CITATION: THE GLOBE AND MAIL AND OTHERS v. HMQ, 2013 ONSC #6836
COURT FILE NO.: M 248/13
M 259/13
DATE: 20131105

ONTARIO

SUPERIOR COURT OF JUSTICE
Toronto Region

B E T W E E N:	
THE GLOBE AND MAIL INC., CTV A DIVISION OF BELL MEDIA INC., CANADIAN BROADCASTING CORPORATION, SHAW TELEVISION LIMITED PARTNERSHIP, POSTMEDIA NETWORK INC., SUN MEDIA CORPORATION AND CANADIAN PRESS ENTERPRISES INC.	*P. M. Jacobsen & A. MacDonald*, for the applicants
Applicants	
- and -	
HER MAJESTY THE QUEEN	*D. Calderwood & J. Levy*, for the respondent
Respondent	
A N D B E T W E E N:	
TORONTO STAR NEWSPAPERS LIMITED	*R. Gilliland*, for the applicant
Applicant	
- and -	

HER MAJESTY THE QUEEN	)	*D. Calderwood & J. Levy*, for the respondent
Respondent	)	
	)	**HEARD:** November 1, 2013

NORDHEIMER J.:

[1] The applicants seek, by way of *certiorari*, to review and set aside the order of Justice Downes of the Ontario Court of Justice dated September 16, 2013, by which he declined to provide access to the applicants to an Information to Obtain ("ITO"). The ITO had earlier been sworn by an officer in support of an application for a search warrant under section 487 of the *Criminal Code* that was, on May 31, 2013, ordered sealed pursuant to section 487.3. The ITO in question includes extensive references to non-consensual interceptions of private communications that were obtained by police in the course of their investigation further to judicial authorizations granted under Part VI of the *Criminal Code*. Central to the determination of the issues raised by these applications is whether s. 193 of the *Criminal Code* provides a complete prohibition against the disclosure of those non-consensual interceptions subject only to the exceptions set out in s. 193(2). As was observed by the applications judge, there are important reasons to ensure that these matters are addressed without undue delay.

[2] I should make clear at the outset that the only issue being determined at this stage of these applications is whether s. 193 prohibits the disclosure of the ITO to the applicants. If it does not, whether the ITO should be disclosed, in whole or in part, and the timing of any disclosure are matters to be addressed at a later date.

Background

[3] The search warrants in issue were obtained as part of a large police investigation known as Project Traveller. The Project Traveller investigation involved not only the offence of murder but also weapons trafficking offences as well as other offences. As part of that investigation, the police obtained authorizations under Part VI of the *Criminal Code* permitting them to intercept the private communications of a number of people. The investigation eventually culminated in

the arrest of more than forty people. At the time of those arrests, the police executed a large number of search warrants at dozens of locations in Toronto. It is the basis upon which these search warrants were obtained that gives rise to the interest of the applicant media organizations.

[4] At the time that the search warrants were issued, the authorizing judge ordered that the material in support of the search warrants be sealed. That is not an uncommon order since the effectiveness of a search warrant will be greatly diminished if the subjects of the search learn in advance that a search is going to occur.

[5] After the arrests and after the search warrants had been executed, the applicants sought to set aside the sealing order and obtain a copy of the ITO used to obtain the search warrants.[1] In preparation for the argument of that application, the Crown provided a redacted copy of the ITO. The ITO is 119 pages long and contains 347 paragraphs. I am told that something in the order of almost one hundred pages of the ITO were redacted in whole or in part or about 90% of the ITO. All but one of those redactions were based on the proposition that s. 193 of the *Criminal Code* prohibited the disclosure of all non-consensual intercepted private communications mentioned in the ITO.

[6] The matter came on before the applications judge on September 12, 2013. On September 16, 2013, the applications judge, in careful and thorough reasons, dismissed the application on the basis that the relief sought was prohibited by s. 193.

[7] Given the importance of s. 193 to the issues raised in this application, I will set out the section in full:

> (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

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[1] It is apparent that there were a large number of search warrants granted and more than one ITO involved in that process. For the purposes of these applications, however, the matter can proceed as if we were talking about one ITO only.

