Unofficial English Translation of the Judgment of the Court

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| R. c. Zampino | | | | | 2023 QCCA 1299 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| Nos: | 500-10-007193-194, 500-10-007472-200 | | | | |
| (500-01-160503-170 SEQ 001, 003, 004, 006, 007 and 008) | | | | | |
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| DATE: | October 20, 2023 | | | | |
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| CORAM: | | THE HONOURABLE | | MANON SAVARD, C.J.Q.  FRANÇOIS DOYON, J.A.  PATRICK HEALY, J.A. | |
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| 500-10-007193-194 (500-01-160503-170 SEQ 001) | | | | | |
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| HIS MAJESTY THE KING | | | | | |
| APPELLANT – Prosecutor | | | | | |
| v. | | | | | |
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| FRANK ZAMPINO | | | | | |
| RESPONDENT – Accused | | | | | |
| and | | | | | |
| BARREAU DU QUÉBEC | | | | | |
| ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL-LAVAL-LONGUEUIL | | | | | |
| and | | | | | |
| DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA | | | | | |
| INTERVENERS | | | | | |
|  | | | | | |
| 500-10-007472-200 (500-01-160503-170 SEQ. 003, 004, 006, 007 and 008) | | | | | |
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| HIS MAJESTY THE KING | | | | | |
| APPELLANT – Prosecutor | | | | | |
| v. | | | | | |
|  | | | | | |
| ROBERT MARCIL | | | | | |
| KAZIMIERZ OLECHNOWICZ | | | | | |
| BERNARD POULIN | | | | | |
| DANY MOREAU | | | | | |
| NORMAND BROUSSEAU | | | | | |
| RESPONDENTS – Accused | | | | | |
| and | | | | | |
| DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA | | | | | |
| INTERVENER | | | | | |
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| JUDGMENT | | | | | |
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1. “A stay of proceedings is the most drastic remedy a criminal court can order […]. Nonetheless, this Court has recognized that there are rare occasions — the “clearest of cases” — when a stay of proceedings for an abuse of process will be warranted”: *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, paras. 30 and 31; see also *R. v. Ahmad*, 2020 SCC 11, [2020] 1 S.C.R. 577; *R. v. Ramelson*, 2022 SCC 44; and *R. v. Haevischer*, 2023 CSC 11.
2. The trial judge found that such was the case and ordered a stay of proceedings on September 30, 2019, in the case of the respondent Frank Zampino (*R. c. Zampino*, 2019 QCCQ 5880 – “Zampino decision”), and on December 2, 2020, for the other respondents (*R. c. Marcil*, 2020 QCCQ 7898 – “Marcil decision”).
3. The standard of review is well known. It has been articulated and reiterated on several occasions, notably, in *R. v. Babos*, *supra*:

[48] The standard of review for a remedy ordered under s. 24(1) of the Charter is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is “so clearly wrong as to amount to an injustice”.

[References omitted]

1. For the reasons that follow, the Court is of the view that the trial judge erred by misdirecting herself in law and by committing palpable and overriding errors of fact, in other words, reviewable errors of fact. A stay of proceedings should not have been ordered.

# I - BACKGROUND

1. The Unité permanente anticorruption (Permanent Anti-corruption Unit) (“UPAC”), a group made up of members from various organizations, undertook a major investigation known as “*projet Fronde*”. It had also conducted another investigation, known as “*Faufil”*.
2. Following the *projet* *Fronde*, the respondents were indicted on various charges on September 19, 2017: fraud (380(1)(a) *Cr. C.*), breach of trust (122 *Cr. C.*), municipal corruption (123(1)(c) *Cr. C.*) and conspiracy (465(1)(c) *Cr. C.*). Those charges were not laid against all of the respondents, but, overall, the case involves this type of offences.
3. At the time of that indictment, Mr. Zampino had moreover already been charged with conspiracy, fraud and breach of trust in the context of the *Faufil* investigation, a case involving a request for qualification and a call for tenders regarding the development of the *Contrecoeur* site and the completion of a project known as *Nouveau Mercier*. Contrary to what the trial decisions may suggest, however, the other respondents were not charged in that matter.
4. On June 17, 2015, during the *projet* *Fronde*, a Court of Québec judge issued an authorization to intercept the private communications of 39 individuals, so-called [translation] “targets”. Among the respondents, only Frank Zampino and Bernard Poulin were targets.
5. That authorization led to the interception of nearly 20,000 private communications, excluding those [translation] “without content”, i.e. telephone calls and text messages (“SMS”) with no transfer of information, also referred to as [translation] “X sessions”. Of those interceptions, 820 involved the participation of lawyers. Investigators had access to the content of some of these, although a number of them turned out to be privileged.
6. A few months prior to the beginning of the trial in the *Fronde* file, the respondent Zampino filed a motion for a stay of proceedings, alleging that the interception of his private communications with his lawyers as well as the lax and negligent management of those interceptions were a violation of solicitor-client privilege, an infringement of his rights as guaranteed under the *Canadian Charter of Rights and Freedoms* (“*Charter”*) and constituted an abuse of process. He invoked the failure to ensure the protection conferred to him by ss. 7, 8 and 11(d) of the *Charter*. On September 30, 2019, the trial judge granted that motion. She declared that the wiretap authorization was invalid, [translation] “since it was obtained in violation of ss. 7, 8 and 11(d) of the *Canadian Charter of Rights and Freedoms”,* and because the police had displayed negligence and laxity that had to be denounced. In the Zampino decision, she wrote:

[translation]

[90] The defense has further demonstrated that the state's management of these conversations, in many respects and at many levels, demonstrates a laxity that is inconsistent with the many clear and consistent teachings of our Supreme Court to protect the fundamental and most important principle of justice that is solicitor-client privilege.

1. She ordered a stay of the proceedings against Mr. Zampino.
2. Following that decision, the respondents Marcil, Olechnowicz, Poulin, Moreau and Brousseau also filed a motion to stay proceedings based on considerations similar to those invoked in the Zampino decision and adduced additional evidence. On December 2, 2020, the judge granted their motion and likewise ordered a stay of the proceedings against them.
3. The Crown appeals those two decisions. It argues that the trial judge erred in finding that the wiretap authorization, its terms and its execution did not sufficiently protect solicitor-client privilege and led to a violation of ss. 7, 8 and 11(d) of the *Charter*. It also argues that the trial judge erred in finding that the state’s conduct constituted an abuse of process justifying a stay of proceedings.
4. These two appeals were heard jointly, and the parties have rightly agreed that the evidence adduced in the context of the Marcil decision be filed in the appeal of the Zampino decision.

# II – OVERVIEW OF THE EVIDENCE

1. The following is a summary of the evidence tendered upon the motions. The Court will revisit certain aspects of this evidence and specify the content thereof when addressing the arguments on appeal.
2. The *projet Fronde* was concerned with the allocation of professional service contracts in the context of public calls for tenders of the City of Montreal between 2002 and 2009. More specifically, the investigation focussed on the award of contracts related to a water meter installation project in industrial, commercial and institutional buildings of the City of Montreal, allegedly in exchange for financial contributions to the Union Montréal party, then led by mayor Gérald Tremblay, who also happens to be a lawyer.
3. At the relevant time, Mr. Zampino was mayor of the borough of Saint-Léonard and Chairman of the Executive Committee of the City of Montreal, while Mr. Marcil was a City employee. As for the other respondents, they held positions within consulting engineering firms.
4. The monitoring of private communications arose from a judicial authorization that targeted various individuals, none of which were lawyers (except Mr. Gérald Tremblay, who was not targeted in that capacity, by rather in his capacity as Mayor of the City of Montreal). It authorized the interception of telephone calls and SMSs, was valid for a period of 60 days (from June 17 to August 15, 2015) and contained a basket clause that allowed the interception of communications of non-targeted persons who would communicate with the persons targeted.
5. The monitoring was for the most part done on a delayed basis, meaning that the communications were recorded automatically and listened to later, unlike live monitoring, which consists of listening to them in real time, whether they are otherwise recorded or not.
6. On that matter, the parties differ in opinion. According to the appellant, there is no evidence of live monitoring. According to the respondents, such evidence exists. As such, the respondent Zampino submits that his communications with his lawyers were listened to live on at least 16 occasions. In support of this, he submitted a table appended to his supplementary memorandum showing that an analyst allegedly had access to those 16 communications while they were occurring. The Court will return to this issue below, but it should immediately be noted that in the instant case, access to a communication does not necessarily mean that there was any listening or reading involved.
7. The interception system used was *Target 360o* software, which ran on a [translation] “closed network” and was only accessible to authorized users via dedicated work stations.

## Processing of communications

1. The general procedure for the processing of communications can be described as follows: an intercepted communication (called a “session” in the software) was first made available to the analysts, civilian employees of the Sûreté du Québec, who processed it. This was known as “System A”. If a communication was not blocked by the analysts following this first stage, investigators (police officers handling the case assigned to wiretapping) had access to the content of the communication for analysis purposes; this was known as “System B”. In other words, investigators could not access the content of a communication without the analysts having processed it first.
2. In that process, analysts were responsible for listening to (or reading) the communication, reporting it and classifying it. However, if they had any reason to believe that one of the participants was a lawyer, they had to immediately block it and add the endorsement [translation] “notary/lawyer/judge” by way of comment. Any prior communications related to the same telephone number was reported to a coordinator and had to be blocked retroactively.
3. When a communication was blocked, neither the analysts nor the investigators could access its content. They only had access to the metadata related thereto (date, telephone numbers, duration, etc.) and to the analysts’ comments, if any. Only the monitoring room managers and the system administrators could access the content of a blocked communication, the former for quality control purposes and the latter to perform connections, monitor material sent to the authorizing judge (as per the terms of the authorization, as will be discussed below) and ensure classification of the communications following the judge’s response.
4. The nature and the time of certain operations or manipulations performed by users could be identified by the system. That information was recorded in the “audit trails” (*pistes de vérification*). It was impossible to access the metadata of an intercepted communication, or the communication itself, without leaving a trace of that operation in the audit trails. However, the system did not allow one to determine whether a communication had been listened to, or to know who listened to it or who consulted it and when, if that was the case.
5. If a communication was blocked and a user attempted to access it, the system showed an error message which, in essence, read [translation] “Content blocked. You are not authorized to display this content”. That communication nevertheless appeared as being “displayed” in the audit trails, even though there had been no actual access to it. The priority level of a communication could also be modified without it having been listened to or read.
6. Understanding what follows requires that we now set forth one of the features of the authorization at issue. Indeed, the authorizing judge provided the following specific conditions to ensure the protection of solicitor-client privilege:

[translation]

No communication may be intercepted at a lawyer's office or residence or at any other place where lawyers ordinarily hold consultations with clients.

As soon as there are reasonable grounds to believe that a lawyer is a party to a communication, the listening will be interrupted but the recording will continue. Recordings whose listening has thus been interrupted will be sealed by the Service de la surveillance électronique of the Sûreté du Québec and must not be listened to by anyone until I have personally reviewed their content and ruled on the confidential nature of each intercepted communication.

When recordings are placed under seal pursuant the above terms, a copy of the recordings will be placed on a CD or any other similar computer medium and will be given to me together with a list identifying the place, session, date and time. I will indicate on this document which conversations or portions thereof are privileged and which are not. This document will be placed in a sealed envelope together with the CD or similar computer medium. The envelope will be kept in the Court file relating to this authorization. I will give a copy of this document to D/S Sylvie Martel or her alternate. Conversations or portions of conversations that I deem to be non-privileged may be listened to by police officers assigned to the investigation, by civilian and police personnel assigned to wiretapping or by prosecutors in criminal and penal prosecutions. If I am unable to exercise the powers provided for in this clause, they may be exercised by another judge of the Court of Québec.

[Emphasis added]

1. This clause is important with respect to the application to stay proceedings since the respondents drew on this in making their case. Indeed, if, at first, the police believed that they were under no obligation to transmit all the recorded communications involving a lawyer to the authorizing judge, they revised their position in May 2016 after having discussed the matter with agents. They concluded that they had to transmit them all, such that they had to retroactively retrieve thousands of them, since about twenty distinct projects were subject to a similar clause. At the end of that process, 233 communications with lawyers in the instant case were unfortunately omitted and were therefore not delivered to the authorizing judge.
2. For the respondents, such police conduct constitutes one of the aspects of the case demonstrating impermissible laxity.
3. In any event, as regards to whether a communication was privileged or not, the procedure that had to be followed subsequently to the authorizing judge’s decision can be summarized as follow.
4. Communications deemed privileged were to remain blocked and the coordinator was to amend the endorsement from [translation] “Notary/Lawyer/Judge” to [translation] “Privileged”. For those that were not, the coordinator was to unblock them and assign them to analysts to process them as they would process a normal session. Once the analysts processed them, the investigation unit was to be notified via an amendment notice that the coordinator was to send to them.
5. As for communications that were privileged in part only, they were to remain blocked, so that no one could gain access to the privileged portions. An administrator was to edit them in accordance with the judge’s instructions and place the non-privileged portions in a file that was independent from the interception system. The coordinator was to copy the report prepared by the analysts and link it to the original session in the system. It should be noted that those sessions remained blocked and that only a member of the management team was authorized to perform that procedure. The coordinator was to further notify the investigation team that these sessions had been processed through an amendment notice.
6. The non-privileged portions of those communications were then made available to investigators.
7. Returning to the wiretapping procedure, the *Target 360o* system included at the time a feature by which telephone numbers could be entered in a phone directory, allowing the system to automatically identify, for instance, phone numbers associated with lawyers. Such communications were thus readily identifiable by analysts who could block them. However, because that feature tied together telephone numbers targeted by other Sûreté du Québec and UPAC wiretapping operations, including prior operations that may no longer have been active, it was not used in the *Fronde* investigation*.* The aim was to avoid the confusion that it could have caused and the unwitting importation of information in another operation that that could have led to, posing a risk for the security and integrity of the investigations. The use of that feature did in fact comprise a risk, namely that investigators identify individuals targeted by other investigations and thus have access to confidential information.
8. Instead, analysts set up a telephone list (an external file outside the *Target 360o* software) which indexed phone numbers communicating with the targets, including, *inter alia*, telephone numbers associated with a lawyer. To distinguish the latter from the other participants in the communications, lawyers’ numbers were identified in red on the list.
9. At the beginning of the investigation, the list did not contain any phone numbers (except those of the targets). The numbers of the targets’ lawyers were therefore not identified at first, even though investigators knew the identity of some of them, including those of Mr. Zampino in the *Faufil* file. The analysts enriched the list as their work progressed. As soon as they had reason to believe that one of the participants to the communication was a lawyer, they added him or her to the list. If an analyst changed a number from black to red on the list, he or she had to ensure that all previously processed communications involving that number were blocked (retroactive blocking). Moreover, as soon as they began processing a communication, analysts consulted the phone list. If any of the relevant numbers appeared, the communication had to be blocked (prospective blocking).
10. Analysts and investigators worked separately, in different areas. The former were in a room that was not accessible to the latter (other than the monitoring room managers) and, for confidentiality and security reasons, their workstations did not have Internet access. They proceeded to identify communications potentially involving a lawyer by referring to their phone list or by analysing the content of the communications. While analysts assessed the identity of the participant to a communication, the latter was [translation] “in abeyance” in System A and remained inaccessible to investigators in System B.
11. The Sûreté du Québec team of analysts includes dozens of people and processes on average between 3,000 to 5,000 communications daily in numerous projects. The risk of error is plain to see.
12. The team of investigators assigned to wiretapping in the *projet Fronde* was much smaller than the analyst team and operated differently. It comprised three investigators (Catherine Poutré-Noiseux, Patrick Denis and Michel Vadeboncoeur) who divided the targets among them, to ensure that each always monitored the same targets.
13. The investigators worked, *inter alia*, with Erika Goulet-Larocque, a civilian tactical analyst whose main task consisted, in System B, in identifying the people with whom the targets were communicating. They also worked in collaboration with the lead investigator of *projet* *Fronde*, Yanick Gouin, who managed the project, proposed investigative procedures and, together with the team leader (at the time, France Lessard), ensured the coordination of the various phases of the project.
14. The investigators used their own phone list to identify the people in contact with the targets. Analyst Erika Goulet-Larocque was responsible for preparing and enriching that list. Unlike the monitoring room analysts, Ms. Goulet-Larocque had access to the Internet and to police databases to assist her in her identification work. She could also obtain information from phone service providers.
15. Investigator Catherine Poutré-Noiseux testified that [translation] “quite frequently” (at least 20 times), communications involving a lawyer were not flagged by analysts and were made available to police. Some of them were listened to, at least in part.
16. When such situations occurred, she promptly notified the analysts so that they would block the communication and add the lawyer’s phone number to their list. Because the investigators did not have the capability to block a communication, they had to notify the analysts to do so. The first time such an event occurred, she notified Ms. France Lessard who assured her that her way of managing the situation was adequate.
17. Analyst Erika Goulet-Larocque testified that on July 6, 2015, i.e., a few weeks after the wiretapping began, investigators notified her that communications involving lawyers had been made available to them. She was thereupon asked to double-check her phone list to ensure that numbers associated with lawyers were properly identified and to notify investigators thereof. Beginning on July 6, 2015, the investigators’ phone list was divided under two tabs, one of which was reserved exclusively for numbers associated with lawyers.
18. Ms. Poutré-Noiseux indicated that two communications that the authorizing judge had deemed to be non-privileged should have, in her view, been considered privileged. She believed that she should not have had access to their content, and she so notified Lieutenant Nathalie Gauthier. Such an incident did not occur again. The communications in question were related, respectively, to Bernard Trépanier and Luc Aubertin. She did not know how those two communications were ultimately handled.
19. In January 2017, during the *Faufil* trial, the Crown informed the defense that a number of communications involving lawyers had been intercepted in the *projet Fronde*. A few days later, it disclosed to the defense a table listing [translation] “communications intercepted and submitted to the [authorizing] judge for determination as to privilege in relation to the four targets also charged in Faufil” (among the respondents in this appeal, only Mr. Zampino is included in those targets also charged in *Faufil*). That table revealed that 35 communications involving a lawyer and Mr. Zampino had been intercepted and sent to the authorizing judge for determination as to their privileged character.
20. Mr. Zampino therefore sent to the Crown a series of phone numbers related to his lawyers to ensure that all potentially privileged communications involving him had been disclosed to the defense. Four additional communications involving a lawyer and related to Mr. Zampino, which had not been blocked in the interception system nor sent to the authorizing judge for determination as to privilege, were thus identified. On February 10, 2017, those communications were retroactively blocked by the electronic monitoring room coordinator.
21. According to the evidence filed in Mr. Zampino’s motion to stay proceedings, it has been established that the police intercepted 39 private communications between Mr. Zampino and a lawyer. Investigators had access to the content of one communication held to be privileged by the authorizing judge and to three others held to be non-privileged. They also had access to four communications which had not been sent to the authorizing judge and whose status was therefore not determined. As we have just seen, these latter communications were blocked in February 2017. Consequently, investigators only had access to a single communication held to be privileged by the authorizing judge, although it is possible that some of those among the four whose status was not determined were privileged. That communication was not led into evidence, the appellant having declared at the beginning of the trial that the evidence resulting from the wiretap would not be filed.
22. The evidence heard subsequently in relation to the motion of the other respondents shed further light on the matter.
23. At the close of the first day of the hearing on that motion, in November 2019, the evidence showed that 48 communications between the respondent Bernard Poulin and a lawyer were intercepted and sent to the authorizing judge. Of that number, investigators had access to the content of two communications held to be privileged and three communications held to be non-privileged. One of the intercepted communications also involved the respondent Dany Moreau. That communication was held to be privileged and its content was never made accessible to investigators.
24. In cross-examination, computer analyst Christian Danguy was confronted with inconsistencies contained in his various reports. He proceeded to conduct further inquiries and found a discrepancy between the number of communications involving a target and a number associated with a lawyer listed in the system and the number of communications forwarded to the authorizing judge. The hearing on the motion was consequently adjourned.
25. The evidence which was subsequently filed, together with that heard during Mr. Zampino’s motion, ultimately showed that 40 communications (instead of 39) between Mr. Zampino and a lawyer had been intercepted. One more communication was therefore added. This was a session that had not been sent to the authorizing judge. It was blocked in 2019, such that investigators were able to access its content prior to that date.
26. That evidence also established that 64 communications between Mr. Bernard Poulin and a lawyer had been intercepted. Of that number, investigators had access to two communications held to be privileged and to three held to be non-privileged. They also had access to 16 communications that had not been sent to the authorizing judge and whose nature remains undetermined. Those communications were also blocked in November 2019.
27. The evidence also supports the finding that communications involving a number associated with a lawyer were sent to the authorizing judge on five separate occasions. As explained earlier, initially, not all communications involving a lawyer had been sent to him. Team leader France Lessard was unable to explain how the communications were selected to be sent. She indicated having received [translation] “instructions from up top” not to send all the potentially privileged sessions to the authorizing judge.
28. According to Ms. Nathalie Martin, head of the technological surveillance department from February 2016 to September 2017, the practice prior to May 2016 consisted in sending to the authorizing judge only those communications flagged by investigators. These were selected based on what the investigation unit deemed relevant. Other communications remained blocked in the system and therefore remained inaccessible. In May 2016, i.e., after having consulted with agents, investigators understood that the terms of the authorization required that all communications involving a lawyer be sent to the authorizing judge. At that point, Ms. Martin ordered Lieutenant Nathalie Gauthier to ensure that all communications involving a lawyer be sent to the authorizing judge.
29. Despite Ms. Martin’s order, some communications were unfortunately not sent to the authorizing judge. In all, of the 820 potentially privileged communications, as explained, 233 communications were not sent to the authorizing judge. Of that number, 96 were blocked by analysts, while 137 were accessible to the investigation team, before being blocked on November 22, 2019.
30. According to analyst Christian Danguy, of the 96 blocked sessions, 88 contained no “information”. This could have included, for instance, a dial tone, a phone service provider announcement, or a voice mail automated message. It is the appellant’s view that those sessions cannot not be characterized as “communications” within the meaning of s. 183 of the *Criminal Code.*
31. Of the eight other sessions containing information, four were related to Mr. Gérald Tremblay and four to Mr. Zampino (these are communications whose existence was revealed in the motion for disclosure of evidence in the *Faufil* case). As explained, those communications related to Mr. Zampino were only blocked in February 2017 and were therefore accessible to investigators prior to that date. Finally, of the 137 unblocked and accessible communications up to November 22, 2019, 56 contained no information and, among the 81 others, 16 were related to the respondent Bernard Poulin and one was related to Mr. Zampino (these are additional communications whose existence was discovered in 2019). Despite the Crown’s request to that effect, the trial judge refused to examine those communications to determine whether they were privileged or not, holding that they had to be presumed privileged.

# III – THE JUDGMENTS IN FIRST INSTANCE

1. As we know, the judge rendered two decisions ordering a stay of proceedings. It should be recalled that, at the outset, as it argued the respondent’s Zampino motion, the appellant told the judge in the following terms that, under the circumstances, it would not proffer wiretap evidence:

[translation]

[…] the Crown does not intend to use the wiretaps in any way, whatsoever […] the Crown, […] undertakes to act as if those wiretaps never existed.

## The September 30, 2019 judgment (Zampino judgment)

1. With respect to Mr. Zampino’s motion, the judge was of the view that the terms of the authorization and the [translation] “procedures put in place” by the state were abusive and unduly infringed upon Mr. Zampino’s privacy. After having written that [translation] “the wiretap warrant provided the maximum duration” (60 days), she added that [translation] “the applicant no longer had any privacy” during that period.
2. Noting that the authorization allowed for the use of cameras as well as GPS beacons and that it even provided for post-arrest monitoring in police vehicles, the judge concluded that [translation] “it is difficult to conceive of anything more intrusive, and indeed, abusive”. Moreover, in the judge’s view, the measures used to safeguard solicitor-client privilege provided for in the authorization, including the clause described above, were clearly insufficient, notably because the authorizing judge would automatically listen to all conversations between a target and a lawyer. Also, the authorizing judge could divide a conversation in order to block the privileged portion only. As the trial judge noted, [translation] “[s]olicitor-client privilege cannot be fragmented” and, in any event, the authorizing judge was not in a position to distinguish between what was privileged and what was not:

[translation]

[50] Solicitor-client privilege is not to be fragmented on a case-by-case basis, from various conversations or snippets of conversations, gleaned from a defined temporal and situational space, but constitutes a continuum of communication between a lawyer and his or her client. […]

[52] Thus, in the Court's view, it seems difficult to imagine how an authorizing judge, who is not familiar with the entire factual history of a case, can determine what is privileged and what is not, in whole or in part. […]

[54] Also, the judge is not familiar with the evidence, nor with all the explicit and implicit implications of the words exchanged between the parties. What is passed on to the police, after review, can become a trove of information for the latter, who better understand the evidence and is in a position to make connections with material that may appear inconsequential to the authorizing judge.

[References omitted]

1. Moreover, at the time that the authorization was granted, Mr. Zampino was preparing for a trial in which he was facing charges, according to the trial judge, for acts of a similar nature (*projet Faufil*). According to her, the authorizing judge should have thereupon taken that situation into account and have been stricter as to the information that was to be disclosed to him by the Information to Obtain (ITO) (for example, the names and contact details of the targets’ lawyers) as well as to the measures to protect solicitor-client privilege.
2. She was critical not only of the duration and the circumstances of the wiretapping, but also of the use of investigative techniques that sought to elicit reactions from the targets in order to obtain evidence in the form of conversations.
3. She rejected the notion advanced by the appellant that the interceptions involving lawyers occurred inadvertently. Rather, in her words, they were [translation] “intended, targeted and inevitable”.
4. In the judge’s view, those communications should have been blocked at the outset and kept under seal [translation] “without anyone having access thereto, except following a hearing, the parties’ representations and judgement allowing their disclosure, until the end of the proceedings” especially given that the requirements of s. 186(2) *Cr. C.* had not been met. The state displayed laxity in the management of the authorization and the situation was exacerbated by the monitoring of the communications by the authorizing judge and their disclosure to police, in the absence of argument, whereas Mr. Zampino was to be tried in the *Faufil* case. She was therefore of the opinion that there had been numerous and serious violations of ss. 7, 8 and 11*(d*) of the *Charter.*
5. Relying on a double presumption (that communications with a lawyer are privileged and that a breach of the privilege is prejudicial to trial fairness), she was of the view that the state’s conduct was all the more serious.
6. With respect to the Crown’s statement that it did not intend to use that evidence, the judge noted:

[translation]

[104] Although the Crown indicated to the Court that it would not use the wiretaps during the trial, this assertion in no way reduces the violations that occurred in the first place. Their use would only constitute an additional violation.

[105] The Court has ruled that the process of obtaining the wiretaps, as well as the management of the wiretapping itself, were flawed, and the evidence derived from the wiretaps seems impossible to determine, although the Court had concerns in that regard at the hearing.

[106] It is impossible to extract all the information contained in or derived from those illegal wiretaps. It may be a question, for example, of trial strategy, of whether or not to call a witness, or of preparing for the cross-examination of an accused.

1. Finding that the two categories of *R. c. Babos*, *supra,* (trial fairness and the integrity of the justice system) were at issue, the judge concluded that no remedy less drastic than a stay of proceedings could be ordered.

## The December 2, 2020 judgment (Marcil judgment)

1. The judge noted that the previous decision served as a starting point for this one. The Zampino judgment was therefore incorporated into the Marcil judgment and was to form an integral part thereof. That being so, in the judge’s view, the same conclusion must apply, especially given that the evidence was even more convincing:

[translation]

[16] The evidence indicates a serious situation, more serious in fact than that on the hearing of the first motion for a stay of proceedings.

1. She added that the police had knowingly breached the terms of the authorization:

[translation]

[8] According to witness Danguy's audits, there remain, to this day, 233 presumptively privileged conversations in the police computer system that have not been sent to the authorizing judge, as the latter’s order clearly enjoined them to do in the wiretap warrant, dated June 17, 2015.

[…]

[98] In the Court's opinion, the crux of the matter lies in UPAC's breach of the authorizing judge's order, which was in fact clearly set out in the wiretap warrant under the heading “*Terms for safeguarding solicitor-client privilege*”.

[99] According to the witnesses’ testimony, this was done knowingly.

1. She noted the difference in views referred to previously between investigator Poutré-Noiseux and the authorizing judge as to the privileged nature of two communications. Clearly, she considered that the authorizing judge had erred and she criticized the inspector for her failure to follow up:

[translation]

[41] While several solicitor-client sessions were sent to the authorizing judge, as required by the order, for determination as to whether or not those conversations were privileged, investigator Poutré-Noiseux stated that, upon the return of sessions that had been held to be non-privileged by the judge, she had blocked two that, in her opinion, were privileged.

[42] She listened to them and determined that she should not have had access to them, contrary to the authorizing judge's opinion.

[43] Although this evidence was not known at the time of the first hearing in the judgment staying the Frank Zampino proceedings, the Court had raised such a possibility.

[44] This leads to the finding that the authorizing judge should not have listened to those conversations, already presumed privileged in any case, since he was not familiar with the fine points of the investigation, especially since the latter had been ongoing for six years.

[45] He therefore did not know the value of the information given to investigators.

[46] Although investigator Poutré-Noiseux responded in this way, she did not follow up on her request to block those two sessions.

1. In the judge’s view, there had been improvisation, disorganization and bungling on the part of agents of the state and she reiterated that the authorizing judge should not have listened to the communications involving a lawyer, since he could not have known the significance of the information that they contained.
2. She criticized the agents of the state for having knowingly breached the terms of the authorization [translation] “in order to pick and choose their evidence, sort it out, make their case in an editorial fashion, for the purposes they were seeking”. Such conduct could not be tolerated. To find otherwise [translation] “would send the message that the ends justify the means, no matter which ones are […] used by the police, and irrespective also of whether they constitute flagrant violations of the accused’s constitutional rights and a judge’s order”.
3. The investigators’ conduct constituted [translation] “a serious violation of the integrity of our justice system which brings its administration into disrepute”, which must be denounced. The police investigation in its entirety was, thereby, flawed. Relying on *Babos* and the second category of abuse that it describes, the judge concluded that this was a clear case in which a stay of proceedings was necessary.
4. This Court now turns to an analysis of those two judgements.

# IV – INFRINGEMENT OF THE RESPONDENTS’ RIGHTS

## The wiretap authorization

1. To begin with, we note that it was not open to the judge to impugn the duration of the authorization, i.e., 60 days, nor the means of investigation used by the police. Yet, that is what she did in the Zampino judgment:

[translation]

[21] Since this was an invasion of privacy, the *Criminal Code* provides a mechanism for granting authorization, as well as terms and limits thereof, particularly as to time, i.e., a *maximum* of sixty days.

[22] Here, the wiretap warrant provided for the maximum duration, and a reading of the terms of the warrant leads the Court to conclude that the applicant no longer had any privacy during those two months.

[23] On November 10, 2015, the applicant received a notice pursuant to ss. 196 and 487.01(5) *Cr. C.*, informing him that he had been the subject of wiretapping between June 17 and August 15, and that the authorization allowed his activities to be observed by means of a camera or other similar electronic device, pursuant to the provisions of s. 487.01(4) *Cr. C.*

[24] Even the applicant's spouse was included among the targets whose communications could be intercepted during those two months, under the same restrictive terms as all the other targets. The applicant's workplace was also covered by the warrant.

[25] The warrant also simultaneously provided for a general warrant pursuant to s. 487.01 *Cr. C.*, a warrant for a tracking device pursuant to s. 492.1 *Cr. C.*, and a warrant for a transmission data recorder pursuant to s. 492.1 *Cr. C*.

[26] This meant that the targets' places of residence and vehicles were also among the places where private communications could be intercepted.

[27] Moreover, all Internet communications involving the targets were intercepted during that period.

[28] The warrant even provided terms for post-arrest monitoring in police vehicles, whether unmarked or not, as well as in any place of detention, prior to the appearance of the persons targeted by the warrant.

[29] In the Court's opinion, it is difficult to conceive of anything more intrusive, and indeed, abusive. […]

[References omitted]

1. An authorization’s duration and the intensity of the investigative measures are to be assessed in light of the law, the scale and complexity of the case, and not in the abstract. It is true that the measures put in place were uncommonly extensive; this does not mean, however, that they were abusive, without further demonstration. Yet the judge provided no analytical factor, simply stating that Mr. Zampino [translation] “no longer had any privacy during those two months”.
2. The judge took issue with the fact that the authorization was coupled with a general warrant (487.01 *Cr. C.*), an assistance order (487.02 *Cr. C.*), a warrant authorizing a tracking device (492.1*Cr. C.*) and a warrant allowing the use of a transmission data recorder (art. 492.2*Cr. C.*). Yet s. 186(8) *Cr. C.* allows such orders to be issued if they are related to the implementation and the execution of the authorization. That was the case here. As the appellant argues, [translation] “these were not additional discrete invasions of [the respondents’] privacy capable of constituting a violation, let alone an abuse of process”.
3. Moreover, contrary to what the judge suggested, the fact that Mr. Zampino’s spouse was a target and that his vehicles as well as his [translation] “places of residence and work” were included in the locations targeted was in no way inherently abusive or offensive. Police investigations in matters such as corruption, conspiracy and fraud sometimes require extensive measures, provided that they are within the law. In the case at bar, the authorizing judge simply rendered orders necessary for the execution of the authorization pursuant to s. 186(8) *Cr. C.* In short, the trial judge could not criticize the authorizing judge for having done this without any further demonstration and, in so doing, she erred in law. She could not hold, without evidence, that the measures put in place were, in themselves, abusive.
4. We now turn to the professional secrecy protection clause.
5. The judge’s reasoning on the issue appears rather unclear.
6. On the one hand, she seemed to conflate the authorization’s validity (or legality) with its execution. On the other hand, she stated that the communications should have been blocked and sealed from the outset, with no one – not even the authorizing judge –being able to have access thereto, adding nevertheless that the police had acted improperly by not complying with the order and by not sending all the conversations to the authorizing judge for the purpose of listening to them.
7. In any event, the judge erred in law when she wrote: [translation] “Nothing in the warrant addresses reasonable and probable grounds to believe that the applicant’s solicitor has been or is about to become a party to an offence”. In doing so, she was necessarily referring to s. 186(2) *Cr. C.*, which applies in fact only in the case of interceptions that will occur “at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients”. This was not at all the case here, rendering that subsection inapplicable. The communications involving lawyers were not intercepted at the latter’s offices or residences, or at any other place usually used for consultation with clients. They were intercepted at their clients’, i.e., targets, locations, solely because they communicated with the latter (or vice versa). Those interceptions were carried out in accordance with the so-called basket clause that authorized the interception of communications between the targets and unknown persons.
8. In other words, the lawyers were not targets, such that the authorization cannot be said to have contravened the provisions of s. 186(2) *Cr. C.* It is therefore inaccurate to say, as did the judge, that the interceptions of the lawyers’ communications were [translation] “intended, targeted and inevitable”. While it is obvious that they were predictable, the purpose of the authorization and its execution was not to intercept the lawyers’ communications, but rather those of the targets.
9. It is in this sense that the lawyers were unknown persons. Of course, the existence of some of them was known to police, but the fact is that they were not persons “the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation”: *R. v. Chesson*, [1988] 2 S.C.R. 148, p. 164. The lawyers were not targeted by the investigation and their communications could not, by themselves, assist the investigation.
10. It bears repeating: a person is unknown “even if police officers know of them, if there are no reasonable grounds to believe that intercepting their conversations could be useful to the investigation”: *Pasquin c. R*., 2014 QCCA 786, para. 43, and the communications involving lawyers were intercepted not because police officers had grounds to believe that intercepting those communications would be useful to the investigation, but because they contacted the targets (or vice versa). Indeed, in *Pasquin*, the Court rejected the notion that s. 186(2) *Cr. C.* always applies, including when the lawyer is not even the subject of an investigation and his communications are recorded solely because he communicated with a target.
11. As to the police’s interest in those conversations, investigator Poutré-Noiseux was categorical; there was none:

[translation]

Q O.K. Was there any particuliar interest in lawyer-target conversations? In the sense that they could provide important information. Did you, in the investigation, in the plan…

A None whatsoever.

1. Team leader France Lessard confirmed that the investigation team had [translation] “no interest” in that type of communications. Indeed, the fact that Ms. Poutré-Noiseux deemed it necessary to notify her superior that communications cleared by the authorizing judge should have, in her view, been classified as privileged provides a further indication that the police were not seeking to intercept lawyers’ communications. In this regard, one can also consider the fact that all communications related to Mr. Gérald Tremblay were systematically blocked, even though he was not actively practicing law. Everything therefore points to the fact that the police had no particular interest in those communications.
2. Therefore, the judge was wrong to infer from Ms. Nathalie Martin’s testimony that the police had a particular interest in the targets’ communications with their lawyers.
3. Ms. Martin testified that at the time of the wiretapping in the *Fronde* investigation, the practice then in force at the Sûreté du Québec was to block all potentially privileged communications and to send to the authorizing judge only those of which investigators wanted their status to be determined (privileged or not). According to the respondents, that practice was based on an erroneous interpretation of the protection clause. Ms. Martin testified that the choice of communications to be sent to the authorizing judge for determination of their status was established on the basis of the investigation’s requirements. It is in that context that she uttered the sentence that the respondents hold against her: [translation] “investigators were to indicate which lawyers, to them, in fact, […] where of interest, which lawyers were of interest to them”.
4. That sentence, when considered in its context, does not show that the police had an illegitimate interest in the lawyers’ communications. On the contrary, Ms. Martin stated that investigators were able to determine, based on the investigation’s requirements, which communications had to be sent to the authorizing judge. In other words, they prioritized the communications of certain targets. Ms. Martin had no idea of how investigators selected the communications to be sent to the judge (before realizing that they all had to be sent to him). It cannot be inferred from this testimony that the targets’ lawyers were known persons within the meaning of *Chesson* or that their communications were targeted.
5. The fact that Mr. Zampino was also charged in the *Faufil* case at the time of the interceptions does not change this. On that point, the appellant rightly argues that [translation] “persons charged or under investigation must be capable of being subject to lawfully authorized electronic surveillance” », and that [translation] “nothing justifies that they benefit from immunity, purportedly on account of an increased risk of intercepting communications involving a lawyer”. Knowing that a target will likely communicate with a lawyer is not a bar to the issuance of a wiretap authorization. One cannot argue that the execution of a valid judicial authorization should be prevented because there was an increased risk that a lawyer might contact a target (or vice versa). The solution lies in the execution of such an authorization and its implementing provisions.
6. The same holds true with respect to the fact that the investigators publicly disclosed information about ongoing police operations in order to provoke communications relevant to the investigation. The record does not show that the investigators acted for the purpose of provoking communications between the targets and lawyers, communications that could turn out to be privileged. The interception of such communications was simply a collateral effect of the investigation. To say otherwise, as the judge did, amounts to prohibiting any police scenario aimed at eliciting a reaction from a target, since a person involved in a crime is always liable to communicate with a lawyer under such circumstances.
7. In the case at bar, the authorizing judge knew that certain targets (including Mr. Zampino) were accused in the *Faufil* case and that investigators would employ tactics designed to have them react in order to elicit communications. He had before him all of the information necessary to decide to issue the authorization. In other words, he had before him sufficiently accurate and complete information that allowed him to exercise his jurisdiction with full knowledge of the relevant facts, which is not to say, as will be discussed below, that it would not have been more prudent to provide more robust terms on that matter.
8. All of this does not mean that the authorization was beyond reproach. Some have spoken of its validity, others, of its legality. Yet, because the judgments were rendered in the context of a claim for relief under s. 24 of the *Charter*, and not on an application to quash or set aside an authorization, one should speak instead of its reasonableness (or lack thereof) with regard to the protection of rights under the *Charter*, notably s. 8, it being understood that an interception carried out pursuant to an otherwise valid authorization will be reasonable: *R. v. Doroslovac*, 2012 ONCA 680, para. 30 (application for leave to appeal to the Supreme Court denied, April 25, 2013, No. 35126).
9. In *Pasquin*, *supra*, the Court endorsed a protection clause that bore certain resemblances with the one at issue here, although there exist significant differences between the two. Indeed, in *Pasquin*, the clause, which stemmed from a directive by the Sûreté du Québec, read as follows:

[translation]

[15] With live monitoring, the analyst who observes that one of the callers is a solicitor must interrupt the interception, that is, he or she must immediately stop listening to the conversation and stop recording. The portion of the conversation that is already recorded is then sealed, archived, and access to it is blocked.

[16] As for pre-recorded monitoring, as its name indicates, it occurs once the conversation has been recorded. It is entirely recorded and kept for later monitoring. In that case, the Directive states that the analyst must stop listening as soon as he or she observes that one of the callers is a solicitor. The analyst must then block access to the recording, seal it, and archive it. The Directive does provide, however, that if the analyst has reasonable grounds to believe that a conversation that has been made inaccessible is not privileged, the head of the Electronic Surveillance Unit may inform an agent (within the meaning of subsection 185(1) Cr. C.) and send it on, sealed, for the latter to determine whether a judicial decision should be sought on the matter.

[Emphasis added]

1. The directive endorsed in *Pasquin* was therefore different. Indeed, contrary to the instant case, it clearly distinguished between the terms applicable to pre-recorded monitoring and those applicable to live monitoring (whereupon the monitoring and recording had to stop immediately). Moreover, pursuant to that directive, only communications for which there existed reasonable grounds to believe that they were not privileged were to be sent to a judge for determination on the matter. This was not the case here, if one relies on the interpretation given to the clause by the parties and the trial judge: all conversations were to be sent to the judge, who would then review them even if there existed no grounds to believe that they were not privileged.
2. In *Pasquin*, conversations with a lawyer were not thus sent to the judge until such time that an agent deemed that there existed reasonable grounds to believe that the lawyer was [translation] “involved in the criminal activities” under investigation, which was not the case here. Moreover, the directive provided that the recording of live monitored interceptions was to stop, contrary to the terms of the clause in the case at bar.
3. Without directly commenting on the validity of the directive regarding live monitoring, the Court approved the directive used in *Pasquin* with regards to pre-recorded monitoring. What is the situation in the case at bar?

## The clause at issue in the case at bar

1. It should be mentioned that interpreting the clause at issue in the case at bar is no easy matter. Let us give it a closer look. To facilitate this exercise, we reproduce it again in part:

[translation]

As soon as there are reasonable grounds to believe that a lawyer is a party to a communication, the listening will be interrupted but the recording will continue. Recordings whose listening has thus been interrupted will be sealed by the Service de la surveillance électronique of the Sûreté du Québec and must not be listened to by anyone until I have personally reviewed their content and ruled on the confidential nature of each intercepted communication.

[…]

The sealing procedure described above shall apply, with such modifications as the circumstances require, to any other type of private communication intercepted.

[Emphasis added]

1. Two aspects of this clause beg attention: **1)** Since [translation] “the recording will continue” and the clause deals with [translation] “[r]ecordings whose listening has thus been interrupted” the inevitable conclusion is that it necessarily and solely refers to live monitoring, since, in the case of pre-recorded monitoring, the recording has already ended. Without of course asserting that that was the intended purpose, the fact remains that, literally, it could be understood in that way. **2)** Moreover, it could also be wrong to argue that all communications were to be sent to the judge, whereas only those that the police wanted to listen to had to be since, according to the clause, they [translation] “[were not] not be listened to […] until” the judge ruled on the confidential nature [translation] “of each intercepted communication”. Therefore, it would only be those communications that the police wanted to listen to that had to be sent to the judge. That would require that the police make a choice, a choice based on the requirements of the investigation, which is what the respondents argue that they improperly did.
2. To state the obvious, the words [translation] “of each intercepted communication”, as well as those found in the last paragraph, lead to the conclusion, as the parties argue, that all interceptions were covered and therefore had to be sent to the authorizing judge, including pre-recorded interceptions (in light of the clause’s last paragraph), which is obviously consistent with the very nature of wiretapping, that is generally conducted on a delayed basis. In reality, that is not the issue, however. This exercise shows, rather, the clause’s sheer ambiguity and the distinct possibility that the police simply made a mistake in interpreting it at the outset, thus eliminating any likelihood of gross negligence and bad faith on that matter, as the respondents argue and as the judge evidently found. Indeed, the latter was of the view that, according to the clause, all communications involving a lawyer had to be delivered to the authorizing judge, such that the police had willfully failed to comply with it. Yet, we know that investigators believed the opposite at first before concluding otherwise in May 2016, following discussions with agents. Never, in the Marcil judgment, did the judge contemplate the possibility of an error made in good faith before making a finding of gross negligence and even bad faith on the part of police who, in her words, [translation] “knowingly” violated the terms of the clause:

[translation]

[98] In the Court's opinion, the crux of the matter lies in UPAC's breach of the authorizing judge's order, which was in fact clearly set out in the wiretap warrant under the heading [translation] “*Terms for safeguarding solicitor-client privilege*”.

[99] According to witnesses’ testimony, this was done knowingly.

[…]

[103] Police officers, UPAC investigators, team leaders, captains and superiors who did not comply with a judge's order in order to pick and choose their evidence, sort it out, make their case in an editorial fashion, for the purposes they were seeking, this cannot be tolerated.

[…]

[106] This was not a snap decision, made by a police officer in the heat of the moment. These were concerted, ongoing acts involving several levels of decision-making, from which emanated the instruction not to send everything to the judge, in other words to disobey his order. For others, it was a matter of laxity and negligence.

[107] The Court cannot continue the proceedings after such a finding. The police investigation is vitiated. The evidence heard undermines any confidence in the rest of the investigation.

1. It was an error of law to fail to consider all of the evidence, including, in the instant case, the protection clause’s ambiguity, thereby reducing the magnitude of the blame cast against the police.
2. In any event, whatever interpretation must prevail, two conclusions are inevitable: first, the protection clause in the case at bar was, at the very least, confusing and, second, it was less protective of solicitor-client privilege than that in *Pasquin*.
3. Indeed, on the first point, the clause was vague as regards pre-recorded monitoring and, on the second point, either the pre-recorded conversations were simply not protected, or they were all liable be monitored, if only by a judge, and they could therefore be more easily held to be non-privileged without having to first undergo the screening stage to determine that there were reasonable grounds to believe that they were not.
4. What can explain this change in the Québec approach? Why did Québec police, and more particularly the Sûreté du Québec, stop using a formula recognized to be valid in *Pasquin*? Why were the terms of the wiretap authorization issued on June 17, 2015, therefore after the April 15, 2014 *Pasquin* decision, so different? The record provides no answer to these questions, but the fact of the matter is that the terms of the authorization here were more permissive and more readily allowed access to conversations that may have been, at least on their face, privileged.
5. The intervener Director of Public Prosecutions of Canada indicated to the Court that the standard clause used in Québec by federal prosecutors is similar to the one used in the case at bar, in that all communications to which access is not permitted because they involve a lawyer, whether monitored live or on a delayed basis, can be submitted to a judge so that he or she [translation] “determines, *ex parte*, whether access to that communication can be granted”. It is perhaps true that this standard clause is akin to the one at issue here in that prior screening is not required (although it also contains an important difference, since it is clear that all communications need not be submitted to the judge); this does not explain, however, why the practice in Quebec has changed and has become less protective of solicitor-client privilege.
6. Solicitor-client privilege is a fundamental concept in Canadian law and it must be protected at all costs by limiting to the fullest extent possible access to privileged conversations.
7. As the intervener Association des avocats de la défense de Montréal-Laval-Longueuil rightly observed, [translation] “the professional secrecy of lawyers is essential to the proper functioning of our legal system”. The intervener thereby echoed decisions of the Supreme Court, notably *Canada (A.G.) v. Chambre des notaires du Québec,* 2016 SCC 20, [2016] 1 S.C.R. 336, which held that such secrecy is a principle of fundamental justice within the meaning of s. 7 of the *Charter.* For its part, the decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, highlighted the essential character of a lawyer’s advice in our legal system and the need to give it an assurance of confidentiality as close to absolute as possible. As noted in *Rizzuto c. R.*, 2018 QCCS 582, par. 209, the utmost caution is called for.
8. This being so, it is undeniable that, even though communications between a client and his or her lawyer do not necessarily involve the provision of legal services, they must take place in a climate of confidence. Without of course suggesting that such a climate of confidence must necessarily be respected to the point where all communications between a lawyer and his or her client must remain confidential (that is not the law), it remains essential to consider that reality when developing the terms of access with respect to wiretaps. Thus, in *Blank v. Canada (Minister of Justice),* 2006 SCC 39, [2006] 2 S.C.R. 319, the Court noted:

