

5-1-1999

Co-operation Between Regulators and Law Enforcement: n Regulators and Law Enforcement:

Daniel P. Murphy

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

 Part of the [Comparative and Foreign Law Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

Murphy, Daniel P. (1999) "Co-operation Between Regulators and Law Enforcement: n Regulators and Law Enforcement;" *Penn State International Law Review*: Vol. 17: No. 3, Article 4.

Available at: <http://elibrary.law.psu.edu/psilr/vol17/iss3/4>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Co-operation Between Regulators and Law Enforcement: A Canadian Concern

Daniel P. Murphy*

The fight against financial crime is one of the major challenges of our times. We emphasise that, as both financial services and crime become increasingly globalized, this challenge can only be met if all major financial centres work together. Effective co-operation between financial regulators and law enforcement authorities at the international level is an essential element of this (co-operation) . . .¹

I. Introduction

In May 1998 the Finance Ministers of the G7 leading industrialised democracies, met in London to prepare for the May 15-17, 1998 Birmingham Summit. These ministers continued the work that had developed out of earlier summits. In this paper there is no need to review all of the many achievements from various summits since 1975's in Rambouillet, France. It is sufficient to note that as the cold war wound down economic and other concerns occupied the attention of the summit leaders. In the last few Summits the problem of crime has assumed greater importance in the Summit discussions. This has had a positive impact in law enforcement.

Crime has been seen as a global issue of concern in several Summits. This concern has achieved significant results.² One issue

* The opinions expressed are the author's and do not reflect the positions of the Department of Justice

1. An excerpt from paragraph 7 of the *Conclusions of G7 Finance Ministers*, May 8, 1998 at the 1998 Birmingham Summit <<http://birmingham.g8summit.gov.uk/forfin/finance.shtml>>.

2. It is trite to refer to the 1989 Economic Summit since it was the precursor to the development of the Financial Action Task Force (FATF). The FATF, comprised of 26 countries, the European Commission and the Gulf Co-operation Council promotes the development of anti-money laundering controls and enhanced co-operation in counter-money laundering efforts among its membership and around the world.

that has developed out of the Summit process is the recognition of the need to foster co-operation between regulators and criminal investigators. The commitment to greater regulator/law enforcement co-operation has grown out of the last four Summit meetings. It was also an important point for consultation in the many pre-summit meetings of officials undertaken to prepare the discussions for the Birmingham Summit.

This regulatory/law enforcement co-operation issue arose at the 1996 Halifax Summit, where the participants made a commitment to improve international communication between regulators and law enforcement agencies in cases involving financial fraud. The 1997 Denver Economic Statement called on officials to report and make recommendations on international co-operation in cases involving serious financial crime and regulatory abuse.³ G-7 experts subsequently reviewed the issue and, while they did not identify any serious gaps in domestic and international sharing arrangements pursuant to the Lyon Summit, they left the door open to further dialogue.

The work of the Denver and Birmingham Summits is the precursor to the suggestion that nations consider how regulators can more effectively work with law enforcement. This is an interesting development. We need to remember that the result of the recommendation from various Summits can go well beyond the immediate members of the Summit. The work of the FATF and the various regional bodies that have developed out of the FATF illustrate this fact. If the Summit statement on financial crime is aggressively advanced and picked up within the work of the Financial Action Task Force many nations will be called upon to undertake similar work.

In this paper I will briefly examine this issue as it relates to Canadian law on search and seizure. When law enforcement is allowed to obtain information held by regulators on the basis of co-operation between the regulator and law enforcement the initial justification for the regulator's collection of the evidence shifts. I will not review the issue of a regulator's statutory restrictions against the disclosure of information they collect in the course of their activities. Others can deal with that issue. This is a larger

3. Paragraph 28 of the Denver's "Summit of the Eight" public report states: We reiterate our commitment to improve international co-operation between law enforcement agencies and financial regulators on cases involving serious financial crimes and regulatory abuse. We ask our experts to report and make recommendations at next year's Summit.

undertaking and restrictions on time and space preclude such a review.⁴ I will briefly discuss our national privacy law but, again, this issue is left to another discussion. The significant implication in this commitment to co-operate lies with the impact of the Canadian *Charter of Rights and Freedoms* (the *Charter*), Canada's basic constitutional protection. I will therefore look at the impact the *Charter* may play on the commitment to greater co-operation.