(b) discloses the existence thereof,

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

(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;

(b) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

(c) in giving notice under section 189 or furnishing further particulars pursuant to an order under section 190;

(d) in the course of the operation of

(i) a telephone, telegraph or other communication service to the public,

(ii) a department or an agency of the Government of Canada, or

(iii) services relating to the management or protection of a computer system, as defined in subsection 342.1(2),

if the disclosure is necessarily incidental to an interception described in paragraph 184(2)(c), (d) or (e);

(e) where disclosure is made 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 and is intended to be in the interests of the administration of justice in Canada or elsewhere; or

(f) where the disclosure is made to the Director of the Canadian Security Intelligence Service or to an employee of the Service for the purpose of enabling the Service to perform its duties and functions under section 12 of the Canadian Security Intelligence Service Act.

(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).

[8] The applicants contend that the police officer who swore the ITO and filed it with the court in order to obtain the search warrants disclosed non-consensual intercepted private communications "in the course or for the purpose of giving evidence" in a criminal proceeding. If that is correct, and if the applicants can then obtain access to the contents of the ITO, they would be entitled to disclose (i.e. publish) that same information by virtue of s. 193(3). The Crown contended the opposite. In particular, the Crown contended that s. 193 prohibits the disclosure of the non-consensual intercepted private communications by virtue of the prohibition it says is found in s. 193(1). The Crown further contends that the disclosure of the non-consensual intercepted private communications by the police officer for the purposes of obtaining the search warrant was authorized under s. 193(2)(b), not s. 193(2)(a), as being done for the purpose of a criminal investigation.

[9] In my view, these applications break down into two issues: (i) does s. 193(1) govern access to the ITO in this case and (ii) if s. 193(1) does apply, do the circumstances in this case fall within s. 193(2)(a) such that the applicants would be entitled to disclosure of the contents of the ITO subject to any non-publication order that the court might make pursuant to the Dagenais/Mentuck test.[2]

(i) Does s. 193(1) govern the issue of access to the ITO?

[10] These applications proceeded before the applications judge on the apparent assumption that s. 193 applied to the relief sought and that it provided a blanket prohibition against access to the ITO at least insofar as the ITO makes reference to non-consensual intercepted private communications. The issue then became whether the ITO in question fell within one of the exceptions to that blanket prohibition, namely, the exception in s. 193(2)(a). However, as the argument of these applications proceeded in this court, it became apparent that there is an issue whether s. 193 is properly the section that governs the determination of the issue of access to the ITO.

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[2] This test is named after the decisions of the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442

[11] I begin by noting that the issuance of a search warrant is governed by s. 487 of the *Criminal Code*. As part of the process for obtaining a search warrant, s. 487.3 provides that a court may make an order denying access to the ITO used to obtain a search warrant if the court is satisfied that:

> (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
>
> (b) the ground referred to in paragraph (a) outweighs in importance the access to the information.

If such a "sealing" order is granted, s. 487.3(4) provides that an application made subsequently be made to terminate the order or to vary any of its terms and conditions.

[12] In this case, however, it is contended that s. 487.3 is not the governing provision for the purpose of gaining access to the ITO. Rather, the Crown asserts that s. 193 becomes the governing provision because the ITO makes reference to non-consensual intercepted private communications. In that regard, the Crown says that it is important to consider the entire Part VI scheme found in the *Criminal Code* that covers the interception of private communications. In addition, the Crown says that it is important to keep firmly in mind the nature of the privacy interests engaged in this case, that is, personal private communications and the very high privacy protection that is accorded to those communications in law.

[13] In that regard, it is important to consider the provisions of s. 187 of the *Criminal Code* that expressly deal with the handling of the information used to obtain a wiretap authorization, generally referred to as the wiretap packet. Section 187(1) reads:

> (1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5).
>
> (1.1) An authorization given under this Part need not be placed in the packet except where, pursuant to subsection 184.3(7) or (8), the original authorization is

in the hands of the judge, in which case that judge must place it in the packet and the facsimile remains with the applicant.