26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients’ cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[Emphasis added]

1. Knowing that the conversation could be monitored (even if only by a judge) without any prior grounds to believe that it may not be privileged (whereas it is presumptively so), that confidence is in risk of being eroded. Not because a judge will fail to respect confidentiality, but because one cannot exclude the risk of error when sending recordings to the judge, nor even errors by the judge.
2. Similarly, the possibility of indiscriminate monitoring, by anyone, has the potential of undermining the confidence of clients who believe, by and large, that no one, no matter what their role, will listen to their communications of a legal nature. Yet there exists a means of effectively protecting that confidence and that is by using a clause similar to the one used in *Pasquin*. To be clear, what is at issue here is the clients’ confidence and not an infringement of the privilege; nevertheless, that confidence is the foundation of a solicitor-client relationship.
3. Of course, a judge, a court of law, is the appropriate forum to determine that such a communication is not privileged: *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.,* 2004 SCC 18, [2004] 1 S.C.R. 456, para. 47.
4. Even so, the trial judge determined that, contrary to what the authorization provided, a judge was not able to divide a communication to glean non-privileged portions therefrom. As mentioned earlier, she wrote, in the Zampino judgment:

[translation]

[50] Solicitor-client privilege is not to be fragmented on a case-by-case basis, from various conversations or snippets of conversations, gleaned from a defined temporal and situational space, but constitutes a continuum of communication between a lawyer and his or her client.

[…]

[52] Thus, in the Court's view, it seems difficult to imagine how an authorizing judge, who is not familiar with the entire factual history of a case, can determine what is privileged and what is not, in whole or in part.

[53] Especially in a context where the investigation has been going on for six years and the applicant has been represented by the same firm for three years.

[54] Also, the judge is not familiar with the evidence, nor with all the explicit and implicit implications of the words exchanged between the parties. What is passed on to the police, after review, can become a trove of information for the latter, who better understand the evidence and are able to make connections with material that may appear inconsequential to the authorizing judge.

[Reference omitted]

1. This shows very little regard for judicial experience and indeed for the judiciary, not to mention that there is, in that assertion, a good deal of speculation, hypotheticals and even bias. Judges are trained to render decisions based on the evidence and the law. One must be willing to have confidence in the courts. If they are mistaken, there are means to challenge their decisions.
2. Moreover, the case at bar clearly shows the value of the presumption that judges will not render a decision if they are not able to do so legally. Indeed, out of an abundance of caution, the authorizing judge, in this case, characterized as [translation] “privileged” all communications that were either unintelligible or inaudible. Under those circumstances, surely one cannot suggest, as the trial judge did, that the authorizing judge took on a role that he was unable to assume.
3. On that issue, the intervener Barreau du Québec suggested the possibility that the authorizing judge be counselled or accompanied by a jurist, by the targets’ lawyer even, when came time to decide, drawing a certain parallel with the searches and seizures carried out in lawyers’ offices (*Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink,* 2002 SCC 61, [2002] 3 S.C.R. 209). This suggestion cannot be accepted.
4. As the Director of Public Prosecutions of Canada rightly pointed out, [translation] “that procedure cannot be transposed as is to electronic surveillance” for two reasons. First, there are exceptions to the *audi alteram partem* rule, it being understood that, in the ordinary case, a judge would be “well equipped . . . to determine whether a record is subject to [solicitor-client] privilege”, without the assistance of counsel of the parties (*Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 S.C.R. 350, para. 57. Second, electronic surveillance is, by its very nature, surreptitious, or else it is ineffective. This is by no means comparable to a search that the targeted person is generally aware of. Therefore, it was an error for the trial judge to hold, in the Zampino judgment, that the parties must have the opportunity to submit their observations to the authorizing judge:

[translation]

[71] However, in order to protect the evidence in its entirety, and in the event that a situation arises in which a crucial debate arises in the case, these solicitor-client conversations must be kept under seal, without anyone having access to them until the end of the proceedings, except after a hearing, parties' representations and a judgment authorizing disclosure.

1. This being so, communications with a lawyer cannot however be treated as if the presumption of confidentiality did not exist. As the Supreme Court held in *Foster Wheeler*, *supra*:

42 […] It would be enough to have the party invoking professional secrecy establish that a general mandate had been given to a lawyer for the purpose of obtaining a range of services generally expected of a lawyer in his or her professional capacity. At this stage, there would be a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature. […]. The opposing party would then have to give a specific indication of the nature of the information sought and show that it is subject neither to the obligation of confidentiality nor to immunity from disclosure, or that this is a case where the law authorizes disclosure notwithstanding professional secrecy. This method would have procedural consequences. […] This would prevent “fishing expeditions” in which lawyers, through the files they handle and reports they prepare for their clients, are used as a source of information for building cases against their own clients. One would also hope that every effort would first be made to obtain the information from available sources other than lawyers. A sound judicial policy, mindful of the social importance of lawyers’ professional secrecy and the need to protect it, should certainly not attempt to facilitate this sort of questioning, but rather restrain it as much as possible.

[Emphasis added]

1. The protection clause which was held to be valid in *Pasquin*, *supra*, fully met such a standard with regard to communications monitored on a delayed basis. That standard is high and seeks to properly minimize the infringement of the targets’ rights, while allowing police to monitor communications where appropriate, provided that there are reasonable grounds to believe that the presumption of privilege can be rebutted. Obviously, clients cannot be required to first establish, as was the case in *Foster Wheeler*, “that a general mandate had been given to a lawyer” for the presumption to apply. The surreptitious aspect of wiretaps precludes such prior demonstration. One must therefore adapt the rule and proceed as in *Pasquin*, i.e. consider that the communication is presumptively privileged. Thus, in that case, the prosecution could have access to the contents of a pre-recorded and presumptively privileged conversation, but to do so, it had to first satisfy a requirement that adequately reflected the existence of the presumption (which it did, by the way). For the reasons noted above, the protection clause in the instant case does not meet such a requirement since it flouts the presumption of confidentiality, which in turn rendered the authorization unreasonable and invalid. The clause proposed by the Court in the case at bar is more exacting, more protective of rights, all the while protecting the authorities’ legitimate right to monitor and use a communication that is not privileged.
2. As for live monitoring, *Pasquin* does not answer the question, since there was no such monitoring in that case. Furthermore, whether or not there was evidence of live monitoring in the case at bar changes nothing. The mere probability raised by the respondents is enough to allow the Court to make a determination, especially since the clause provided for that type of monitoring.
3. In *Pasquin*, with regard to live monitoring, the recording would have had to be immediately interrupted as soon as it was observed that a lawyer was a party to the communication, which is different than the clause here and that used by federal prosecutors in Quebec. While it is indisputable that the directive in *Pasquin* was respectful of the solicitor-client relation, this does not mean that the recording has to be interrupted in all cases where a lawyer takes part in a live-monitored communication. The authorizing judge will decide as he or she does for all the terms of the authorization. While it is true that, generally, the recording should be allowed to continue, the Court cannot exclude specific cases that, according to the authorizing judge, would require that it be terminated. In other words, while the Court may require a minimum level of protection in all authorizations (for example, the existence of reasonable grounds to believe that the communication is not privileged before sending it to a judge), it cannot prevent an authorizing judge from being more demanding before authorizing a wiretap according to circumstances.
4. If recording had to be terminated for all communications involving a lawyer, live monitoring would become the rule. However, this has been rejected by the Supreme Court in *R. v. Taylor*, [1998] 1 S.C.R. 26, which substantially confirmed the reasons of Huddart, J.A. in *R. v. Taylor* (1997), 86 B.C.A.C. 224. As the latter noted, this would result in lawyers enjoying protection of their privacy exceeding that available to the ordinary citizen:

[16] If this Court were to accept the interpretation counsel seeks to have us put on section 186, counsel agrees that live monitoring of all interceptions would be required and that any conversation by anyone with a lawyer would be required to be terminated automatically upon the solicitor's phone being answered. One consequence of such a policy would be that solicitors would have protection of their privacy far exceeding that available to the ordinary citizen, whether or not there was any realistic possibility that the interception would infringe solicitor/client privilege. They would have such protection not only at their offices but also in their homes and anywhere else they might answer a phone. The respondent considers the incidental benefit to lawyers to be a reasonable price to pay to ensure the sanctity of solicitor/client communications.

1. The directive in *Pasquin* literally created, for live monitoring, an irrebuttable presumption of privilege that became effective as soon as a lawyer was involved, which is both unnecessary and too strict, since it makes it impossible to rebut the presumption of privilege. Moreover, termination of the recording is not always necessary where, on the other hand, communications with a lawyer cannot be sent to a judge unless there are reasonable grounds to believe that they are not privileged. Consequently, even for live monitoring, the clause does not necessarily have to provide that the recording must be interrupted, although the monitoring itself must always stop.
2. This latter requirement adequately protects targets’ rights, while not precluding the possibility that a conversation becomes one day accessible because it turned out to be non-privileged. In short, what is illegal is not the interception of any conversation involving a lawyer, but rather the monitoring of privileged communications by investigators. It is inappropriate, therefore, to totally prevent legal interceptions and their subsequent monitoring, upon certain conditions, where a sealing mechanism exists and is already used for pre-recorded monitoring.
3. In the Court’s view, live monitoring does not necessarily require that the recording be immediately terminated, provided, however, that it be stipulated that the monitoring of the communication would have to cease and that the recording could not be sent to a judge, unless there are reasonable grounds to believe that it is not privileged. That, indeed, would be a balanced approach that must now become the norm.
4. In this regard, in addition to *Pasquin*, *supra*, two other Canadian decisions considered clauses that contained such a requirement: *R. v. Martin*, 2010 NBCA 41 and *R. v. Fox*, 2022 SKKB 235. It is therefore apparent that, in New Brunswick and Saskatchewan at least, such a clause better protects communications between lawyers and their clients than is the case in Quebec. In other words, the Court’s decision here does not revolutionize the rules to be followed; at most, it adopts an already recognized practice and ensures that the solicitor-client relationship is adequately protected.
5. In sum, on the issue of the wiretap authorization, the trial judge made various errors of law 1) by asserting that the scope of the investigative methods and their intensity constituted an unreasonable and abusive invasion of the respondents’ privacy, whereas, they sought, at the most, to effectively address a complex case; 2) by requiring, for all intents and purposes, the application of s. 186(2) *Cr. C.* to obtain the authorization, whereas the lawyers were unknown persons and not targets, and the application for an authorization was not in relation to the office or residence of a lawyer or to any other place usually used for solicitor-client consultations; 3) by asserting that the authorizing judge could not, under any circumstances, listen to the communications and that he was not able to split them in order to identify the privileged portions thereof; 4) by requiring that the communications could not be held to be non-privileged without the parties having had the opportunity to submit their observations to a judge; 5) by failing to consider all of the evidence before finding that the police had knowingly breached the terms of the authorization.
6. She also made a palpable and overriding error of fact by stating that the interceptions involving lawyers were [translation] “intended, targeted and inevitable” and that the police had a particular interest in the lawyers’ communications. While it was likely that a target would communicate with a lawyer in the circumstances of the present case, the fact remains that here, there was no evidence that the lawyers’ communications were targeted, nor that their interception was intended.
7. By contrast, as noted above, it was open to the judge to disagree with the terms of the authorization, but not for the reasons that she gave.
8. In short, in the Court’s view, a valid protection clause must stipulate the termination of live monitoring, while nevertheless possibly allowing the recording to continue, as soon as it is observed that a lawyer is a party to a communication with a target. As for pre-recorded monitoring, the recording of a communication with a lawyer must no longer be listened to as soon as it is observed that the lawyer is a party thereto. In both cases, any recordings must then be sealed and archived, and may not be sent to a judge for determination of their status unless there are reasonable grounds to believe that the communications may be non-privileged. Because the authorization at issue did not contain such a clause, it must be found to have infringed the protection of s. 8 of the *Charter*.

## The handling of the recordings

1. Now, what should become of the recordings of the communications that were not held to be non-privileged? In all such cases (for example for recordings that were not sent to the authorizing judge or for those that he declared privileged), should they be preserved and archived or simply destroyed?
2. If we were to hold that communications between lawyers and their clients benefited from an irrebuttable presumption of privilege, the destruction of all such recordings could be contemplated. That is not the case, however. There may be circumstances in which, as in *Pasquin*, *supra*, the police acquire, subsequently, reasonable grounds to believe that those communications were not privileged. There is no reason to deny authorities this opportunity.
3. Moreover, as the Association des avocats de la défense de Montréal-Laval-Longueuil argued, what is done is done. The recordings took place, they exist, and the state should not be authorized to destroy without cause elements of the evidentiary record, even though they are inadmissible, at least for the time being. In addition to the possibility that the communication is later held to be non-privileged, there is also the possibility, the Association noted, that it even be exculpatory, and the accused should not be denied the right to have access thereto.
4. The solution, therefore, is to seal those recordings and to archive them with no possibility of listening to them or accessing them, according to the terms described previously.

## The ITO prior to the authorization

1. The trial judge blamed the informant for having failed to mention, in the sworn ITO, that Mr. Zampino had retained Mtre Isabel Schurman to represent him in the *Faufil* case while he was [translation] “in the midst of preparation” for the trial that was to begin in a few months. This being so, it was almost certain that Mr. Zampino would contact his lawyer and that that communication would be recorded.
2. The ITO was dated June 17, 2015 and the trial was scheduled to begin on February 8, 2016. In the Zampino judgment, the judge wrote:

[translation]

[35] This aspect was known to the authorizing judge, since the file came back before him on four occasions (October 29, 2012, December 12, 2012, January 16, 2013 and April 29, 2013), before he authorized the wiretap. He was also aware that the applicant had been represented by the same lawyer since the beginning of the proceedings, in 2012, and that other members of her firm were assisting her in these proceedings.

[36] This observation applies to all state actors. The situation was obvious for all to see. At the time the warrant was obtained, the solicitor-client relationship between the applicant and the members of Mtre Schurman's firm was unequivocal.

[37] The affiant should have informed the authorizing judge of this fact in order to protect solicitor-client privilege, but the judge himself was aware of it.

1. In sum, the trial judge considered that this information was crucial and should have led to a more robust protection clause (for example, by automatically blocking, from the outset, any communications associated with the lawyer’s phone number). Of course, as witnesses confirmed, the lawyer and Mr. Zampino would probably communicate with one another, even if only in the context of the upcoming *Faufil* trial, especially since the police were going to use various means to make public information that could elicit a response by the targets, and solicitor-client privilege had to be protected.
2. But it must be recognized that paragraph 37 of the Zampino judgment appears at the very least to be contradictory: on the one hand, the trial judge blamed the informant for having failed to inform the authorizing judge that Mr. Zampino was represented by Mtre Schurman, while noting, on the other hand, that he was already aware of this. If the authorizing judge knew, the absence of information in the ITO caused no prejudice to the respondent.
3. Moreover, it was not quite accurate to say that (Ms. Sylvie Martel’s) ITO did not contain the information. Indeed, she indicated the following, in section 4.26.11 of her affidavit:

[translation] On January 22, 2015, S/D Yanick Gouin analysed a newspaper article published at www cyberpresse.ca. on January 12, 2015, entitled “*Des reproches à l'horizon pour l'administration Tremblay”*. […] In this article, as far as Frank Zampino is concerned, his lawyer Isabel J. Schurman did not want to comment on the information obtained by “La Presse”.

1. While it is true that the ITO did not underline Mtre Schurman’s role, that passage, combined with the authorizing judge’s prior knowledge, nevertheless leads us to find that the latter possessed all the information required to provide for terms to adequately preserve the confidentiality of the communications. The informant’s conduct, which the trial judge had issue with, was therefore inconsequential.
2. We must also acknowledge that this aspect of the case in no way affected the rights of the other respondents. Indeed, none was accused in the *Faufil* case and none had any criminal case pending. Moreover, aside from Mr. Poulin, none of the respondents was targeted by the wiretap application.
3. Consequently, the police officer could not be blamed for having breached her duty of full disclosure by not notifying the authorizing judge of the identity of one the respondents’ lawyer. Furthermore, as we know, the authorizing judge was also informed of the police’s intention to use various investigative techniques, notably by making public certain information in order to induce communications. In sum, the authorizing judge had in hand all of the required knowledge to issue an order in conformity with the requirements of the law.
4. Moreover, in the circumstances of the present case, the trial judge’s objection cannot relate to the rights of respondents other than Mr. Zampino, unless we were to say, as was argued before the Court, that the police were responsible for assessing the situation of each of the targets to determine whether a lawyer represented them or had already represented them in other cases to so inform the authorizing judge of that fact.
5. And yet the police cannot be required to undertake such an inquiry in all cases. How would the boundaries of such an inquiry be determined? Should the inquiry be limited to criminal cases, or extend to civil, commercial and family matters? Would one have to ensure that the lawyers or members of their team are still representing the target? How far back in time should the inquiry go? Would one also have to determine whether family members are represented? One can imagine a host of difficulties for that type of duty. Each situation must remain unique and be decided on its own circumstances.
6. Here, in view of the *Faufil* case, whose trial was set to begin in six months, it would certainly have been more prudent to declare to the judge in so many words that Mtre Schurman represented Mr. Zampino in a related case and that there would likely be communications between the two. Consideration must however be given to the contents of the affidavit (which disclosed Mtre Schurman’s existence and the involvement of lawyers for other targets, as well as the use of various investigative techniques) and to the authorizing judge’s prior knowledge before finding that the conduct was abusive. Consideration must also be given to the fact that the identification of a lawyer’s phone number is not a panacea. That is not to say that the lawyer alone can use that number nor to say that one day, the communication will not be held to be non-privileged.
7. In short, although the affidavit could have been worded differently, its deficiencies could only have affected Mr. Zampino’s rights, and not those of the other respondents. Moreover, they do not have the importance that the trial judge gives them, and, above all, they cannot constitute evidence that could lead to a finding of bad faith or gross negligence, let alone abuse.
8. In conclusion, on this first ground of appeal (infringement of the respondents’ rights), the trial judge made several errors of law pertaining to the wiretap authorization and its execution, palpable and overriding errors of fact, notably with regard to the police’s intent to target the lawyers, and drew inferences therefrom without considering all of the evidence, which was another error of law. Although the authorization was deficient, the reasons that underpin that finding are not those identified by the trial judge and, above all, her objections as to the circumstances of the authorization and its execution (see para. 128 of this judgment) are unfounded.
9. As the issue in dispute does not concern s. 24(2) of the *Charter* (exclusion of evidence), but rather s. 24(1) (stay of proceedings for abuse of process), let us now address this question, since it is possible that the violation caused by the authorization (mainly of s. 8 of the *Charter*) does not lead to a stay of proceedings. In any event, if this was the only issue, the legal standing of the respondents other than Messr. Zampino, Poulin and Moreau to request the exclusion of wiretap evidence that did not infringe upon their rights should be seriously questioned, since their private communications were not intercepted. It is rather in the context of s. 24(1) that the issue can arise, according to *R. v. Bjelland*, 2009 SCC 38, [2009] 2 R.C.S. 651, an issue that becomes moot, however, given the appellant’s statement that it will not use that evidence. Let us now consider the issue of abuse of process.

# V – ABUSE OF PROCESS AND STAY OF PROCEEDINGS

1. There is undoubtedly evidence that the respondents’ rights were violated. It is even possible to conclude that that should lead to the exclusion of evidence, considering the conduct of the police as well, under s. 24(2) of the *Charter*, (perhaps even under s. 24(1) in accordance with *Bjelland, supra*). Such a measure would likely not be objected to by the appellant, given the latter’s statement at trial pursuant to which it undertook not to use the wiretap evidence. It is not a foregone conclusion, however, that such violations constitute an abuse of process justifying a stay of proceedings. In other words, the question is whether a stay of proceedings is the appropriate remedy?
2. In *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, abuse of process is characterized as a broad concept:

[42] The remedy of abuse of process may or may not provide protection against relitigation of a particular issue. Abuse of process is a broad, somewhat vague concept, that varies with the eye of the beholder. Traditionally, it has been reserved for obviously egregious abuses of the Crown power, and this Court has said that successful reliance upon the doctrine will be extremely rare — only in “a process tainted to such a degree that it amounts to one of the clearest of cases”: *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 120. […]

[Emphasis added]

1. An infringement of rights protected by *Charter* does not suffice, for the purpose of s. 24(1) of the *Charter*, to constitute an abuse of process. Even if bad faith or malice on the part of the State is not required, there must be evidence of prejudicial conduct: *R. v. Hunt*, 2017 SCC 25, [2017] 1 S.C.R. 476; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, para. 41.
2. It is true that abuse of process and stay of proceedings are often treated indiscriminately. That was the case, for example, in *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307, para. 118, as well as in *R. v. Conway*, [1989] 1 S.C.R. 1659, in which it is said, at p. 1667:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. […]

1. But the fact remains that there can be abuse of process without necessarily triggering a stay of proceedings. That was the case in *Tshiamala c. R.,* 2011 QCCA 439 (application for leave to appeal to the Supreme Court denied, December 1, 2011, No. 34243):

[translation]

[101] For the following reasons, I am of the opinion that the trial judge was justified to find that the incidents that took place peripherally to Wilkerno Dragon's testimony violated the respondents' rights to a full answer and defence and to a fair trial, and undermined the integrity of the justice system thus constituting an abuse of process.

[…]

[161] What are we to think of all this? Certainly, Crown counsel's misconduct is clear, serious, and deliberate. It must be strongly denounced. Must it be inferred from this, however, that the only appropriate remedy is a permanent stay of proceedings? I find that the circumstances of the case do not reasonably support such a conclusion; therefore, despite all deference due to the trial judge's judgment, it is necessary to intervene.

1. In any event, as discussed above, there are only two categories of abuse of process for the purposes of s. 7 of the *Charter*: when the State’s conduct impinges on the accused’s right to a fair trial (main category) or when it impinges on the integrity of the justice system (residual category): *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, paras. 49-51; *R. v. Babos*, *supra*.
2. The Court holds that the impugned conduct in the case at bar engages the second category only, primarily on account of the police’s conduct, as well as the defects of the authorization. However, the seriousness of that conduct was considerably less than that found by the trial judge, such that a stay of proceedings is not the only conceivable remedy. The instant case does not involve the characteristics described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, i.e., proceedings “unfair to the point that they are contrary to the interest of justice”.