II. The Recommendation

It is useful to consider the full scope of the Finance Ministers conclusions in paragraph 7's commitment, from the May 8, 1998 pre-meeting to the Birmingham Summit. This paragraph must be considered together with subsequent paragraphs since they specifically deal with financial crimes. The brief extract of the conclusion of Finance Ministers set out at the top of this paper merely opens the stage. The relevant paragraphs on financial crime read as follows:

Financial Crime

7. The fight against financial crime is one of the major challenges of our times. We emphasise that, as both financial services and crime become increasingly globalised, this challenge can only be met if all major financial centres work together. Effective co-operation between financial regulators and law enforcement authorities at the international level is an essential element of this. A G7 expert group was set up by the Denver Summit to consider how this co-operation can be improved within our countries. We now agree to:
 - review our laws and procedures concerning information exchange between financial regulators and law enforcement agencies against a common list of key elements for effective co-operation;
 - identify by October what modifications are desirable, consistent with fundamental national and international legal principles, to improve our systems and to implement such measures as quickly as possible;
 - take forward a number of practical steps to improve co-operation;

4. See the article by John L. Laskin, *Enforcement Powers of Administrative Agencies*, Law Society of Upper Canada Special Lectures 1992 (Toronto, Carswell 1992) at 191.

- disseminate a G7 Reference Guide to Procedures and Contact Points on Information-Exchange-to-financial regulators and law enforcement agencies in our countries and to expand this Guide to cover all major financial centre countries.
8. We have instructed the G7 expert group to provide a report on progress on all these areas and any further recommendations in preparation for the Köln Summit.
 9. We also recognise that action must not be confined to G7 members and we emphasise that all countries should provide effective international administrative and judicial co-operation. In particular, we are concerned at the number of countries and territories, including some financial offshore centres, which continue to offer excessive banking secrecy and allow screen companies to be used for illegal purposes. We recognise that the Financial Action Task Force (FATF) has already taken significant steps in this area and endorse FATF's efforts to support the Offshore Group of Banking Supervisors in its mutual evaluation process. We therefore call on the FATF to review the present position and make recommendations to Ministers by the Köln Summit on what can be done to rectify these abuses.

The Finance Ministers statement went on to commend the work of the FATF and support the expansion plans for that organisation.⁵ The recommendations in favour of co-operation may result in a shift from regulatory compliance and well understood administrative law concepts to an expanded commitment directed to co-operation with law enforcement in order to attack financial crime. This will mean that a regulator will have parallel considerations when they undertake their responsibilities. Equally, law enforcement may have unreasonable expectations that they will obtain an information windfall.

A. *The Problem*

We should start with the position that their financial crime recommendations and the work of the FATF are examples of an expansive approach to law enforcement. The global problem associated with money laundering illustrates this fact. This concern has evolved over the last decade. The commitment to attack

5. *Supra* at note 1, paragraphs 10, 11 and 12.

laundering activities associated with any serious crime, rather than a more limiting reference to laundering of money obtained from the illicit drug trade, means that law enforcement may have significant allies within the regulatory community. This commitment may create expectations, for law enforcement, that may be misplaced. Equally, regulators may reasonably expect that law enforcement will be more open to their needs and equally ready to assist regulators.

Their mutual expectation may also trigger legal impediments that vary depending upon the differing national laws when the required co-operation is between different nations. It can also conflict with domestic laws in a particular country in light of the nature of the regulatory agency and statutory controls against disclosure of information in a regulator's enabling statute. Regulators and law enforcement have impediments that impact upon this expectation of a new co-operation between these sectors. Their mandates differ. Their expertise varies. A globalised financial system benefits many, criminals included, yet domestic laws sometimes prevent co-operation. This last consideration is important since regulator responsibilities vary between countries.

In some jurisdictions, the scope of a regulator's activity is more analogous to a law enforcement activity.⁶ Other regulators are more concerned with good governance or regulatory compliance options rather than enforcement priorities.⁷ Some regulators have a hybrid role that includes both elements. In addition, many regulators have specific restrictions on the disclosure of any information they may collect.⁸ Finally, national privacy laws and constitutional protections can each establish unexpected impediments to the commitment to co-operate.

B. Canada's Position

In Canada, the commencement on any analysis of the commitment to participate in parallel proceedings between

6. The United States Securities and Exchange Commission is an example of this type of agency.

7. Canada's Office of the Superintendent of Financial Institutions (OSFI) illustrates this type of agency.

8. In Canada a variety of laws illustrate this point. Section 241 of the *Income Tax Act* may be the best example since it creates a criminal offence for any employee of our National Revenue who improperly co-operates or discloses tax information. Another example can be seen in Canada's *Office of the Superintendent of Financial Institutions Act*, R.S., 1985, c. 18 (3rd Supp.). This office is the responsible regulator for all significant financial institutions in Canada.

regulators and law enforcement must start with our *Charter of Rights and Freedoms*. Section 8 of the *Charter* reads as follows: "Everyone has the right to be secure against unreasonable search or seizure."

There is a significant body of case law regarding constitutional protection. The scope of this section, and time, precludes a detailed analysis of this law but it is sufficient to indicate that every individual in Canada has the constitutional right to be free from unreasonable search and seizure. In a regulatory context, the *Charter* plays a significant role whenever information is compelled from clients who are the subject of the regulators scrutiny.⁹ In addition, Canada, like most nations, depends upon an extensive system of regulatory schemes in modern commerce. The number of agencies continually grows. In one case, *Belgoma Transportation Ltd. (Belgoma) v. Ontario (Director of Employment Standards)*¹⁰ the Ontario Court of Appeal notes that at the time of their decision there were 223 provincial public statutes, 61 private statutes, 86 regulations and numerous municipal by-laws that allowed various agencies undertaking a regulatory activity to enter land and premises. This did not include federal statutes or similar laws in the other Canadian Provinces. There are so many agencies that the commitment to greater co-operation between these agencies and law enforcement may achieve unexpected results.

In the *Thomson Newspaper* case¹¹ the court had to consider a case where the individual appellants, who were officers of specific corporations, were the subject of a Restrictive Trade Practice Commission inquiry. The appellants sought the court's intervention against an order compelling the officers to testify before and produce documents for the inquiry. This case dealt with various *Charter* provisions but, for our purposes, section 7 and 8 were pivotal to the decision. Regulators need business records and the power to obtain such records in order to undertake their functions. The subsequent use of that collected information can have a pivotal role in any review of the regulator's functions and powers. There were several judgements in the *Thomson* case but a common

9. There are many examples. The Supreme Court of Canada, in a trilogy of cases, canvassed this issue in our Restrictive Trade Practices Commission and the Income Tax Act. See, *Thomson Newspapers Ltd. et al v. Director of Investigations & Research et al*, [1990] 1 S.C.R. 425, 54 C.C.C. (3d) 417 and *Stelco Inc. v. Canada (Attorney General)*, [1990] 1 S.C.R. 617, 55 C.C.C. (3d) 227 and *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 55 C.C.C. (3d) 530.

10. (1985), 51 O.R. (2d) 509 (C.A.) at 511.

11. *Supra* at note 8.

thread on the constitutional issue in section 8 of the *Charter* is seen in Justice Wilson's dissent, where the following statement is advanced:

... [W]hat may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation respond in a meaningful way to the concerns identified by Dickson J. in *Hunter*.¹²

The regulatory context justifies the regulator's action in conducting an investigation or inquiry. If sharing of the information collected by the regulator is one possibility then a court may have an additional consideration when it reviews the regulator's conduct. A regulatory regime, for example, can impose a requirement on the individuals who are subject to the regime to keep and maintain records. In some cases, those records can justify a prosecution of the participant in the regulatory scheme for an offence under the scheme.

In *R. v. Fitzpatrick*¹³ the Supreme Court of Canada considered the admissibility of compelled information. In that case, the appellant was a commercial fisherman charged with over fishing. The appellant's hail reports and logs, documents required under the relevant regulations, were used to prosecute the appellant. The *Regulations* under the *Fisheries Act* protected conservation and management of a resource. The appellant was a participant in this regulatory scheme and he was obliged to maintain the records as a condition of the licence he accepted.

If compelled records support the enforcement of the specific statute or regulations that create the regulatory scheme there are minimal constitutional concerns. On the other hand, if the compelled records are used in another unrelated investigation other considerations will apply. The search and seizure of these types of documents, in a regulatory context, is not the same as in a criminal context.¹⁴ In the *Fitzpatrick* case, the information was used in a

12. *Thomson Newspaper v. Canada*, *supra* at S.C.R. page 495-496, C.C.C. (3d) at page 468.

13. [1995] 4 S.C.R. 159; (1995), 18 C.E.L.R. (N.S.) 237 and the case comment by Stan Berger at 18 C.E.L.R. (N.S.) 283.

14. In *Fitzpatrick*, the court opined, at S.C.R. pages 182-183, CELR, page 258 as follows:

My conclusion that it is not abusive for the state to prosecute those who overfish, using their own hail reports and fishing logs as evidence of the

prosecution undertaken in a legislative and regulatory scheme where the appellant voluntarily participated. The move to cooperate and share information between regulator and criminal law enforcement raises different concerns such as privilege, confidentiality and compellability.

Business records maintained by participants who are subject to a regulatory scheme and the records of the regulator raise search and seizure considerations when law enforcement attempts to access the regulator's information. Law enforcement is faced with this problem if they try to access the individual's business records. Why should they have a less onerous problem when they try to access the same information from a regulator? The use of the records, in a law enforcement context, may be problematic.

There is a significant concern with respect to invasions of informational privacy.¹⁵ In order to be sure that a constitutional

offence, is strengthened by reference to this Court's jurisprudence on the application of s. 8 of the Charter in the regulatory context. In applying a contextual approach under s. 8, this Court has repeatedly emphasized that searches and seizures of documents relating to activity known to be regulated by the state are not subject to the same high standard as searches and seizures in the criminal context. This is because a decreased expectation of privacy exists respecting records that are produced during the ordinary course of business; see in particular my reasons in both Thomson Newspapers, *supra*, at pp. 506-8, and Comité paritaire de l'industrie de la chemise v. Potash, [1994] 2 S.C.R. 406, at pp. 420-21 and 424, as well as those of Wilson J. in R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, at pp. 645-47, L'Heureux-Dubé J. in Comité paritaire, at pp. 443-44, and Sopinka J. in R. v. Plant, [1993] 3 S.C.R. 281, at pp. 291-96. In my view a similar standard should be applied to the use in a regulatory prosecution of records that are statutorily compelled as a condition of participation in the regulatory area. Little expectation of privacy can attach to these documents, since they are produced precisely to be read and relied upon by state officials. Similarly, I do not believe it is inconsistent with the principles of fundamental justice for the Crown to rely upon these documents in a prosecution for overfishing. The documents should not be equated to involuntary confessions to investigators, reflecting as they do instead the voluntary compliance by commercial fishers with the statutory requirements of the regulated fishing regime. The principle against self-incrimination under s. 7 of the Charter should not be understood to elevate all records produced under statutory compulsion to the status of compelled testimony at a criminal or investigative hearing.

15. In *R. v. Plante*, [1993] 3 S.C.R. 281 at 293, 84 C.C.C. (3d) 203 at 213 the Supreme Court of Canada held that:

"In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate

impediment does not operate to prevent co-operation between a regulator and law enforcement it is important to appreciate that, generally, information can only be disclosed as a result of an independent judicial authorization in the criminal law context, such as a search warrant. Such authorizations may or may not be conditional. The failure to obtain a proper judicial authorization to obtain information can have a serious impact upon a subsequent law enforcement investigation.¹⁶ If you consider the financial information maintained by banks in Canada, you will observe that there is no legal requirement to report. There is, however, a strong disincentive to voluntarily co-operate if arguments are made that the financial institution is the custodian of the type of biographical core of personal information deserving of *Charter* protection.

Timely and properly collected financial information would aid in investigations of any financial, drug and proceeds of crime investigation. In a law enforcement context, the manner of collection of the information is important. This is because a target of a criminal investigation and charge will attack the procedure used to collect evidence. Therefore, the evidence must be properly accessed by law enforcement. This will reduce the risk that a court might subsequently reject evidence in light of a taint argument based upon how the police initially obtained the financial information.

details of the lifestyle and personal choices of the individual. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence. Therefore the information collected by regulatory agencies will frequently be subject to a *Charter* restriction vis-à-vis subsequent disclosure to law enforcement . . .

The most obvious illustration of this may be seen in the administration of Canada's *Income Tax Act*. Tax auditors generally perform a regulatory function in the course of an examination of a taxpayers annual return. The law requires all taxpayers to maintain records and respond to inquiries by the taxation authorities. If the audit function in a taxation review shifts towards a tax evasion or criminal fraud investigation different *Charter* expectations are created. This shifting focus was specifically recognised, by the Supreme Court of Canada in *R. v. McKinlay Transport supra*; *Knox Construction Ltd. et al v. Canada* [1990] 2 S.C.R. 338; *Baron v. Canada* [1993] 1 S.C.R. 416, 78 C.C.C. (3d) 510 and *Kouretissis v. MNR* [1993] 2 S.C.R. 53, 81 C.C.C. 286.

16. Banking information illustrates this point. Canada has established a mandatory record-keeping requirement to combat money laundering in *The Proceeds of Crime (money laundering) Act* R.S.C. c. P-25.5. There is no reporting requirement.

Currently, criminal investigators may rely upon their network of contacts in financial institutions to "tip" them about suspicious transactions.¹⁷ This can be risky in a criminal investigation. There is a limited disclosure justification for persons who suspect criminal money laundering activity. Canada's *Criminal Code* provides a defence for the record holder.¹⁸ It does not ensure that the information provided to the law enforcement agency is admissible in a subsequent trial or that the collection of that information does not taint subsequent steps in the investigation.

In addition, there is no effective procedure to access financial transaction information that will be generated at a subsequent time. The timely acquisition of such information may be relevant in any case where law enforcement has reasonable grounds to believe that a target of a financial investigation will use a financial institution. Canada does not have a production order procedure in its proceeds of crime provisions. This frequently means that, unless existing wiretap intercepts happen to catch a conversation between a target and the target's bank, the investigator can miss essential information. Co-operation would assist a criminal investigation and result in timelier discovery of evidence.

We need to consider the information lag between the accumulation of financial or other information by an individual, business, or regulator and law enforcement. Law enforcement would like to have this information immediately. It is relevant to the investigation of a financial crime. The speed in which this type of information is shared depends upon the regulator's enabling legislation, the knowledge that the information exists and the need for law enforcement's access to the information. Even if this issue is resolved, we continue to have a problem. Regulators in the course

17. In *R. v. Lillico* (1994), 92 C.C.C. (3d) 90 (Ont. Ct. Gen. Div), Mr. Justice McCombs rejected an argument that a bank officer's disclosure of banking information tainted the subsequent search warrant and seizure of the bank records. There was no s. 8 problem since the disclosed information did not reveal the "biographical core" of the accused's financial information. In another Ontario case, *R. v. Rotondi* (unreported) Dec. 8, 1994 Hamilton, Ontario Court Gen. Div, Marshall J. held that a Bank which voluntarily co-operated with the police and provided a customer's account information breached s. 8 of the *Charter*. In *R. Eddy* (1994), 119 Nfld. & P.E.I.R. 91(Nfld. S.C.T.D.), Mr. Justice Puddester reached the same conclusion. In that case more than "confirmatory information" was disclosed. In *R. v. Eyob* (unreported) Dec. 5, 1994-Supreme Court of British Columbia, Maczko J., Van. Reg. CC931456, access to bank information, absent a warrant, infringed s. 8 of the *Charter*.

18. R.S.C. 1985, Chap C.-46, Section 462.47. Note that the *Income Tax Act* is specifically excluded from this provision. Section 462.48 contains an exceptional provision to obtain a search warrant for tax information.

of their duties obtain the information. Does the ability to voluntarily disclose financial information solve this problem? The immediate response is that it does not since the issue of subsequent admissibility of the information continues (see below).

If a regulator finds the information in the course of its administrative search of a business the automatic dissemination of the information to law enforcement is not the panacea suggested by the Summit recommendation. In Canada, the suggested transmission of the information to law enforcement invites a *Charter* challenge. This is more important than any potential dissemination delay between the regulator and law enforcement. The regulator may be able to voluntarily pass the necessary information on to law enforcement. This does not eliminate all concerns with respect to the use that law enforcement may make of the information. If the information cannot be admitted at a trial, or its receipt taints subsequent criminal investigations, we have a greater problem. Conversely, if a business holds the information and voluntarily gives the information to law enforcement we may still have a *Charter* concern.

In Canada the *Proceeds of Crime (money laundering) Act*¹⁹ contains an explicit statement that records are required to be maintained “to facilitate the investigation and prosecution of offenses . . . ”²⁰ The problem is that the act does not provide an automatic means to access a financial institution’s records. One author defined the issue raised by this particular statute as a conflict between a paternalistic mandatory reporting framework and a *laissez-faire* strategy.²¹ Ultimately, this author suggests that “targeted” mandatory reporting is warranted in appropriate cases.²² The *laissez-faire* strategy is not very persuasive. The *Charter* risk is that subsequent investigations can be tainted unless a judicial authorization is obtained. That order justifies access to and use of the information.

The FATF has addressed the issue of mandatory suspicious transaction reporting in Recommendation 15 of its 40 Recommendation.²³ It advocates a mandatory suspicious transaction report-

19. *Supra* at note 16.

20. Section 2

21. Christopher J. Kent, *The Canadian and International War Against Money Laundering: Legal Perspectives*, 35 CRIM. L. Q. 21 at p. 24.

22. *Id* at 32.

23. Recommendation 15 states, “If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.”

ing requirement. Financial institutions should be required to promptly report when they “suspect” funds in their possession come from criminal activity. The regulator/law enforcement co-operation recommendation takes this issue one step further by requiring regulators to share information.

Canada is considering the FATF’s Recommendation 15.²⁴ We must consider this issue in light of our *Charter*. In any scenario where nations are participating in a regime where regulators are committed to full co-operation with law enforcement the original “regulatory” justification for the initial collection of the information shifts to a criminal enforcement purpose when it is passed on to law enforcement. This problem is magnified when the co-operation extends to law enforcement in other countries.

Essentially, the issue involves information collection by an agent of the state, i.e. the regulator, for one purpose and a decision to share that information for a crime prevention purpose. This may be the legislated purpose in any Suspicious Transaction Reporting Agency but the same argument cannot be made for other regulators. We could examine this issue from the simple example of a regulatory regime, such as municipal fire safety inspection, or from more complex examples such as securities law or banking. Most individuals might relate to financial institutions rather than the securities industry and securities regulators.

III. Banking and the Regulatory/Law Enforcement Issue

Our Bank Regulator, the Office of the Superintendent of Financial Institutions (OSFI) has an important role to play in the Canadian banking sector. Before reviewing that role, we should look at the relationship between a bank and its customer. In *Tournier v. National Provincial Bank of England*, we see the common law analysis on the issue of the confidential relationship between a bank and its clients.²⁵ Mr. Tournier brought action against his banker when the bank officials released information to Tournier’s employers. The court recognised a duty of confidentiality between a Bank and its customer. It was not an absolute duty. One Canadian text on Banking Law indicates that *Tournier* is

24. In May 1998 a consultation document was circulated on the issue of a suspicious transaction reporting regime.

25. [1924] 1 K.B. 461 (C.A.). See also *Canadian Imperial Bank of Commerce v. Sayani* [1994] 2 W.W.R. 260 (B.C.C.A.).

authority for four distinct exceptions to the duty for confidentiality.²⁶ The author describes these exceptions as (a) where there is disclosure under compulsion of law; (b) where there is a duty to the public to disclose; (c) where the legitimate interests of the bank require disclosure and (d) where the disclosure is made with the express or implied consent of the customer.

If you examine the decisions of Scrutton L.J. and Atkin L.J., in *Tournier*, both describe the second exception, as one needed to “prevent crime”.²⁷ In another era, we might have been able to argue that this exception permitted banks and the police to combine their efforts and fully co-operate in a criminal investigation. The *Tournier* case and the more recent case of *Canadian Imperial Bank of Commerce v. Sayani* would continue to be helpful in any situation where a bank unilaterally and voluntarily provided information and the customer subsequently brought action against the bank. This argument seems futile when the *Charter* protects the “biographical core” of an individual’s financial information.