(1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.

(1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

(a) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and

(b) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

[14] As can be easily seen from the contents of s. 187(1), Parliament has laid out a detailed scheme for the handling of wiretap packets with an emphasis on keeping the contents of those packets confidential. The section begins with a general provision that the contents of all such applications are confidential. The section then proceeds to provide exceptions to that confidentiality. Among those exceptions is the broad discretion, found in s. 187(1.3), by which certain designated judges may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents. I note that there is no restriction in s. 187(1.3) regarding the purpose for which that copying and examining may take place.

[15] I contrast the scheme set out in s. 187(1) with the provisions in s. 193. The requirements of s. 187(1) are specifically directed to the general rule of confidentiality of the wiretap packet and the exceptions to that general rule. Section 193 is, on its face, not directed to that purpose. If it were, either s. 187(1) or s. 193 would be redundant. Rather, s. 193 is an offence creating section. Its purpose is to criminalize the disclosure of non-consensual intercepted private

communications. The section then goes on to exempt certain people from what would otherwise be that criminal conduct. Specifically in s. 193(2)(a) it exempts persons who are required under oath to disclose non-consensual intercepted private communications in the course of civil, criminal or other proceedings and in s. 193(2)(b) it exempts persons who disclose non-consensual intercepted private communications in the course, or for the purpose, of a criminal investigation.

[16] In my view, s. 193 does not, and was not intended to, operate as a provision dealing with access to documents filed in court that happen to refer to non-consensual intercepted private communications. The *Criminal Code* contains many express provisions dealing with access to, and non-publication of, evidence received by a court. Section 187 is itself such a provision as is s. 487.3. I see no reason to interpret s. 193 as dealing with a procedural matter, such as access to material filed with the court for the purpose of obtaining a judicial authorization, when the section does not, on its face, purport to do so and where other provisions within the *Criminal Code*, including within Part VI, specifically address those procedural matters.[3]

[17] I am reinforced in my view in this regard by the existing authorities of the Supreme Court of Canada that have considered the issue of access to wiretap applications. In particular, I refer to the decision in *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3. In that case, the Supreme Court of Canada dealt with whether a non-accused target of a wiretap authorization could gain access to the sealed packet. The Supreme Court of Canada concluded that the non-accused person did not have an automatic right to access but could gain access if he could provide a justifiable reason for needing access. My point in mentioning *Michaud* is that throughout their analysis of the issue there is only a single mention by the court of s. 193 and that is to s. 193(2)(c). If, as the Crown contends here, s. 193 provides a blanket prohibition against disclosure then one would have thought that the Supreme Court of Canada would have addressed that point in their decision.

[18] Similarly, the Supreme Court of Canada considered the issue of access to the wiretap authorization in *R. v. Dersch*, [1990] 2 S.C.R. 1505. In that case, the court concluded that an

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[3] I note on this point the general rule of statutory interpretation that that the specific prevails over the general: *generalia specialibus non derogant* – see, for example, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.) at para. 42.

accused person had an automatic right to access the wiretap packet. In that case, neither the majority nor the minority makes any mention of s. 193. Again, if s. 193 provides a blanket prohibition against disclosure of intercepted communications, subject only to the exceptions in s. 193(2), then one would think that the Supreme Court of Canada would have had to address that issue in reaching the conclusion that the accused had an automatic right of access to the wiretap package. This is particularly so given that access to wiretap packets includes access to applications for renewals of wiretap authorizations that frequently refer to private communications that have already been intercepted under the original authorization.

[19] If the Crown's assertion is correct, then it follows that the asserted blanket prohibition in s. 193, subject only to the exceptions in s. 193(2), trumps the discretionary authority given to the court to allow access to the wiretap packet under the various provisions found in s. 187 if the wiretap packet refers to intercepted private communications. Yet, none of the provisions in s. 187, that authorize a judge to grant access to the wiretap packet, are expressly made subject to s. 193 even though those provisions were inserted into the *Criminal Code* after s. 193 was already present. I note that s. 193 has been part of the *Criminal Code* for many, many years. The same result would occur with respect to s. 487.3 and the court's control over access to the ITO for a search warrant.