## Abuse of process and police conduct

1. We know that in addition to the issue of the content of the Information to obtain the authorization, the trial judge considered the police’s conduct during the execution of the authorization, including the failure to comply with the order, to render her decision. Thus, she determined that the police’s negligence, if not their bad faith in the management of the authorization, constituted misconduct that led to an abuse of process. We now turn to this issue.
2. First of all, a clarification: in the Zampino judgment, the trial judge asserted that Mr. Poulin was charged in a [translation] “similar” case at the time of the wiretap authorization and that his trial was [translation] “set to begin in February 2016” This is not accurate: aside from Mr. Zampino, none of the respondents was charged in a similar case.
3. The trial judge noted [translation] “some shortcomings in the handling of the electronic surveillance”, notably as to the need to block and identify communications with lawyers and adequately mitigate the impacts thereof. For example, the trial judge indicated that as early as July 6, 2015, tactical analyst Goulet-Laroque was informed by investigators [translation] “that sessions with lawyers had slipped through the cracks of system A, where they should have been blocked”. A notice was issued to correct that situation, but some investigators nevertheless had [translation] “access” to them prior to this.
4. It must be recalled, however, that access to communications could occur without them having been listened to. In fact, the record includes several examples where accesses lasting a few seconds or less were logged. In other words, police may have had access to some privileged conversations upon the occurrence of such incidents, but they did not necessarily listen to them. It was also shown that they did not try to cover-up the matter and that they attempted, albeit ineptly, to plug the gap. Still, it must be recalled that, according to investigator Poutré-Noiseux, communications with lawyers slipped through the cracks on at least 20 occasions, which may suggest that some of those were listened to.
5. The trial judge also returned to Ms. Poutré-Noiseux’s opinion that she had had access to two conversations characterized as non-privileged by the authorizing judge, whereas in her opinion, they [translation] “should have been blocked”. The Marcil judgment noted the following:

[translation]

[43] Although this evidence was not known at the time of the first hearing in the judgment staying the Frank Zampino proceedings, the Court had raised such a possibility.

[44] This leads to the finding that the authorizing judge should not have listened to those conversations, already presumed privileged in any case, since he was not familiar with the fine points of the investigation, especially since the latter had been ongoing for six years.

[45] He therefore did not know the value of the information given to investigators.

1. The trial judge appeared to prefer the police officer’s opinion to that of the authorizing judge. And yet, nothing in the evidence sheds any light on the rationale of that conclusion.
2. Moreover, this last issue calls for some clarifications: according to the witness, such an incident did not occur again and none of the respondents took part in those two communications. This greatly limits the impact of that irregularity, if indeed there was one.
3. What is more, despite the obvious earnestness displayed by Ms. Poutré-Noiseux, the trial judge blamed her for having failed to follow-up on the matter:

[translation]

[46] Although investigator Poutré-Noiseux responded in this way, she did not follow up on her request to block those two sessions.

1. This criticism is indeed surprising under the circumstances, considering the position occupied by the police officer, whose responsibility did not include follow-ups, and her obvious desire to protect the targets’ rights.
2. The trial judge also took from her testimony that she frequently had access to communications with lawyers without them having been blocked, without further clarification, except that she had notified team leader France Lessard on her own initiative, since there existed no internal directive on how to deal with such cases.
3. In the Marcil judgment, the trial judge noted that Ms. Poutré-Noiseux’s testimony was more specific than the one given in the Zampino proceedings and described a situation that was even more disturbing than expected: [TRANSLATION] “[t]he facts that she now relates reveal improvisation, disorganization and bungling in the monitoring room, and then on the part of investigators, afterwards”.
4. The judgment noted that communications were sent to the authorizing judge on February 11 and September 15, 2016, adding that [translation] “the electronic surveillance ended on August 15, 2015. Consequently, there was a 6 month, and even a 13 month delay between the end of the electronic surveillance and the time lawyer-client conversations were sent to the authorizing judge”.
5. And yet, there is a beginning of an explanation for those delays, an explanation that the trial judge noted, in fact: it was only in May 2016 that investigators understood that all communications had to be sent to the authorizing judge (Ms. Lessard spoke of several months following the end of monitoring). The required inquiries then had to be conducted, which necessarily took time. As noted previously, the investigators’ mistake was quite understandable, if not reasonable and, at the very least, explained by the ambiguous wording of the protection clause. The trial judge was therefore especially and even unduly harsh when, in the Marcil judgment, she wrote, with respect to Ms. Lessard’s testimony, disregarding her explanations:

[translation]

[64] She indicated that a selection of lawyer-client conversations to be sent to the authorizing judge was made and that investigators Poutré-Noiseux and Yannick Gouin sorted through them, contrary to the order issued by the authorizing judge.

[…]

[69] But there's more. She mentioned that it was her superiors at the Sûreté du Québec who asked her to select the conversations, i.e., not to send everything to the authorizing judge.

[Emphasis added]

1. The trial judge also noted that at the hearing on the application, 233 communications with lawyers had not been sent to the authorizing judge, contrary to the terms of the order. However, the nature of those 233 communications should not have been overlooked when assessing the scope and gravity of police conduct, as we shall see later. In this regard, as far as Ms. Martin’s testimony is concerned, the following observations, also taken from the Marcil judgment, were incomplete and overly simplistic:

[translation]

[84] The final tally indicates that of those 233 presumptively privileged conversations, only 96 were blocked and the investigators had access to the remaining 137.

[85] She then qualified that initial assertion before the Court by saying that it was "*her impression that they had complied with the order and that their mission had been accomplished and that the wiretap analysts had information on solicitor-client privilege*”.

[86] The Court notes that, during her testimony, while engaging in reductionist calculations of the number of relevant or irrelevant sessions, in order to trivialize the enormity of the finding, Ms. Martin did not seem to be concerned or troubled.

[Emphasis added]

1. On the basis of those findings, the trial judge concluded, as discussed above, that the respondents’ rights had been violated and, without further explanation or actual demonstration, that an abuse of process had been made out, which required, in her view, a stay of proceedings:

[translation]

[98] In the Court's opinion, the crux of the matter lies in UPAC's breach of the authorizing judge's order, which was in fact clearly set out in the wiretap warrant under the heading “Terms for safeguarding solicitor-client privilege”.

[99] According to the witnesses’ testimony, this was done knowingly.

[…]

[103] Police officers, UPAC investigators, team leaders, captains and superiors who did not comply with a judge's order in order to pick and choose their evidence, to sort it out, to make their case in an editorial fashion, for the purposes they were seeking, cannot be tolerated.

[104] To decide otherwise would send out the message that the ends justify the means, regardless of the means favoured and employed by the police, and regardless of whether they constitute flagrant violations of the accused's constitutional rights and of a judge's order.

[105] This is a serious violation of the integrity of our justice system which brings its administration into disrepute.

[….]

[107] The Court cannot continue the proceedings after such a finding. The police investigation is vitiated. The evidence heard undermines any confidence in the rest of the investigation.

1. It was therefore the violation of the respondents’ rights, under the residual category described in *R. v. Babos*, *supra*, that guided the trial judge in the Marcil judgment. But thereby asserting, in the absence of any meaningful analysis, that there was an abuse of process that had to lead to a stay in proceedings, while the onerous burden of demonstrating that fell upon the respondents’ shoulders, constituted an error of law.
2. Let us return for a moment to the 233 communications that were not sent to the authorizing judge. The Court holds that the trial judge did not consider several parts of the evidence that may be used to assess the impact of the failure to send those communications and lessen in turn the intensity of the prejudice that that could have caused to the respondents. The number, in and of itself, seems exorbitant and could suggest that there was an abuse justifying a stay of proceedings. And yet, that is not at all the case when things are examined in their context.
3. As noted above, that number of communications was disclosed during the testimony of computer analyst Christian Danguy at the hearing on the motion of respondents Marcil *et al.* Let us return to his testimony.
4. Mr. Danguy was assigned to quantify the number of communications with lawyers associated with the respondent Poulin and another target. Mr. Danguy explained that he had indexed the communications associated with those persons by using the lists sent to the authorizing judge. He did not personally inquire as to whether those lists indeed included all communications intercepted with lawyers.
5. He thus conceded that he could not assert [translation] “that there were no other sessions involving […] a lawyer that were not shown in those [lists]”.
6. In cross-examination, Mr. Danguy was confronted with certain inconsistencies among his different analysis reports, so that he conducted inquiries to try to understand what had happened. He found that, according to the list, by using certain data available in the intercept system, the number of communications associated with a target involving a lawyer was greater than the number of communications sent to the authorizing judge. At the end of that new exercise, Mr. Danguy initially identified 26 additional communications that had not been sent to the authorizing judge.
7. The prosecution immediately notified the trial judge and the respondents of those developments.
8. Consequently, the hearing on the motion was suspended to allow Mr. Danguy to conduct further inquiries.
9. This is how he identified the 233 communications that were not sent to the authorizing judge. To do so, he did a recount of the intercepted lawyer-target communications. He used a more [translation] “elaborate” methodology. He began by generating a list of all the communications intercepted during the electronic surveillance and subtracted therefrom sessions with no audio or content (sessions classified “X”). He then indexed, for each target, the sessions involving phone numbers associated with lawyers on the analysts’ lists. From the communications thus identified, he determined which one appeared on the five lists sent to the authorizing judge.
10. He then divided the communications according to four types of content: **1)** audio; **2)** SMS (text messages); **3)** voice mail; and **4)** no information (dial tone, tone ringing, etc.).
11. He identified 821 communications related to a phone number associated with a lawyer on the list. Among these, 589 had been sent to the authorizing judge and 232 had not. It is important to note here that, according to the numbers that he had at that date, 626 communications had been sent to the authorizing judge, among which 37 were not related to a number associated with a lawyer on the analysts’ list, which leaves us with the number 589.
12. Among those 37 communications not related to a number associated with a lawyer on the analysts’ list, some were found to be privileged.
13. Mr. Danguy amended his report after discovering that two sessions with no audio had been sent to the authorizing judge and that the total number of communications sent to the authorizing judge, not counting the sessions with no audio, should have been 624, and not 626. He therefore revised the results of his analysis and conducted a [translation] “new validation round” to determine whether [translation] “sessions with audio [had] been mistakenly classified X [no audio] by wire-room analysts”.
14. He thus discovered that some sessions had indeed been mistakenly classified X. For all of the *projet* *Fronde* sessions classifed X by analysts, he identified 40 errors. Of the 40 sessions mistakenly classified X, only one was related to a phone number associated with a lawyer. It had not in fact been sent to the authorizing judge, but had been blocked in the intercept system. The session was associated with Mr. Gérald Tremblay.
15. The new results of Mr. Danguy’s analysis can be summarized as follows: total number of intercepted communications: 33,269. Number of sessions classified X (no audio): 14,953, therefore 18,316 sessions [translation] “with content”. Number of phone numbers related to a lawyer according to the analysts’ lists: 59. Total number of sessions associated with those numbers: 820. Total number of sessions sent to the authorizing judge: 632. Sessions classified X sent to the authorizing judge: 8, therefore 624 sessions “with content” were sent to the authorizing judge. Number of sessions unrelated to a number associated with a lawyer mistakenly sent to the authorizing judge: 37; consequently, 587 sessions “with content” related to a number associated with a lawyer were sent to the authorizing judge. Therefore, there remain 233 sessions not sent to the authorizing judge out of the total of 820 related to lawyers.
16. Mr. Danguy determined that, of the 233 communications that were not sent, 96 were blocked in the intercept system and 137 had been made accessible to investigators.
17. Of the 96 blocked communications, 88 contained no information.
18. Of the 8 blocked communications that contained information, 4 were related to Mr. Tremblay and the 4 others to Mr. Zampino. The latter were only blocked in February 2017, in the context of an application for disclosure in the *Faufil* file*.* Investigators were therefore able to access them prior to that date.
19. Of the 137 communications that were not blocked and were accessible to investigators, 56 contained no information, ruling out the possibility that privilege had been violated in their regard. Consequently, 81 contained information and, of that number, 16 were related to the respondent Poulin and one to the respondent Zampino. They should have been blocked and sent to the authorizing judge. They were not blocked, however, until November 2019. The other communications did not concern any of the respondents.
20. To summarize, 40 communications between Mr. Zampino and a lawyer were intercepted. Of that number, investigators had access to the contents of only one communication held to be privileged and three communications held to be non-privileged.
21. They also had access to the contents of five communications involving Mr. Zampino that were never sent to the authorizing judge for determination of privilege and their nature remains undetermined to this day; one was blocked in November 2019 and the four others in February 2017.
22. Similarly, 64 communications between the respondents Bernard Poulin and a lawyer were intercepted. Investigators had access to the contents of two communications held to be privileged and three communications held to be non-privileged by the authorizing judge.
23. They also had access to the contents of 16 communications that were not sent to the authorizing judge and their nature remains undetermined to this day.
24. In short, 6 of Mr. Zampino’s communications (1 privileged and 5 undetermined) and 18 of Mr. Poulin’s (2 privileged and 16 undetermined) are truly problematic. For the remainder, one would have to rely quite heavily on hypotheticals and speculation to identify a prejudice that could have been caused to Messrs. Zampino and Poulin.
25. What must we conclude from all this? First, the obvious: there was bungling and probably negligence. One can certainly criticize the police for their lack of rigour in the management of communications whose importance requires no further elaboration. Because of their lack of rigour, they listened to or had the opportunity to listen to conversations between lawyers and their clients. Still, for the reasons given previously, there are no elements of bad faith or illegitimate or outright illegal purposes in this. The work conducted by Mr. Danguy shows just how difficult it is to obtain specific answers owing to the ineffectiveness and flaws of the procedures put in place during the electronic surveillance. Again, however, one must note the police’s willingness to find and identify the errors in the handling of the sessions to provide satisfactory answers to the justice system. We must also point out the prosecution’s decision not to introduce those communications into evidence because of the deficiencies of the police investigation. Finally, although there were material deviations from the rules protecting solicitor-client privilege, their seriousness and their number are not those found by the trial judge. Indeed, the number of relevant communications cannot be reduced to the imposing number of 233, without further explanations and nuances. It was an error of law to have failed to consider the evidence in its entirety.
26. It can be seen from paragraph 60 of the Zampino judgment that the trial judge erroneously weighed the evidence or, at the very least, drew inferences therefrom without having considered it in its entirety:

