurance Co.* (1979), 13 B.C.L.R. 316, which concerned an application for discovery of recordings under Rule 26(11) of the rules of procedure of the British Columbia Supreme Court (B.C. Reg. 310/76). The Royal Canadian Mounted Police (“RCMP”) had intercepted private communications of the principal shareholder of Tide Shore Logging in the course of a criminal investigation into a fire that was at the centre of civil proceedings between that company and its insurer. The insurer refused to compensate Tide Shore Logging, as it considered that the fire had been set deliberately. Counsel for the Attorney General of British Columbia, on behalf of the RCMP, did not object to disclosure of the recordings provided that the disclosure did not entail the commission of a crime. The court considered the offence now provided for in s. 193(1) and the exemption now set out in s. 193(2)(*a*). Although satisfied that such pre-trial disclosure did not fall within the words “in the course of giving evidence”, the court considered that it did fall within the phrase “for the purpose of giving evidence”. The court ordered the disclosure of the recordings, concluding that Parliament had clearly contemplated the use of intercepted communications in civil proceedings under provincial jurisdiction, and not only in civil proceedings over which Parliament itself had jurisdiction.
3. To the same effect, in a civil proceeding involving the state (*Ault v. Canada (Attorney General)* (2007), 88 O.R. (3d) 541), the Ontario Superior Court of Justice dismissed a motion to exclude recordings obtained by means of a wiretap warrant that the federal government wished to produce in evidence (paras. 31-32). The court also stated that the plaintiffs and the targets of the warrant — who objected to the evidence in part because it was being produced late — could have requested its disclosure on discovery under the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (para. 11). The court held that s. 193(2)(*a*) provided for the introduction in evidence, in civil proceedings, of wiretap information obtained previously in the course of a criminal investigation (para. 31).
4. More recently, in *Canada (Procureur général) v. Charbonneau*, 2012 QCCS 1701 (CanLII), the Quebec Superior Court considered a motion by the RCMP to quash a subpoena ordering it to disclose, among other things, private communications it had intercepted in the course of an investigation. The court found that there was no privilege or restriction that would preclude the RCMP from disclosing evidence from its investigation, including the intercepted communications, to the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry. In response to the RCMP’s argument that none of the exemptions set out in s. 193 *Cr. C.* applied in that case, the Superior Court reached the following conclusion:

[translation] The Court is well aware of the Supreme Court’s ruling in *Michaud*, to the effect that the regime set out at section 193 of the *Criminal Code* was enacted in an effort to “balance society’s interest in the detection of crime, particularly organized crime, with an individual’s right to personal privacy.” Nevertheless, the Court must conclude that, in the present case, section 193 allows the RCMP to provide the information requested to the Commission.

. . .

The RCMP alleges that the Commission’s work does not constitute an inquiry in a civil or criminal proceeding, seemingly wanting to limit the exemption to court proceedings. It fails to mention, however, that the exemption set out at section 193(2)(*a*) of the *Criminal Code* also applies to any other proceedings in which a person may be required to give evidence under oath. A commission of inquiry constitutes another proceeding for the purposes of this exception. [Emphasis deleted; paras. 34 and 36.]

1. In short, the courts have applied the exemption provided for in s. 193(2)(*a*) in contexts other than that of giving evidence at a trial, and in cases in which the state is not directly a party. Section 193(2)(*a*) has also been applied in the context of disciplinary hearings (for example, *Law Society of Upper Canada v. Canada (Attorney General)* (2008), 89 O.R. (3d) 209 (S.C.J.); *Re Board of Commissioners of Police for City of Thunder Bay and Sundell* (1984), 15 C.C.C. (3d) 574 (Ont. Div. Ct.)) and in youth protection cases (for example, *Children’s Aid Society of Thunder Bay (District) v. D. (S.)*, 2011 ONCJ 100, 2 R.F.L. (7th) 202).
2. The commentators agree that the exemption provided for in s. 193(2)(*a*) permits the disclosure in civil proceedings of private communications intercepted in the course of criminal investigations. For example, Hubbard, Brauti and Fenton state the following:

While wiretaps can only be authorized for criminal investigations, any evidence obtained pursuant to an authorization can be used in civil proceedings. There is nothing express in Part VI of the *Code* authorizing the use of wiretap evidence in civil proceedings because the *Code* focuses on criminal offences and procedure. However, s. 193, which creates an offence for disclosure of information intercepted by electronic devices, specifically exempts disclosing wiretap evidence “in the course of or for the purpose of giving evidence in any *civil* or criminal proceedings”. [Emphasis added; p. 6-40.6a.]

1. To the same effect, Bellemare, after reviewing the case law on this question, concludes that

[translation] disclosure can lawfully be made in the course of or for the purpose of any civil proceedings under provincial jurisdiction, just as in the course of or for the purpose of any proceedings under Parliament’s jurisdiction, as long as it meets the requirements of s. 178.20(2)(a) of the Criminal Code. [p. 156]

* + - * 1. Conclusion

1. We conclude from our analysis of the language, context and purpose and of the case law that s. 193(2)(*a*), which sets out an exception to the criminal offence provided for in s. 193(1), applies in the instant case. Bélanger J.’s decision was therefore correct in this regard.
   * 1. “Innocent Third Party” Status
2. In addition to supporting the position taken by its co-defendants, one of the appellants, Imperial Oil, argues that it has special status as an “innocent third party”, because it was not charged in the parallel criminal proceedings or “targeted” by the wiretap operation. It submits that this status precluded the motion judge from ordering the disclosure of recordings that involved it in any way. This argument is without merit.
3. In our opinion, it must be borne in mind that, although Imperial Oil is a third party in the parallel criminal proceedings, it has become a party to the civil proceedings. It therefore has the same rights and is subject to the same procedural rules as all the parties. As we mentioned above, the court must encourage the fullest possible disclosure of evidence at the exploratory stage unless a specific exception applies. It is only if there are reasons why he or she should not do so that the judge may refuse to order the disclosure.
4. From this perspective, Imperial Oil asserts that the public interest in protecting the privacy of innocent persons is sufficiently important to constitute a cause why it should not disclose the evidence contained in the recordings even though that evidence has been found to be relevant. In support of this assertion, it cites, *inter alia*, *Michaud*, *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, and *R. v. Durette*, [1994] 1 S.C.R. 469. According to the appellant, those cases show that the protection of the innocent must take precedence over the search for truth. It adds that the disclosure of recordings involving an innocent third party must therefore be denied.
5. We agree with the appellant that the impact of disclosure on the rights of innocent persons requires that care be taken in considering motions for disclosure. However, this rule of caution cannot constitute a cause why evidence should not be disclosed in all circumstances.
6. First, although we will not discuss the cases relied on by Imperial Oil, we must point out that, in the circumstances of the case at bar, the harm allegedly faced by Imperial Oil differs from the harm faced by the persons concerned in the cases it cites. In most of those cases, the contents of the communications could have been made public, but that is not a factor here. Bélanger J.’s order limits disclosure to the professionals participating in the proceedings. Second, it should not be forgotten that the protection of the innocent, and more specifically of their right to privacy, is not absolute. The scope of this protection depends on the specific circumstances of each case and must always be assessed in light of the various interests at stake (*MacIntyre*, at pp. 186-87; *Vickery* *v.* *Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671; *Durette*, at p. 495; *Phillips* *v. Vancouver Sun*, 2004 BCCA 14, 27 B.C.L.R. (4th) 27). In the instant case, since, as we will see, the potential harm has been considerably reduced by the measures taken by the judge to control the disclosure process and the scope of the disclosure, the search for truth must prevail.
   * 1. Conclusion
7. When all is said and done, therefore, there is no factual or legal impediment to disclosure of the documents requested by the respondents under art. 402 *C.C.P.* In our opinion, this suffices to dispose of the constitutional arguments. There is no basis for concluding that this provision of the *Code of Civil Procedure* is inconsistent with the provisions and principles relied on by the appellants. Moreover, it seems to us that such a conflict is implausible, if not impossible, given the scheme of art. 402, para. 1 *C.C.P.* itself. By giving judges the power to refuse to order disclosure where a barrier to disclosure is provided for in legislation or has been established by the courts, this paragraph already provides that, where necessary, the principle of disclosure it codifies will yield to any applicable federal provision that prohibits disclosure.
8. The fact that there is no impediment to disclosure does not dispose of the case, however. The interests at stake in a case such as this require us to consider the controls imposed on the disclosure process and the scope of the disclosure.
   1. Controls on Disclosure
9. The courts have always had a right to oversee and control the evidentiary process. They therefore have all the powers necessary for the exercise of such control (arts. 2, 20 and 46 *C.C.P.*; *Lac d’Amiante*, at paras. 36-37). These include the power to control the process of disclosing evidence and to set conditions for and limits on disclosure (art. 395 *C.C.P.*; *Glegg*, at paras. 29-30). Judges have great discretion in exercising this power at the exploratory stage (*Frenette*, at p. 685; Ferland and Emery, at p. 627; Ducharme and Panaccio, at p. 437). The appropriateness and the extent of such control therefore vary with the interests to be protected and the circumstances of each case.
10. A judge laying down conditions for the disclosure of private documents must consider and weigh the various interests involved. On the one hand, the judge must limit the potential for invasion of privacy and, on the other, he or she must avoid unduly limiting access to relevant documents so as to ensure that the proceedings remain fair, the search for truth is not obstructed and the proceedings are not unjustifiably delayed (see *Frenette*, at pp. 685-86). Where, as in the case at bar, the documents requested by a party result from a criminal investigation, the judge must also consider — in addition to the factors just mentioned — the impact of disclosure of the documents in question on the efficient conduct of the criminal proceedings and, if applicable, on the right of the accused to a fair trial. In light of the interest of society at large in these two principles, particular attention should be paid to them. In this regard, we wish to point out that these principles are sufficiently important that they could, although this is not a case in which they would, warrant the Crown’s intervening in a situation involving the disclosure of documents *in the possession of one of the parties* to a civil proceeding. They could be relied on by the Crown itself to object to the disclosure to other parties of documents it has already disclosed to an accused who is also a party to a civil proceeding, or to ask that specific conditions be imposed for disclosure. The courts, which have control over the entire proceeding, should then weigh the various interests at stake to decide whether to grant the disclosure being sought and, if so, what the extent of the disclosure should be.
11. At the exploratory stage of a proceeding, the right to privacy, the efficient conduct of criminal proceedings and the right to make full answer and defence are, to some degree, protected by the duty of confidentiality imposed on the parties, their counsel and their experts (see *Lac d’Amiante*; *Autorité des marchés financiers*, at para. 57; *Marché Lionel Coudry inc.* *v. Métro inc.*, 2004 CanLII 73143 (Que. C.A.), at para. 7; *Southam* *Inc.* *v. Landry*, 2003 CanLII 71970 (Que. C.A.), at para. 6). Despite its importance, however, this preventive measure will not always be enough. If necessary, judges have the powers they need to impose other conditions (*Glegg*, at para. 30). For example, a 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 this access by, for example, ordering that disclosure be made in a specific manner and, if necessary, at a specific time and place. And where appropriate, the judge can order that the information in a requested document be “screened” (Ducharme and Panaccio, at pp. 437-38).
12. In every case, the judge must, bearing in mind the proportionality principle that is inherent in art. 402 *C.C.P.* and is also spelled out in art. 4.2 *C.C.P.*, consider the financial and administrative impact of the conditions being imposed and how they will affect the general conduct of the proceedings. The judge must also consider the scope of the disclosure being ordered, although the number of documents sought in a motion is not in itself a ground for dismissing the motion (*Daishowa inc.* *v.* *Commission de la santé et de la sécurité du travail*, [1993] R.J.Q. 175 (Sup. Ct.), aff’d [1993] AZ-50072356; *S.M.* *v.* *S.G.*, [1986] R.D.J. 617 (C.A.)). Likewise, where a judge orders the person in possession of the documents to sort the information before disclosing it, the judge must also take the financial and administrative burden thus imposed on that third party into account. Combined with the relevance test, this factor will enable the judge to limit the scope of disclosure to that which is strictly necessary. A court hearing an application for disclosure can also consider the related costs and order that the applicant pay a reasonable amount in compensation to the person who is thus required to disclose documents in his or her possession.
13. Where the requested documents result from a criminal investigation, the judge can refuse to order disclosure if he or she is satisfied that even the strictest disclosure conditions would not be sufficient to ensure, *inter alia*, the efficient conduct of criminal proceedings, the protection of third-party rights or the right to a fair trial. In such exceptional situations, the judge will therefore have the power to deny an application for disclosure under art. 402 *C.C.P.* if, from a societal perspective, the prejudicial effect of the disclosure outweighs its potential benefits. In this context, a judge may not refuse to order disclosure solely because it is argued that fundamental rights were violated in obtaining the requested evidence. In such a case, it is not the disclosure but the admissibility of the evidence that can be contested under art. 2858 *C.C.Q.*, which provides that a court “shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute”.
14. In the instant case, Bélanger J.’s order is perfectly consistent with these principles. Its scope is limited so as to protect the right to privacy of all those whose communications were intercepted. The limits also ensure that disclosure of the information will not hinder the efficient conduct of the criminal proceedings or violate the right of the defendants still facing criminal charges to a fair trial. Finally, there is no indication that the order imposes an undue financial and administrative burden on the third party in question in this case.
15. Conclusion
16. For all these reasons, we are of the opinion that both appeals must be dismissed with costs.

The following are the reasons delivered by

1. The Chief Justice — I have read the reasons of my colleagues LeBel and Wagner JJ., and am in agreement with the conclusion that they reach in these appeals. However, assuming that my colleagues’ reasons can be read as characterizing s. 193(2)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, as empowering Canadian authorities to disclose intercepted private communications for use in civil proceedings (an assumption that I do not share), I must respectfully disagree.
2. In my view, the power to obtain disclosure of the intercepted private communications in the circumstances of this case arises solely from art. 402 of the *Code of Civil Procedure*, CQLR, c. C-25, not s. 193(2)(*a*). Section 193(2)(*a*) provides an exemption from the application of s. 193(1), the offence provision. Where the state is otherwise empowered or required to disclose intercepted private communications in civil proceedings — as in the case where a court orders disclosure pursuant to art. 402 — s. 193(2)(*a*) protects the authorities from criminal sanction.
3. I am otherwise in agreement with the reasons provided by LeBel and Wagner JJ. I would therefore dismiss the appeals.

The following are the reasons delivered by

1. Abella J. (dissenting) — “[O]ne can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance”. Those words were written by La Forest J. in *Duarte* in 1990.[[1]](#footnote-1) In reflecting on the threat to privacy from this extraordinary investigative technique, he said:

The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. [p. 44]

1. And in *R. v. Mills*, [1999] 3 S.C.R. 668, this Court held that “[p]rivacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged” (para. 108). See also *R. v. Commisso*, [1983] 2 S.C.R. 121, at pp. 134-35, *per* Dickson J., dissenting).
2. Our legal system has taken those admonitions to heart. Electronic surveillance can only be authorized in the limited circumstances set out in Part VI of the *Criminal Code*[[2]](#footnote-2) for the investigation of serious crimes, or under the *Canadian Security Intelligence Service Act*[[3]](#footnote-3) for the investigation of threats to national security.
3. Notably, it is not legally permissible in Canada to authorize electronic surveillance for the purpose of gathering evidence in civil proceedings.
4. The question in these appeals is whether intercepted private communications authorized as part of a criminal investigation can nevertheless be disclosed in the discovery process of a civil case. In my respectful view, such communications can only be disclosed in a civil case where they have already been made public in a criminal trial, or where the targets of the interception have either consented to the disclosure or otherwise waived their privacy interests. None of those exceptions makes an appearance in the scenario before us.
5. The trial judge ordered the disclosure of intercepted private communications to the plaintiffs’ lawyers and experts based on its relevance. She did so before any ruling had been made in the related criminal proceedings about the legality of the electronic surveillance or the admissibility of the intercepted communications. The order was made pursuant to art. 402 of the *Code of Civil Procedure*,[[4]](#footnote-4) which states:

**402.** If, after [a] defence [is] filed, it appears from the record that a document relating to the issues between the parties is in the possession of a third party, he may, upon summons authorized by the court, be ordered to give communication of it to the parties, unless he shows cause why he should not do so.

1. This provision gives significant discretion to a trial judge, but it does not give him or her *carte blanche* to order disclosure of communications protected by an almost impermeable legal coating like a privileged communication. In my view, evidence gathered through electronic surveillance is entitled to the same protection and, as a result, is not amenable to a balancing contest.
2. Cases dealing with solicitor-client privilege offer helpful guidance. In *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, for example, the relevance of the communications did not justify the disclosure of potentially privileged documents to opposing counsel. In other words, when communications are protected by privilege, they are not subject to a balancing exercise weighing their relevance against their immunity. They are protected *regardless* of relevance.
3. Such an approach to intercepted communications seems to me to have the added endorsement of the statutory fact that both the general right to privacy and the specific right not to have confidential information disclosed are expressly protected in Quebec’s *Charter of human rights and freedoms.*[[5]](#footnote-5) The discretion in art. 402 of the *Code of Civil Procedure* should therefore not be so interpreted as to extinguish the scrupulous protection for the non-disclosure of intercepted communications found in other parts of the law.
4. This brings us to the heightened protection for intercepted communications in Part VI of the *Criminal Code*.Section 193(1), found in Part VI, makes it an offence to disclose intercepted communications. The only exceptions are set out in ss. 193(2) and 193(3). Section 193(2)(*a*) is the relevant provision for our purposes:

**193.** . . .

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

1. Part VI recognizes the uniquely intrusive character of electronic surveillance by permitting state interception of private communications *only* if express safeguards are followed. Those safeguards include restrictions in the types of criminal offences for which authorization can be granted;[[6]](#footnote-6) the requirement that there be no other reasonable alternative method of investigating the crime in question;[[7]](#footnote-7) and the requirement that targets of an interception be notified of the interception within a defined period of time, enabling them to challenge the legality of the interception.[[8]](#footnote-8) Until a determination has been made as to the legality of a challenged interception, the communication is not admissible in a criminal proceeding.
2. This means that s. 193(2)(*a*) should not be interpreted in a way that overrides the privacy protections in Part VI. Section 193(2)(*a*) does not create a right to access intercepted communications. At the very least, it should not be available to pre-empt a judicial determination about the validity of an interception. Until those interceptions have been found, or are conceded to be lawful and admitted into evidence in a criminal proceeding, they retain their private character for all purposes and are not available to the public. If, on the other hand, they are found to be lawful and admissible and are in fact made public in those proceedings, they are rendered public for all purposes, including civil proceedings.
3. Using s. 193(2)(*a*) to permit litigants in a civil case to get disclosure of communications intercepted in the course of a criminal investigation before a challenged interception is found to be lawful, allows those litigants to benefit indirectly from an extraordinary investigative technique they are otherwise not legally entitled to. It seems to me to be ironic to say that communications sedulously protected from disclosure in the criminal justice system can somehow shed those protections by crossing over to the civil justice side of the street.
4. It is noteworthy too that in other jurisdictions, intercepted private communications can never be disclosed as part of civil litigation between private parties: *National Broadcasting Co. v. United States Department of Justice*, 735 F.2d 51 (2nd Cir. 1984); *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015 (8th Cir. 1993); C. S. Fishman and A. T. McKenna, *Wiretapping & Eavesdropping: Surveillance in the Internet Age* (3rd ed. (loose-leaf)), vol. 4, at § 41:69; *Regulation of Investigatory Powers Act 2000* (U.K.), 2000, c. 23, ss. 17 and 18.
5. The trial judge in this case ordered the disclosure of confidential intercepted private communications in a civil proceeding about the price of gasoline, undoubtedly an important issue, but hardly of sufficient public urgency to warrant the premature disclosure of private communications before their legality — and the public’s entitlement to their contents — has been judicially determined in the criminal proceedings.
6. I would allow the appeals.

*Appeals dismissed with costs,* Abella J. *dissenting.*

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1. *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 43. [↑](#footnote-ref-1)
2. R.S.C. 1985, c. C-46, s. 183, para. (*a*) of the definition of “offence”. [↑](#footnote-ref-2)
3. R.S.C. 1985, c. C-23, s. 21. [↑](#footnote-ref-3)
4. CQLR, c. C-25. [↑](#footnote-ref-4)
5. CQLR, c. C-12, ss. 5 and 9. [↑](#footnote-ref-5)
6. s. 183, para. (*a*) of the definition of “offence”. [↑](#footnote-ref-6)
7. s. 186(1)(*b*); *R. v. Araujo*, [2000] 2 S.C.R. 992. [↑](#footnote-ref-7)
8. s. 196. [↑](#footnote-ref-8)