[20] In my view, s. 193 does not operate as contended for by the Crown. Specifically, it is not a provision dealing with access to court filings. It is an offence creating provision. The purpose of s. 193 is, as I have said, to criminalize actions of a person who in some improper way gains access to private communications and then discloses those communications. It would, for example, make it a criminal offence for a person to "hack" into someone's phone or computer and intercept their communications if they then disclosed those communications. The section goes on to provide protections or exemptions from criminal liability to persons who are obliged to disclose intercepted private communications in certain specific circumstances.

[21] It is also my view that s. 193 has only tangential reference to the issue of access to ITO's used to obtain search warrants just because the ITO happens to refer, in part, to intercepted private communications. Rather, the issue of access to such an ITO used to obtain a search warrant is to be determined under the provisions contained in s. 487.3 of the *Criminal Code* that

specifically address applications for such access. Section 487.3 is a complete code for applications to obtain access to an ITO used to obtain a search warrant. It provides the considerations to which the court is to have reference in deciding that issue. That said, in evaluating those considerations in any given case, the court will undoubtedly be informed by other provisions in the *Criminal Code*, such as s. 193, and by prevailing court authorities on the issue.

[22] I find further support for my conclusion in this regard in the basic principle applicable to any issue involving access to the processes of the courts. It is clear that that basic principle is openness. This principle has been repeated many times. For example, in *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, Dickson J. said, at p. 185:

> Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule.

[23] To adopt an interpretation of s. 193 that would result in it operating as a blanket prohibition against access to material used to obtain a judicial search authorization, just because it may involve the disclosure of non-consensual intercepted private communications, would be anathema to that basic principle. The extent of the impact of such an interpretation was evident from the Crown submissions. The Crown made it clear that, if s. 193 was so interpreted, the applicants would be barred from obtaining access to the ITO (subject only to fitting themselves within the exemption found in s. 193(2)(a)) for all time unless and until any of the intercepted private communications mentioned to in the ITO were subsequently referred to in open court.

[24] There are two serious concerns raised by that stated position. One concern is obvious and that is that the intercepted private communications might never be referred to in a court proceeding either because they were unnecessary or because the accused person pled guilty or for any number of other reasons. If that occurs, then the ITO used to obtain the search warrant remains secret for all time. The other concern is that, even if such reference is subsequently made in a court proceeding, it might not be for years to come and after the pressing public interest in being able to understand the actions that now taken place have long since passed.

[25] I would also observe that in considering this issue it must be remembered that what is being sought is not access to all of the actual intercepted private communications in their original form. Rather, what is sought is to have access to the ITO that presumably contains reference only to a subset of all of the private communications that were intercepted. That subset is further narrowed, again presumably, only to those intercepted private communications that are relevant to the test for obtaining a search warrant, that is, the establishment of reasonable grounds to believe that there is, in a building, receptacle or place, evidence of an offence. Even in those instances, it may well be that the ITO contains only summaries of those intercepted private communications and not the specific contents of the communications themselves.

[26] I conclude therefore that s. 193 is not the operative provision in the *Criminal Code* that directs the proper determination of this application. Specifically, I reject the contention that s. 193 operates as a blanket prohibition against disclosure of the ITO in this case simply because that ITO references non-consensual intercepted private communications. Rather, it is s. 487.3 that governs the determination of this application as informed by the *Dagenais/Mentuck* test.

(ii) <u>If s. 193 applies to this application, does it serve to prohibit access to the applicants in this case?</u>

[27] I recognize that my conclusion regarding the non-application of s. 193 in this case could well be wrong. Consequently, I consider it prudent to go on and decide the issue as if s. 193 does apply in the manner urged by the Crown. The issue then becomes whether the ITO in this case falls within one of the exceptions in s. 193(2), specifically, s. 193(2)(a).