[translation]

[60] In all, some 57,000 conversations were intercepted, including 624 between lawyers and clients, and 39 conversations between the applicant and his lawyer were held to be privileged by the authorizing judge, after the conversations had been listened to.

1. In reality, not all of the conversations between Mr. Zampino and his lawyer were [translation] “held to be privileged by the authorizing judge”. The evidence before the trial judge at the time of the Zampino judgment showed that 25 communications had been held to be privileged in part; 10 were, instead, held to be non-privileged; and 4 were of undetermined status, because they were never sent to the authorizing judge. The evidence proffered at the time of the Marcil judgment would show that an additional communication between Mr. Zampino and his lawyer had been intercepted and had not been sent to the authorizing judge. It was also untenable to assert that there were 57,000 conversations, since there were, rather, about 33,000 of them, a great many of which (more than 14,000) had no content. The high number of targets (39) also had to be taken into consideration, putting the number of intercepted communications in perspective. Moreover, several communications with lawyers were thus characterized because of the participation of Mr. Gérald Tremblay. These types of nuances were important when it came time to determine if a stay of proceedings was the only available remedy.
2. In these circumstances, the seriousness of the state’s conduct is not that which the trial judge described in her reasons as grounds for her conclusion that the abuse of process justified a stay of proceedings.

## Stay of proceedings

1. The burden is onerous when it comes to a stay of proceedings, and even more so when it comes to the second category described in *Babos*, *supra*:

[35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society’s sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

1. But the trial judge relied on that residual category alone to order a stay of proceedings in the Marcil judgment:

[translation]

[108] The Court relies on *R. v. Babos* and its residual category to determine that such actions by UPAC police officers have undermined the integrity of the justice system and that this is one of the clearest of cases where a stay of proceedings is necessary.

[Reference omitted]

1. As the Court of Appeal for Ontario rightly observed in *R. v. Currado*, 2023 ONCA 274, (application for leave to appeal to the Supreme Court, No. 40804), resort to the residual category to stay otherwise fair proceedings will seldom be appropriate, considering the requirements of *Babos*:

[17] *Babos* uses strong language. That language tells me that resort to the residual category of abuse of process to stay an otherwise proper criminal trial will seldom be appropriate. There is a significant difference between state conduct which is unwise, unnecessary, inappropriate, or even improper, and state conduct that goes so far as to be properly characterized as “offensive to societal norms of fair play and decency”.

1. State conduct can be unwise or inappropriate, as in the case at bar, and nevertheless not be characterized as so offensive as to justify a stay of proceedings. The characterization “offensive” goes to the concepts of society’s sense of fair play and decency, whereas the conduct objected to here is not akin to such a situation.
2. The case of *Brind'Amour c. R*., 2014 QCCA 33, provides a good example of conduct so offensive:

[translation]

[71] Stated simply, the trial judgments stated the following with regard to the RCMP’s misconduct: there was abuse of process because the RCMP, with the objective of having Tremblay become a civilian undercover agent, allowed Tremblay, who was on parole, to commit indictable offences while it was exercising control over him and should have stopped or reported him, deliberately deceiving the NPB [National Parole Board] throughout. It seems clear to me that, if the NPB had not been deceived, the stays of proceedings would not have been ordered.

[…]

[74] It also lied directly to CSC [Correctional Service of Canada]. […]

[…]

[97] Second, the misconduct is so serious and the situation so exceptional that it is like that described in *Tobiass*, where the mere act of going forward with the prosecution would be so shocking that the only option available to the courts is a stay of proceedings. It must be recalled that it is not solely Golden's personal conduct that is at issue; if it were, the characterization might be different. Rather, it is the RCMP itself, with the participation of high-level actors within the organization, that flouted the system, and this resulted in an even more shocking misconduct that shakes public confidence in this state agency and, indirectly, in the justice system as a whole. The conduct is outrageous, and without it there would never have been a prosecution. This is why a stay of proceedings must be ordered. If it were not, the integrity of the justice system would be undermined.

[98] All of the prosecution's evidence is dependent on Tremblay’s participation, whether as a witness or as a civilian undercover agent who provided the information needed to obtain a wiretap authorization. It is admitted that, without Tremblay, no charges would have been laid. In these circumstances, to repeat the words of L'Heureux-Dubé in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659 at 1667, "the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases", such that justice is better served by an order for a stay of proceedings.

1. The instant case is nowhere near conduct so serious.
2. In the Zampino judgment, however, the trial judge relied on both categories of abuse of process. The answer is obviously the same with respect to the second: the circumstances of the case at bar cannot justify a stay of proceedings despite the deference owed when a court renders a decision based on the exercise of a discretionary power.
3. As for the first category, it cannot be concluded, as is required by *Babos* at para. 34, that “the accused’s right to a fair trial has been prejudiced” and that that prejudice “will be carried forward through the conduct of the trial”. There must be ongoing unfairness. That is not the case here, however, since the wiretap evidence will be excluded. This is in fact the appropriate remedy (see, by way of analogy, *R. c. Tshiamala*, *supra*).
4. Indeed, on this point, the trial judge relied once again on hypotheticals to assert that, even though they were not privileged according to the authorizing judge, communications between Mr. Zampino and his lawyer contained [translation] “a great deal of information, whose impact cannot be measured, and that are in the prosecution’s possession”. There is no evidentiary basis for making that assertion and concluding that the authorizing judge erred in that manner.
5. It should be mentioned that the answer might be different if there was merit to the argument that the evidence derived from the electronic surveillance could render the trial unfair. That is what the trial judge held in the Zampino judgment:

[translation]

[105] The Court has ruled that the process of obtaining the wiretaps, as well as the management of the wiretapping itself, were flawed, and the evidence derived from the wiretaps seems impossible to determine, although the Court had concerns in that regard at the hearing.

1. For the trial judge, [translation] “the [derivative] evidence […] seems impossible to determine” and its impact, equally so. But that is not the case.
2. Lead investigator Gouin’s testimony is clear: there is no derivative evidence in the record. Here are a few excerpts of his testimony:

[translation]

**Q** To your knowledge, were any communications between a target and a lawyer used in fact, in any way, for the purpose of carrying out any subsequent investigative steps?

**A** In no way whatsoever.

1. The trial judge having allowed an objection by the defense because of the suggestive nature of the question, counsel for the prosecution reframed it:

[translation]

**Q** So, in fact, did you in fact use, in any way – or for what purposes were used, in fact, communications between a target and a lawyer of record, to your knowledge?

1. As he had not been given access to the impugned communications made available to investigators, lest he be himself “contaminated” on account of his role as lead investigator, the police officer answered:

[translation]

**A** I will answer that as honestly and as briefly as possible, that is, I did not have access to the contents of any conversation. So, those conversations were of no use, because since I had no knowledge of their contents, that did not influence the investigation in any way, the investigative steps, my way of seeing things. I was unaware of the contents those conversations.

[…]

**Q** […] in fact, were any contents whatsoever of conversations between a lawyer and a target used in any way whatsoever, to your knowledge?

**R** No, because I would have... no. The answer is no.

1. There is thus no derivative evidence in the record (except for an isolated situation involving another target) and the above testimony is in no way contradicted. But, despite this, the trial judge found that the existence of derivative evidence [translation] “seems impossible to determine”. To make such a finding, considering the importance of that issue of derivative evidence in her reasoning, the trial judge had to either reject the police officer’s testimony or explain why his testimony was not sufficient. She did neither.
2. The trial judge simply ignored the evidence proffered by the appellant to establish the non-existence of any derivative evidence. She presumed the existence of such evidence and its consequences on trial fairness. And yet, it was up to Mr. Zampino to prove a prejudice to his right to a fair trial and to show that that prejudice would be perpetuated or aggravated through the conduct of the trial. He failed to meet that burden and the trial judge erred in finding that a stay of proceedings was necessary to prevent ongoing unfairness to Mr. Zampino.
3. Finally, the parallel drawn by the respondents between the case at bar and *Zalat* *c. R*., 2019 QCCA 1829, is misplaced. This is not a case where, as in *Zalat*, investigators had taken [translation] “outrageous liberties” with the facts, misled the authorizing judge and displayed [translation] “unacceptable negligence, indifference or recklessness as to the criminal proceedings to come and the rights of an accused”: paras. 31 and 35.
4. We are nowhere near such findings here.

**FOR THESE REASONS, THE COURT:**

**In file 500-10-007193-194:**

1. **DECLARES** the new evidence admissible;
2. **ALLOWS** the appeal;
3. **QUASHES** the judgment in first instance;
4. **ORDERS** a trial;
5. **PROHIBITS** the appellant from using the wiretap evidence during the trial.

**In file 500-10-007472-200:**

1. **ALLOWS** the appeal;
2. **QUASHES** the judgment in first instance;
3. **ORDERS** a trial;

[226] **PROHIBITS** the appellant from using the wiretap evidence during the trial.

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| Mtre Julien Tardif  Mtre Magalie Cimon | | |
| DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES | | |
| For His Majesty the King | | |
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| Mtre Isabel J. Schurman  Mtre Philippe Morneau | | |
| SGM Avocats | | |
| For Frank Zampino | | |
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| Mtre Sylvie Champagne  Mtre André-Philippe Mallette  Mtre Nicolas Le Grand Alary | | |
| BARREAU DU QUÉBEC | | |
| For Barreau du Québec | | |
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| Mtre Giuseppe Battista | | |
| BATTISTA TURCOT ISRAEL | | |
| For Association des avocats de la défense de Montréal-Laval-Longueuil | | |
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| Mtre François-Félix Lacasse  Mtre Anne-Marie Manoukian | | |
| PUBLIC PROSECUTION SERVICE OF CANADA | | |
| For Director of Public Prosecutions of Canada | | |
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| PATERAS & IEZZONI | | |
| For Robert Marcil | | |
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| Mtre Isabelle Lamarche | | |
| MORNEAU, L’ÉCUYER, LA LEGGIA & ROULEAU | | |
| For Kazimierz Olechnowicz | | |
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| Mtre Marc Labelle | | |
| LABELLE, CÔTÉ, TABAH et ASSOCIÉS | | |
| For Bernard Poulin | | |
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| Mtre Paul Kalash | | |
| PAUL KALASH AVOCAT | | |
| For Dany Moreau | | |
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| Mtre Michel Décary | | |
| BCF | | |
| For Normand Brousseau | | |
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| Hearing dates:  Taken under advisement: | June 7 and 8, 2023  June 16, 2023 | |