In *Eddy* a court opined, with respect to records in financial institutions, as follows:

In my view, there is a substantially greater expectation of privacy relating to the records of an individual’s personal financial position, and the pattern of the individual’s operating on his or her bank account, then with respect to electrical consumption records. I note that the Crown argues that the police in this case already had access to the bank book itself and the account number, and that therefore the only “new” information they were abstracting in this connection was the name of the owner. However, in my view that does not lessen the privacy interest protected. It is one thing to have an unidentified bank book containing records of deposits and withdrawals and revealing financial information, when it is not linked to a name. The linkage of a name to that information creates at once the intimate relationship between the information and the particular individual, which is the essence of the privacy interest.²⁸

26. Baxter, *Law of Banking* (4th ed.) p. 57. See also *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985) 22 D.L.R. (4th) 410 (Ont.C.A.).

27. *Supra*, note 24 at pages 481 and 486. This factor was an essential element in the British Columbia Court of Appeal’s decision in *Sayani*.

28. *Supra*, note 10, at 126, paragraph 176.

It would have been interesting to see what the court would have thought of the prevention of crime dicta in *Tournier*. The net effect of the determination with respect to the Bank's disclosure was that the Crown was prohibited from issuing a subpoena to the Bank to produce its records in Court.²⁹

Considering all of the facts, the activity in question in *Eddy* constituted a search in circumstances to which the provisions of s. 8 of the *Charter* apply. I think the situation, involving as it does information about the personal financial status and dealings and intimate lifestyle details of the individual involve a high expectation of privacy. I see no difference between a situation where the police ask for and are given the information by its holder (the bank) by telephone, and one where the police physically attend at the premises and ask for the same information to be produced.³⁰ In its review of the "reasonableness" of the access to the bank information the officer, in *Eddy*, testified that he thought that no warrant was required since he viewed the bank as the equivalent of a willing third party providing information. His lordship, at page 128 paragraph 189, also held that the Crown failed to demonstrate a statutory or common law authority for the request for Bank information.

To complete the picture we now need to consider the dissemination of customer information collected by Canada's bank regulator. The principal banking regulator in Canada is the Superintendent of Financial Institutions. The Superintendent, or the employees in the Office of the Superintendent of Financial Institutions, acting under the authority of *Office of the Superintendent of Financial Institutions Act*³¹, as set out in section 3.1 of the Act, has the following legislated purpose:

The purpose of this Act is to ensure that financial institutions are regulated by an office of the Government of Canada so as to contribute to public confidence in the Canadian financial system.

In order to accomplish the purpose I can summarise the legislated object of the Superintendent and officers into four main functions.³² These are to (a) supervise financial institutions in

29. *Id.* at 132-137.

30. *Id.* at 127, 128.

31. R.S.C, 1985, c. 18 (3rd Supp.).

32. *Id.* at subsection 4(2).

order to determine whether they are in sound financial condition; (b) to promptly advise the management and board of directors of a financial institution in the event the institution is not in sound financial condition or is not complying with its governing statute law or supervisory requirements; (c) to promote the adoption of policies and procedures designed to control and manage risk and (d) to monitor and evaluate system-wide or sectoral events or issues that may have a negative impact on the financial condition of financial institutions. The Regulator accomplishes these objects by establishing policies and guidelines and undertaking inspections of the institutions that are subject to the supervision of the office.

In this last activity, the staff of the Office will come across information in the possession of a financial institution. I assume that this information may sometimes provide evidence or intelligence on a financial crime. The commitment to co-operate with law enforcement is the *sine qua non* of the G7 Finance Minister's recommendation. Yet, OSFI does not have unfettered discretion to pass on information it collects to law enforcement.³³ It should

33. Section 22 applies. This section reads as follows:

22. (1) Subject to subsection (3), all information

(a) regarding the business or affairs of a financial institution or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament,

(b) received by any member of the committee established by subsection 18(1), or by any person referred to in subsection 18(5) designated by any member thereof, in the course of an exchange of information permitted by subsection 18(3),

(c) furnished to the Superintendent pursuant to section 516 of the Bank Act, or

(d) obtained by the Superintendent as a result of an application to the Governor in Council for a consent referred to in subsection 521(1) of the Bank Act, is confidential and shall be treated accordingly.

22(2) Nothing in subsection (1) prevents the Superintendent from disclosing any information

(a) to any government agency or body that regulates or supervises financial institutions, for purposes related to that regulation or supervision,

(a.01) to any other agency or body that regulates or supervises financial institutions, for purposes related to that regulation or supervision,

(a.1) to the Canada Deposit Insurance Corporation or any compensation association designated by order of the Minister pursuant to subsection 449(1) or 591(1) of the Insurance Companies Act, for purposes related to its operation, and

(b) to the Deputy Minister of Finance or any officer of the Department of Finance authorized in writing by the Deputy Minister of Finance or to the Governor of the Bank of Canada or any officer of the Bank of Canada authorized in writing by the Governor of the Bank of Canada, for the purposes of policy analysis related to the regulation of financial institutions,

if the Superintendent is satisfied that the information will be treated as confidential by the agency, body or person to whom it is disclosed.

be noted that the disclosure provisions do not permit disclosure to law enforcement. This creates a significant impediment with respect to any co-operation between the Office and law enforcement.

IV. Other General Laws

Even if we assume that there was an ability to disclose in a regulator's enabling legislation we need to consider other laws of general applicability. This is very important when the law enforcement agency requesting the information is outside Canada. Canada has specific legislation, at both the federal and provincial levels, protecting privacy. The legislation is primarily applicable to the public sector. The federal legislation provides for exceptions where an investigative body listed in the regulations is involved or where disclosure is made after an agreement between the federal and provincial governments or institutions established by them and alternatively, by agreement, with foreign governments or their institutions.³⁴ Similar exceptions exist in some provincial legisla-

22(3) The Superintendent shall disclose, at such times and in such manner as the Minister may determine, such information obtained by the Superintendent under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act and the Trust and Loan Companies Act as the Minister considers ought to be disclosed for the purposes of the analysis of the financial condition of a financial institution and that

(a) is contained in returns filed pursuant to the Superintendent's financial regulatory reporting requirements; or

(b) has been obtained as a result of an industry-wide or sectoral survey conducted by the Superintendent in relation to an issue or circumstances that could have an impact on the financial condition of financial institutions.

22(4) The Minister shall consult with the Superintendent before making any determination under subsection (3).

22(5) Subject to any regulations made under a statute referred to in subsection (3) governing the use by a financial institution of any information supplied to it by its customers, no information obtained by a financial institution regarding any of its customers shall be disclosed or made available under subsection (3).

22(6) The Superintendent shall prepare a report, to be included in the report referred to in section 25, respecting the disclosure of information by financial institutions and describing the state of progress made in enhancing the disclosure of information in the financial services industry.

34. *The Privacy Act*, R.S.C. c. P- 21, section 8. This section starts with the proposition, in subsection 8(1), that personal information shall not, without the consent of the individual to whom it relates, be disclosed by the institution. It then goes on, in subsection 8(2), to establish various exceptions . . . A summary of one exception, subparagraph 8(2)(f), allows disclosure to foreign states but it requires an agreement or arrangement between the Government of Canada or an institution of the Government of Canada (such as OSFI) and the government of a foreign state, or any institution of any such government, for the purpose of

tion. Provincial privacy laws would control the dissemination of their information, subject to their regulator's enabling legislation. The fact that disclosure of personal information may be disclosed as a consistent use under privacy legislation does not mean that this obviates *Charter* concerns. It would, however, generally indicate that the regulatory agency's legislation does not prohibit such disclosure.

In addition, all information that is not in the public domain is subject to such common law protections as solicitor-client privilege, informer privilege and confidentiality. If information held by a regulatory agency falls within any of these categories law enforcement's expectations can be frustrated. The regulator and law enforcement must consider this issue. Each may have to satisfy specific pre-conditions before their information can be shared.

V. Conclusion

Canadian law illustrates a number of concerns when a suggestion is made that regulators and law enforcement co-operate. The reason for the co-operation is very important. If the co-operation shifts the use of the information from a regulatory or civil context to a criminal or quasi-criminal context we have some problems. The need for greater co-operation may be justified but our constitutional protections need to be considered.

In addition, the impetus to co-operate between countries may be another significant problem. There may be a method to co-operate between regulators in different countries. Given the movement to a globalised business environment such regulatory co-operation is essential. When the co-operation moves beyond the regulators to law enforcement all of the concerns set out above are magnified.

Organised crime does not recognise international borders. Laws and States exist in a world where borders create problems. The Summit recommendation is an excellent starting point but we still have a lot of work to bring the recommendation to reality.