[28] On that point, it is important to remember that in order to obtain a search warrant, the police were required to make an application on oath. That is what an ITO is. It is sworn evidence upon which the issuance of the search warrant is based. Presumptively, therefore, the ITO falls within s. 193(2)(a) to the extent that the ITO was provided "for the purpose of giving evidence" and was authored by a person who is "required to give evidence on oath".

[29] What the s. 193(2)(a) issue quickly boils down to is whether the ITO represents evidence given "in any civil or criminal proceedings or in any other proceedings". The applicants say that the ITO is clearly evidence given in a criminal proceeding. The Crown says that the ITO is not

evidence in a criminal proceeding because, at the time that the ITO was filed with the court, there were no criminal proceedings in existence because no charges had been laid. Rather, the Crown says that the ITO was provided under s. 193(2)(b) "in the course of or for the purpose of any criminal investigation". It was this argument that found favour with the applications judge.

[30] The debate on this point turns largely, if not entirely, on what is meant by the words "criminal proceedings" in s. 193(2)(a).[4] On that point, the Crown places great reliance on the decision in *R. v. Linamar Holdings Inc.*, [2007] O.J. No. 4859 (C.A.). Contrary to the position of the Crown, I do not find that the decision in *Linamar* is determinative of the issue that is before me, that is, the proper meaning of "criminal proceedings" in this context.

[31] I begin by noting that the decision in *Linamar* did not deal with the provisions of the *Criminal Code*. It dealt with the *Provincial Offences Act*, R.S.O. 1990, c. P.33. As noted by the court itself in *Linamar*, at para. 6, provisions in the *Criminal Code*:

> [do] not affect the interpretation of a different piece of legislation enacted by a different legislative body.

Presumably the converse is also true. The court's interpretation of a provision in a Provincial statute does not necessarily affect the interpretation of a Federal statute.

[32] In any event, the conclusion in *Linamar* that the laying of an information "constitutes the institution of the proceedings" was an interpretation reached respecting that piece of legislation where the issue was when a limitation period commenced. The same word in a different piece of legislation may have a different meaning depending on the context in which it is placed in that other legislation.

[33] As the Supreme Court of Canada has held repeatedly, the starting point for statutory interpretation in Canada is found in E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense

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[4] The applications judge drew a distinction in his reasons at para. 63 based upon the use of the plural "proceedings" in the subsection. That distinction cannot be sustained given the provision in the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 33(2) that "Words in the singular include the plural, and words in the plural include the singular".

> harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[34] The word "proceeding" is itself a broad one. A proceeding can involve many different processes and can involve many different steps. In the context of legal proceedings, there is usually a distinction that is drawn between trial proceedings and pre-trial proceedings. In the context of the *Criminal Code*, it is hard to see how the application for, and issuance of, a search warrant would not be considered, in the natural and ordinary way, as being part of the pre-trial steps in a criminal proceeding. Many steps may be undertaken in a criminal proceeding before charges are laid but it is contrary to the plain and ordinary meaning of the word "proceeding" to hold that all of those pre-charge steps do not form part of that proceeding. I would add that the steps necessary to obtain a search warrant bear all the hallmarks of a criminal proceeding. An application has to be filed, a court file is opened, affidavit evidence has to be filed and eventually a court order issues.

[35] When I asked counsel how one would describe these steps if they are not a proceeding, I was told that they are steps in an investigation. If one viewed the matter entirely from the perspective of the police, I accept that the obtaining of a search warrant would undoubtedly be viewed by them as a step in their investigation. The matter cannot, however, be viewed only from that perspective. For the purposes of determining whether documents filed with the court are or are not accessible to the public, it must be the perspective of the court and the public that is considered. Viewed from those perspectives, in my view, there can be no reasonable conclusion other than the process for obtaining a court order (which is, after all, what a search warrant is) is part of a proceeding. Given that the order being sought is in the nature of a search warrant, it is clear that the proceeding is also a criminal proceeding.

[36] I find support for my conclusion in this regard in any number of decisions of the Supreme Court of Canada that have dealt with search warrants or wiretap authorizations. The Supreme Court of Canada consistently refers to these matters as being part of a criminal proceeding. For example, in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, a decision dealing directly with access to search warrants, Fish J. said, at para. 5:

> The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. [emphasis added]

[37] In addition to that binding authority, I note that the same conclusion was reached in *R. v. Hennessey*, [2008] A.J. No. 1563 (Q.B.) at para. 26 and in *R. v. Esseghaier*, 2013 ONSC 5779 at para. 151, both of which directly dealt with the proper interpretation of s. 193(2)(a) of the *Criminal Code*.

[38] The applications judge also noted a problem that arises if "criminal proceedings" is interpreted as requiring the laying of a charge as its starting point. It would result in an ITO, that relied on non-consensual intercepted private communications for a search warrant obtained prior to the laying of charges, not being caught by s. 193(2)(a) whereas the very same ITO used to obtain a search warrant after charges were laid would be. The applications judge, having raised the problem, declined to address it on the basis that the latter situation was not before him. While that may be fair enough, it does not change the fact that that problematic result flows from the Crown's interpretation. In deciding between two competing interpretations, the court is entitled to consider how those interpretations would play out in different situations. The clear inconsistency that arises from the interpretation that criminal proceedings in s. 193(2)(a) only commence with the laying of charges is, of its own, good reason to doubt the correctness of that interpretation.

[39] The applications judge also relied on the decision in *National Post Co. v. Canada (Attorney General)*, [2003] O.J. No. 2238 (S.C.J.) that he referred to as "a significant if not binding authority". However, the decision in *National Post* does not address the issue raised here. There is no conclusion in that decision that s. 193 prohibits disclosure of the contents of the ITO. Indeed the decision in *National Post* would appear to favour an interpretation that the section is merely one of the factors that should be considered when deciding whether access should be granted to the ITO. As McKinnon J. said in *National Post*, at para. 12:

> Section 193 of the Code cannot be read independently of the entire scheme of Part VI of the *Criminal Code* relating to "Invasion of Privacy". A textual analysis is mandated. Nor does this argument take into account the provisions of s. 486.3, which mandates a balancing of competing values.

[40] Finally on this point, Crown counsel, in support of a broad interpretation of s. 193(1) and a restrictive interpretation of s. 193(2)(a), placed great emphasis on the confidentiality that must be accorded to private communications. The applications judge appears also to have been motivated largely by this same concern. I do not quarrel with the general proposition that private communications are to be accorded the highest level of privacy protection. Part VI of the *Criminal Code* attempts to do that very thing. The fundamental flaw with using that principle as a foundation for a finding that interprets s. 193 as prohibiting disclosure is that the opposite interpretation does not lead automatically to disclosure. All the interpretation (that s. 193 is not determinative of the issue) does is leave the issue of disclosure to be determined under s. 487.3 where the necessary balancing of competing interests can be undertaken in accordance with the *Dagenais/Mentuck* test. It may well be that after that balancing is undertaken the contents of the ITO will remain undisclosed. Nevertheless, that route to such a result would seem to be more compatible with the openness principle and the long line of authorities from the Supreme Court of Canada that have established that principle.

[41] I conclude therefore that, even if s. 193(1) does operate as a blanket prohibition against the disclosure of non-consensual intercepted private communications, the ITO at issue here and to which access is sought by the applicants, is covered by the exemption in s. 193(2)(a).

Result

[42] In light of my conclusions, the order of the applications judge is set aside. The applicants may continue with their application to seek to set aside or vary the sealing order that was granted with respect to the ITO. Counsel may appear before me any day at 9:30 a.m. to address what the next steps should be in these applications and the timing for those steps.

NORDHEIMER J.

Released: November 5, 2013

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE GLOBE AND MAIL INC.
and others

- and -

HER MAJESTY THE QUEEN

REASONS FOR DECISION

NORDHEIMER J.

RELEASED: NOV - 5 2013

SUPERIOR COURT OF JUSTICE

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TOTAL PAGES (INCLUDING COVER PAGE): Seventeen

MESSAGE: