Regulatory Cooperation: Some Constitutional Considerations

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Regulators need information and documents to do their jobs. In their home statutes, regulators have many powers to gather information and documents. These powers are subject to constitutional limits.

But not all information and documents that regulators get come as a result of their own exercises of powers. Some of the most important information and documents come from separate branches within the regulator or from other regulators. Important information and documents often come from law enforcement personnel.

The usefulness and, thus, the frequency of information and document sharing – regulatory cooperation – should come as no surprise. Although each regulator's jurisdiction is limited, frequently regulatory jurisdictions overlap. The jurisdiction of law enforcement personnel invariably overlaps with the jurisdiction of regulators. Finally, cooperation among regulators, including the sharing of information and documents, has long been recognized as being essential to the effective discharge of regulatory responsibilities.

In the area of regulatory cooperation, however, some important constitutional questions arise.

To what extent is one branch of a regulator able to share information and documents with another branch of the regulator? Are regulators free to share with other regulators information and documents that they have? To what extent can a regulator tip off another regulator that it has relevant information and documents? When are search warrants or other forms of prior judicial authorization required? And assuming that in some circumstances the sharing of information and documents results in an infringement of the *Canadian Charter of Rights and Freedoms*, when will courts prohibit the use of the information and documents under s. 24 of the *Charter*?

The challenge in this area is that there is little authority in point. Foundational or organizing principles can be identified from the few key cases that have been decided in this area, but there are few cases that examine on specific facts when the sharing of information and documents results in a *Charter* infringement.

In this paper, I attempt to identify the key foundational or organizing principles and apply them to the issue of regulatory cooperation.[1] Along the way, I shall offer a few practical tips for regulators and for others in this area of law.

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[1] I welcome comments and suggestions concerning this paper, particularly from regulators who frequently face the practical problems identified in this paper. Nothing has been written in the academic journals

I must emphasize, however, that given the paucity of cases directly on point, this paper on occasion does go beyond the bounds of existing case law and so, until there are decided cases directly on point, the conclusions and opinions in this paper must be applied with caution.

Regulatory cooperation is important

The few reported cases on point have repeatedly emphasized the importance of regulatory cooperation.[2]

Perhaps the leading case is the Supreme Court of Canada's decision in *Global Securities Corp. v. British Columbia (Securities Commission)*.[3] In this case, the Supreme Court of Canada upheld the ability of the British Columbia Securities Commission to require Global Securities Corp. to produce documents to be handed over to the United States Securities and Exchange Commission.[4] In the course of its reasons, the Supreme Court recognized the "indispensible nature of interjurisdictional cooperation" in the area of securities regulation.[5]

Any entity can complain about a breach of law at any time

It is likely a general principle of law that any entity – a corporation (public or private), a partnership, an individual, a body established by statute such as a regulator – can complain to an appropriate authority about a breach of law at any time. *Dicta* to this effect can be found in defamation cases. Those who make good faith complaints to authorities enjoy protection against suits.

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concerning the issue of the constitutional considerations in the area of regulatory cooperation. This paper may be republished in the future in revised form as a result of suggestions received.

[2] See, e.g., *R. v. Bouman*, [2002] O.J. No. 3704 (S.C.J.); *R. v. Caruana*, [1999] O.J. No. 5956 (S.C.J.).

[3] [2002] 1 S.C.R. 494.

[4] The precise question was whether the B.C. Securities Commission could use its power under s. 141(1)(b) of the British Columbia *Securities Act*, R.S. B.C. 1996, c. 418 to require registrants to produce documents "to assist in the administration of the securities laws of another jurisdiction". The argument that the Supreme Court rejected was that this went beyond the provincial power under s. 92(13) of the *Constitution Act, 1867* over "property and civil rights *in the province*" [my emphasis].

[5] *Supra*, n. 3, at para. 21. See also *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 62. Many regulators make it a priority to share information with other agencies to the extent permitted by law: see, *e.g.*, the Canada Revenue Agency, as discussed in *R. v. Gibbs*, [2001] B.C.J. No. 2636 (Prov. Ct.) at para. 23 and the extensive discussion of information sharing in *R. v. Madlener*, [2002] A.J. No. 899 (Q.B.). See also *British Columbia (Securities Commission) v. Simonyi-Gindele*, [1992] B.C.J. No. 2893 (S.C.).

This principle, however, has not been formally discussed in any detail in the regulatory context in a case concerning regulatory cooperation. However, there are *dicta* suggesting that this principle does apply to regulators engaging in regulatory cooperation and that there is nothing *per se* wrong with regulators or law enforcement personnel sharing information,[6] even with agencies outside of the jurisdiction.[7]

As discussed in the next section, regulators may also have the power under a "necessity" doctrine.

Regulators' powers are limited to the terms of their statutes

Regulators are statutory creations and only have the powers and jurisdiction granted to them under their governing statute or other statutes that assign them responsibilities.[8] However, not all of the powers have to be found in the black and white wording of the statute. There is authority, the *Canadian Liberty Net* case, to suggest that regulators also have implicit powers that are "actually necessary" in practice for the administration of the terms of the legislation under which they operate.[9]

Regulatory sharing is likely authorized (implicitly) by most regulators' statutes

Many regulators' statutes do not have specific authorization for the sharing of information with other regulators. Is regulatory sharing "actually necessary" in practice for the administration of the terms of the legislation under which they operate?

A case in which there was an explicit authorization for regulatory sharing ironically may provide strong support for the view that regulatory sharing is indeed "actually necessary" in practice for regulators to do their jobs under their statutes.

In *Global Securities Corp. v. British Columbia (Securities Commission)*, it was argued that the Securities Commission's power to require registrants to produce documents "to assist in the determination of the securities laws of another jurisdiction" was beyond the power of the province to legislate concerning "property and civil rights *in the province*"

[6] Inter-agency sharing of information is often mentioned, with no criticism or expression of concern: see, *e.g.*, *National Financial Services Corp. v. Wolverton Securities Ltd.*, [1998] B.C.J. No. 1012 (C.A.) at para. 10 and *R. v. Harrer*, [1998] B.C.J. No. 894 (C.A.) at para. 12. See also *R. v. Rogers*, [1995] NWTJ 51 (S.C.) at para. 49: "Based on the evidence presented to me, there is no doubt that the audit bureau and the police were working in close cooperation and sharing information. There is nothing wrong with that, indeed it is to be expected. It is standard procedure."

[7] See, e.g., *United States v. Graham*, [2005] B.C.J. No. 716 (S.C.) at para. 25: "I know of no authority that prevents police authorities from sharing information and intelligence".

[8] See *R. v. Village of 100 Mile House*, [1993] B.C.J. No. 2846 (S.C.) at para. 20 where, *semble*, the administrative official did not have statutory authority to seek out and information from another agency.

[9] *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at para. 16.

[my emphasis]. The Supreme Court of Canada rejected this argument. In the course of doing so, it held that this power, although having extraterritorial effect, was indeed "in the province".

Its rationale for that result is key. The Supreme Court held that in order to do its regulatory job under the *Securities Act* "in the province", the Securities Commission must receive information from regulators in other jurisdictions. In order to get those other jurisdictions to cooperate and assist the Securities Commission in doing its job "in the province", the Securities Commission must reciprocate. Therefore, this power to extract documents from registrants in British Columbia for the purposes of a regulator in a foreign jurisdiction, in "pith and substance", was closely related to the regulation of securities "in the province".

The Supreme Court also held that the provision of information by Canadian securities authorities to foreign regulators could uncover improper conduct abroad that raises a regulatory issue in Canada. In other words, the provision of information abroad is part and parcel of effective regulation in Canada.

These comments by the Supreme Court would seem to recognize that the sharing of information by a Canadian regulator with a regulator in a foreign jurisdiction is necessarily incidental to the discharge of the Canadian regulator's duties. Using the words of *Canadian Liberty Net*, the Supreme Court of Canada seems to have recognized that regulatory cooperation is "actually necessary" for the discharge of domestic regulatory duties under the regulator's governing statute.

This analysis suggests certain practical tips that regulators might consider:

> (1) Developing a policy concerning regulatory cooperation. The policy, suitably drafted, might demonstrate why regulatory cooperation is "actually necessary" for the discharge of existing regulatory duties under statute. It may also be useful, through the use of covering memoranda or covering letters, to demonstrate in a particular case why a particular sharing of information has direct relevant to the statutory duties of the regulator. Doing this might also establish "good faith" which might be relevant if the regulator's conduct in sharing the information is later questioned.[10]

[10] For example, good faith may be highly relevant in s. 24(2) issues concerning the exclusion of evidence. Also the existence of good faith can be a defence to any damages claim based on *Charter* infringement (see, *e.g.*, *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405 at paras. 78-81) or based on the tort of abuse of public office (*Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263).

> (2) In the next set of legislative amendments for the regulator's statute, consider inserting a provision such as the one in issue in *Global Securities Corp. v. British Columbia (Securities Commission)*.[11]

> *Section 8 of the Charter can protect reasonable expectations of privacy concerning information and documents*

It is trite that s. 8 protects reasonable expectations of privacy concerning information and documents in certain circumstances.[12] A regulated individual or company that has information and documents sought by a regulator can have a reasonable expectation of privacy over that information and documents.

In many cases, in many regulated sectors, that expectation of privacy can be low. For example, in many regulated sectors, the regulation concerns a business activity and the information and documents concern the business. The Supreme Court of Canada has affirmed that expectations of privacy over business documents is often very low.[13] Despite this, searches in business premises for evidence of a crime do require prior judicial authorization based on *Hunter*[14] standards.[15]

The seminal case of *R. v. Jarvis*[16] governs this area.

When a regulator is engaging in a regulatory spot check designed to verify that the regulated person is complying with the regulatory regime, the reasonable expectation of privacy is very low and s. 8 of the *Charter* does not apply with full force.[17] This applies to inquiries conducted for purely regulatory or disciplinary purposes.[18] This also applies to regulatory spot checks or "inspections" where a representative of the inspector enters onto the premises of the regulated person.[19]

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[11] Section 141(1)(b) of the British Columbia *Securities Act*, R.S. B.C. 1996, c. 418, discussed in *Global Securities Corp. v. British Columbia (Securities Commission)*, *supra*, n. 3.

[12] See, *e.g.*, *Hunter v. Southam*, [1984] 2 S.C.R. 145; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Jarvis*, [2002] 3 S.C.R. 757; *R. v. Tessling*, [2004] 3 S.C.R. 432. See, most recently, *R. v. Rodgers*, 2006 SCC 15 (April 27, 2006).

[13] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

[14] *Hunter v. Southam*, *supra*, n. 12.

[15] *Baron v. Canada*, [1993] 1 S.C.R. 416.

[16] [2002] 3 S.C.R. 757.

[17] See, *e.g.*, *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627.

[18] *Branch v. British Columbia (Securities Commission)*, [1995] 1 S.C.R. 3.

But when the state is pitted against the individual in an attempt to establish culpability, *Charter* protections apply full force.[20] Where the predominant purpose of an inquiry is the determination of penal liability, there exists an adversarial relationship between the taxpayer and the state. In determining whether the predominant purpose of an inquiry is the determination of penal liability, certain factors are relevant, such as:[21]

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

(c) Had the person engaging in the regulatory inspection or spot check transferred his or her files and materials to the penal investigators?

(d) Was the conduct of the person engaging in the regulatory inspection or spot check such that he or she was effectively acting as an agent for the penal investigators?

(e) Does it appear that the penal investigators intended to use the person engaging in the regulatory inspection or spot check as their agent in the collection of evidence?

(f) Is the evidence sought relevant to civil liability generally? Or, as is the case with evidence as to the person's *mens rea*, is the evidence relevant only to the person's penal liability?

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the inspection or spot check had in reality become a criminal investigation?

Section 7 can protect rights to silence and rights against self-incrimination

The seminal case of *Jarvis* also dealt with s. 7 rights, such as the right to silence and the right against self-incrimination. The same analysis described above concerning s. 8 of the *Charter* applies here. There is a fundamental difference between purely regulatory

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[19] *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406.

[20] *Jarvis, supra*, n. 16.

[21] *Ibid.*, at para. 94.

activities, such a spot checking, auditing and verification on the one hand and gathering evidence for the purposes of establishing penal liability or culpability. Section 7 protections apply full force in the case of the latter and are seriously attenuated in the case of the former. The factors outlined by the Supreme Court in *Jarvis* are the key factors for determining whether the regulator is in the former category or the latter category.[22]

Transfers of information and documents from an inspections branch of the regulator to the penal investigations branch of the regulator: generally no problem

Suppose we are dealing with a regulator that has an inspections arm and a penal investigations arm.[23] Suppose that the inspections arm has conducted inspections, audits or spot checks and has discovered evidence of criminality. Can it provide this evidence to the penal investigations arm?

Jarvis makes it clear that the answer is yes.[24] The Supreme Court's rationale is that when one provides documents and information to an inspector within a regulatory regime, one understands that if there is evidence of criminality, that evidence will go to the enforcement personnel.

Jarvis also makes it clear that this is only the case if the inspections arm, when conducting inspections, audits or spot checks, is truly acting on its own behalf for purely regulatory purposes. The situation would be quite different if the inspection arm were acting as an agent and/or at the behest and/or under the direction of the penal investigations arm. In such a case, the investigation is in reality one for penal purposes and the *Charter* will apply full force.

If the penal investigations arm wishes to compel the production of more information and documents, it must comply with full *Charter* standards – in most cases, this will involve the obtaining of prior authorization.[25]

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[22] *Ibid*.

[23] See, *e.g.*, the Ontario Ministry of the Environment's Abatement Branch (inspections) and its Investigations and Enforcement Branch (penal investigators).

[24] *Jarvis*, supra, n. 16, at para. 95.

[25] In the case of documents, the *Hunter v. Southam* standard of prior authorization. In the case of information that is not in physical form – e.g., interrogations or questioning of persons – there must be prior authorization. See, e.g., s. 163.1(2) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended: "On application without notice, a justice may issue an order in writing authorizing a provincial officer, subject to this section, to use any device, investigative technique or procedure or to do any thing described in the order if the justice is satisfied by evidence under oath that there are reasonable grounds to believe that an offence against this Act has been or will be committed and that information concerning the offence will be obtained through the use of the device, technique or procedure or the doing of the thing." See also s. 56 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

Transfers of information and documents from an inspections branch of a regulator to the another regulator: possible Charter breach

There is not much authority directly on point, so the analysis here must be regarded with caution.

Take a regulator that has obtained documents and information for the purposes of its own regulation through its inspections, auditing or spot checking arm. It is not necessarily free to send the documents and information to the penal investigations branch of a different regulator or law enforcement agency.

Also take a regulator that has obtained documents and information for the purposes of its own regulation through its inspections, auditing or spot checking arm and that places the documents or information in a central database or other repository that another regulator may access. That other regulator may not be free to seize those documents and information and use them.

My reasons in support of these conclusions are based on the *Jarvis* case and two other important Supreme Court cases, though the situation is unclear due to paucity of authority.

It will be recalled that the rationale in *Jarvis* for transfers of documents and information from an inspections branch of a regulator to that regulator's penal investigations branch was premised on the reasonable expectations of the regulated person. The Supreme Court said, in the context of an income tax audit, that when one provides documents and information to an auditor, one understands that if there is evidence of criminality, that evidence will go to the enforcement personnel.

That rationale may not necessarily apply in the case of inter-agency transfers. Suppose, for example, that a regulated person supplies information to an environmental inspector for purely regulatory purposes. That regulated person may have a reasonable expectation that the information will only be used by the Ministry of the Environment, meaning either the inspections branch or the penal investigations branch. But that regulated person may not have a reasonable expectation that that information would be sent to the penal investigations arm of a separate agency, such as a Securities Commission, or to the police.

Although the authority is sparse, it does tend to support these assertions.

In *R. v. Colarusso*,[26] a doctor took blood samples from a patient who had been injured in a car accident. A police officer helped himself to some of the blood samples, without

[26] [1994] 1 S.C.R. 20.

getting a warrant. His purpose was to test the blood in order to ascertain whether the patient was driving while intoxicated. This was a penal purpose.

The Supreme Court of Canada held that the police officer could not legally help himself to the blood samples. The patient continued to have a reasonable expectation of privacy under s. 8 of the *Charter* over his blood samples. The patient gave the blood samples for medical purposes only.

Would the situation have been different if the doctor handed the samples to the police officer without the consent of the patient? Likely not. The police officer's acceptance of the blood samples would have been a seizure, in violation of the patient's reasonable expectation, and thus, in violation of s. 8 of the *Charter*.

Injecting considerable uncertainty into the analysis is the more recent Supreme Court of Canada decision in *Smith v. Canada (Attorney General)*.[27] Smith was on vacation outside of Canada for two weeks, while receiving unemployment insurance benefits. She returned to Canada and passed through customs. She completed a customs card. The information on that card, which showed that she was outside of Canada, was accessed by the Canada Unemployment Insurance Commission. The Commission discovered that she had received benefits while out of the country and ordered repayment of those benefits.[28]

Smith appealed on the basis of s. 8 of the *Charter* to the Umpire (then Rothstein J.). Rothstein J. ruled as follows:

> [136] I have concluded from the nature of the information, the relationship between the appellant and other returning Canadian residents and Customs, the place and manner in which the disclosure of E-311 information was made and the seriousness of the offence under investigation, that the appellant and other Canadian residents returning to Canada by air on February 16, 1995, cannot be said to have held a reasonable expectation of privacy in relation to their E-311 information disclosed to the Commission, which outweighs the government's interest in enforcing the laws disentitling unemployment insurance claimants from receiving benefits while outside of Canada. The disclosure of E-311 information in this case is not in violation of section 8 of the *Charter*.[29]

The *Smith* decision can be seen as being consistent with previous case law to the effect that Canadians have a low expectation of privacy when they report to Canada Customs.[30] What is not entirely consistent with the case law is the reliance on "the seriousness of the offence under investigation" as somehow driving down the reasonable expectation of

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[27] [2000] F.C.J. No. 174 (C.A.), aff'd [2001] 3 S.C.R. 902.

[28] Pursuant to paragraph 32(b) of the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1.

[29] *Supra*, n. 27, at para. 4.

[30] *R. v. Simmons*, [1988] 2 S.C.R. 495.

privacy.[31] There is no authority for the proposition that a regulatory authority can supply information to another regulatory authority because reasonable expectations of privacy are lower due to the seriousness of the offence involved. The seriousness of the offence involved may be a factor in assessing whether the exclusion of the evidence in a later proceeding might bring the administration of justice into disrepute under s. 24(2), but it would seem to have no relevance to reasonable expectations of privacy. As well, *Jarvis* would seem to be authority for the proposition that when a regulator gathers evidence for penal purposes, *e.g.*, because there is a serious offence under investigation, s. 8 of the *Charter* and the requirement of prior judicial authorization must strictly apply.

The *Smith* case and the *Colarusso* case, however, do both stand for one important proposition: whether documents and information can be supplied to or accessed by another regulator depends on the reasonable expectations of privacy of the supplier of the information.

Because in some cases the reasonable expectations of privacy may be high – for example, on *Jarvis* principles, when the penal branch of another regulator is receiving information from a regulator, the full panoply of *Charter* protections may be present.[32]

Relevant to this examination will be the predominant purposes of the regulator seeking to receive the information, but also the circumstances existing between the regulator who first acquired the information and documents and the regulated person.[33]

A recent case suggests that it will be relatively rare that a court will find that a supplier of information to a regulator under a search warrant will be able to assert a strong expectation of privacy over the information. In *R. v. Murdock*, a police officer had obtained information under a search warrant.[34] That information suggested that Murdock had stolen certain estate monies. The police officer had a reasonable suspicion that if in fact Murdock had stolen the estate monies he would not have declared it as income for

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[31] There is some basis, though, in the judgment of Sopinka J. in *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.) at 213. Sopinka J., briefly and without explanation, referred to the seriousness of the offence being a consideration in the assessment of the reasonable expectation of privacy.

[32] See, e.g., *R. v. Rogers*, [1995] NWTJ 51 (S.C.) where the judge expressed concern about the Canada Revenue Agency exercising its powers to compel the production in information in circumstances where it was in close cooperation with the RCMP which was simultaneously investigating an offence. *Semble*, the passage of information in that situation would “cross the Rubicon” and offend the principle in *Jarvis*.

[33] What is reasonable “depends upon consideration of what is sought, from whom, for what purpose, by whom, and in what circumstances”: see *Alberta Human Rights Com'n and Alberta, Blue Cross Plan* (1983), 1 D.L.R. (4th) 301 at 307 (Alta. C.A.), quoted by Wilson J. in *R. v. McKinlay*, *supra*, n. 17. In certain regulatory sectors, the practice of interjurisdictional sharing of information may be widely known and this would substantially reduce the reasonable expectation of privacy: see, e.g., the regulatory sector discussed in *Griffiths v. Nova Scotia (Department of Education)*, [2005] N.S.J. No. 328 (S.C.) at para. 10.

[34] [2003] O.J. No. 5736 (S.C.J.).

income tax purposes. So the police officer sent the information to the tax authorities. in a brief oral judgment, the Ontario Superior Court of Justice held that the sharing had occurred between sister law enforcement agencies and the information had been seized pursuant to a validly executed warrant and so any expectation of privacy in the information was greatly reduced if not altogether extinguished, for the purposes of the administration of Canadian law.[35]

Despite *Murdock*, there is authority that suggests that the supplying of information from one agency to another (in this case the RCMP to the Canada Revenue Agency) can potentially result in a *Charter* breach if the supplying of information is outside of the jurisdiction of the agency, done for an improper purpose or other improper conduct.[36] In another case, the court was prepared to prevent the Canada Revenue Agency from sharing information with the R.C.M.P. that might prejudice the accused and affect his *Charter* rights in proceedings concerning pending charges.[37] The mere sharing of information between regulators does not automatically turn a truly regulatory matter into a criminal investigation.[38]

Although the law in this area is embryonic and will develop much further, there is at least one practical thing that regulators might consider. By making it clear that the information gathered in a regulatory audit, spot check or inspection may be shared with other agencies if criminality is detected, the regulators' position will be enhanced. This does not change the predominant purpose of the audit, spot check or inspection activity. But it may be taken to affect the reasonable expectations of privacy of the supplier of the information. To put it another way, the rationale in *Jarvis* supporting the provision of information and documents by an inspections arm of a regulator to a penal investigations arm of the regulator – namely that the supplier of the information has a reasonable expectation that any criminality detected will be shared with the penal investigations arm of the regulator – can be extended, through notice to the supplier of the information, to cover the potential sharing of information with other regulators.

Interestingly, perhaps in reaction to the litigation in the *Smith* case, the standard customs form now alerts us that the information we supply may be shared with other agencies.

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[35] In fact, referring this to the tax authorities was the proper thing to do. The police officer had no jurisdiction to investigate tax offences. Had he done so, he might have used the evidence contrary to the purposes set out in the search warrant. Such exceedance of authority violates s. 8 of the *Charter*: see, *e.g.*, *R. v. Law*, [2002] 1 S.C.R. 227.

[36] *R. v. Lin*, [1997] B.C.J. No. 1277 (S.C.) at para. 27.

[37] *Tyler v. M.N.R.*, 91 D.T.C. 5022 (C.A.). See also *R. v. Lee*, [1998] N.W.T.J. No. 170 (S.C.) at para. 10; *R. v. Vinkle*, [1998] B.C.J. No. 1835 (S.C.); *R. v. Xidos*, [1999] N.S.J. No. 231 (Prov. Ct.) (There is no *Charter* violation if an income tax "requirement is not done in furtherance of the [separate] police investigation, not directed to any specific wrong doing, and not motivated or based on the same factual information". In this case the primary purpose for making the requirements was not to obtain self-incriminating evidence in the context of a criminal investigation.)

[38] *R. v. Bjellebo* (1999), 102 O.T.C. 181 (S.C.J.) at para. 169 cited in *R. v. Wilcox*, [2001] N.S.J. No. 85 (C.A.).

On the other hand, those supplying information to regulators might consider the practical step of making it clear that the information being supplied is private and only for the purposes of the regulator engaged in inspection, audit or spot checking and that any other activity in relation to the information is not consented to.

Improper acquisition of documents and information can taint subsequent regulators

A regulator that has obtained information or documents in a manner contrary to ss. 7 or 8 of the *Charter* cannot supply it to others. The regulator has no legal right to the information and documents and thus, has no power to convey it to others. The good faith of those receiving such documents is not relevant to the analysis of *Charter* breach.

To take a practical example, suppose that the Securities Commission obtains documents contrary to s. 8 of the *Charter*. Its seizure and continued detention of the documents is contrary to s. 8 of the *Charter*. It sends those documents to the Canada Revenue Agency. The Canada Revenue Agency, despite its lack of knowledge about what the Securities Commission had done in obtaining the documents, holds documents that had the Securities Commission acted constitutionally it never would have received. It stands in the same position as the Canada Revenue Agency on the issue of *Charter* breach.

A regulator may nevertheless supply a tip to another regulatory agency that information exists that may be of interest

There is very little authority on point in this area. In my view, the general principle that any entity, including a regulatory authority, may make a complaint about illegality to the proper authorities applies here.

There is a difference between the regulatory authority shipping all of the evidence and information it has gathered to the police and the regulatory authority merely reporting an instance of illegality to the police. The former is a potential violation of s. 8 of the *Charter* if there is a reasonable expectation of privacy. The latter, however, is only the making of a complaint.

In my view, it is very likely that a court would find that a person supplying information has no reasonable expectation of privacy that the regulator will never report an instance of illegality to the proper authorities. Suppose, for example, that an inspector from Ontario's Ministry of Labour is inspecting a workplace to verify workplace safety. The inspector asks a company official for computer files relating to workplace procedures that are designed to prevent accidents. The company official hands over a CD-ROM that contains all of the requested information but also inadvertently contains files of child pornography contrary to the *Criminal Code*. In my view, in such a circumstance the company official can have no reasonable expectation of privacy over the child pornography such that the regulator cannot call the police and complain. The company official, however, may have a greater expectation of privacy that his or her private files will not be turned over wholesale to the police.

Again, *Colarusso* is an instructive case. In *Colarusso*, the Supreme Court held that the police officer could not simply take the blood sample. Instead, since he was engaged in a criminal investigation, he had to obtain a search warrant. Suppose that the doctor who took the blood samples suspected drunken driving by the patient. *Colorusso* suggests that if the doctor gave the blood to the police officer, the seizure of the blood by the police officer would still be a seizure of evidence in a criminal investigation – a matter that would require a search warrant or prior authorization on *Hunter* grounds. But nothing would stop the doctor from complaining to the police officer that the patient had been engaged in drunken driving and reporting that he had blood samples. Assuming that that information rose to the level of reasonable and probable information, the police officer could then obtain a search warrant to obtain the blood samples.

The Supreme Court of Canada has recently released a decision that would seem to confirm this analysis.[39] In this case, *Quebec (Attorney General) v. Laroche*, a regulator, the Société de l'assurance automobile du Québec (SAAQ), found in the course of an audit serious irregularities in five rebuilt vehicle files submitted by Garage Côté Laroche Inc. The regulator was convinced that the certificates of technical compliance for the vehicles had been obtained illegally, and complained to the police. These complaints formed the basis of search warrants obtained by the police. The Supreme Court of Canada upheld the search warrants.

At para. 84, LeBel J. stated:

> Suffice it to note that the SAAQ employee was auditing rebuilt vehicle files submitted by the respondents in order to obtain certificates of technical compliance. The information thus obtained had originally been provided by the respondents, in compliance with the obligations imposed by the legislation and the regulations that applied under the legislation. Laroche and Garage Côté Laroche Inc. should have known that this information would necessarily be examined and audited by the SAAQ and was not, properly speaking, private in relation to the government. In carrying out and expanding his investigation, the employee was merely performing the duties of his position. Transmitting [page 751] information to the police, to initiate an investigation into the irregularities that had been observed, was connected with the performance of his duties. That information constituted reasonable and probable grounds for obtaining the underlying search warrants at the stage when the restraint order was made and the warrants of seizure issued, and when they were reviewed; it was a major source of information concerning the respondents' criminal activities.

Although LeBel J. did not use the phrase "reasonable expectation of privacy" in this passage, it is evident that that is the concept that he is discussing. In the circumstances of this case, the supplier of the information had no reasonable expectation of privacy that

[39] *Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708.

the information would not be scrutinized carefully and any illegalities reported to the appropriate authorities.

An important recent case in this area is *R. v. Stucky*.[40] In that case, the R.C.M.P. supplied some information that it obtained from an individual to the Competition Bureau. The Ontario Superior Court of Justice found that this did not violate the s. 8 privacy interests of the individual. A subjective expectation of privacy over the information was not enough. The expectation of privacy had to be assessed objectively and had to be objectively reasonable.[41] It could not be said that the individual had an objectively reasonable expectation of privacy that information in the hands of the police could be kept from other regulators.

The special situation of certain federal regulatory authorities

In order to be a "reasonable" search and seizure under s. 8, the search and seizure must be "authorized by law".[42] A search or seizure that is contrary to law is not authorized by law and violates s. 8 of the *Charter*. It is arguable that a regulatory authority that takes possession of information contrary to a law is engaging in an unreasonable seizure under s. 8 of the *Charter*.

Federal regulatory authorities are subject to the federal *Privacy Act*.[43] Section 8(1) of that Act provides that "Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section."

Section 3 of the *Privacy Act* defines "personal information":

> "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,
>
> (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another

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[40] [2006] O.J. No. 108 (S.C.J.).

[41] *R. v. Tessling, supra*, n. 12 at para. 19.

[42] *R. v. Collins*, [1987] 1 S.C.R. 265 at 278; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 25.

[43] R.S.C. 1985, c. P-21, as amended.

individual by a government institution or a part of a government institution specified in the regulations,

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual,

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(m) information about an individual who has been dead for more than twenty years;

Section 8(2) allows “personal information” to be disclosed ((e) and (m) being most relevant):

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

(c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;

(d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

(e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;

(f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(g) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;

(h) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;

(i) to the Library and Archives of Canada for archival purposes;

(j) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(k) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

(l) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and

(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(ii) disclosure would clearly benefit the individual to whom the information relates.

Although these sections of the *Privacy Act* do impose certain restrictions on the disclosure of personal information, the net effect of them is that disclosure may happen when (under s. 8(2)(m)), the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. It is arguable that these sections of the

Privacy Act and particularly s. 8(2)(m), left unchallenged under s. 8 of the *Charter*, do affect the objectively reasonable expectation of privacy: anyone supplying information to a federal authority knows that the information may be disclosed in certain circumstances. This sort of reasoning has be used to justify a finding of a low expectation of privacy in at least one case.[44]

Before leaving the issue of statutory restrictions on the disclosure or sharing of information by regulators, it should be noted that many exist in our law. Perhaps the most significant set of restrictions exist under s. 241 of the *Income Tax Act*[45] concerning the disclosure of income tax information by the Canada Revenue Agency.

The ability of another regulator to use information or documents lawfully obtained from another regulator may be restricted

Suppose that a regulator lawfully obtained documents and information from a regulated person through lawful compulsion. For example, suppose that an environmental inspector lawfully obtained information using its powers to question company officials under the *Environmental Protection Act*. That inspector then lawfully turned over the information to the Ministry of Labour and that Ministry became interested in that information. The Ministry may be restricted from using that information against the company officials.

The Supreme Court has made it clear that those compelled to provide information enjoy direct use immunity (the compelled information cannot be used against them) and also indirect, derivative use immunity (evidence found as a result of the compelled information provided and that could not have been found but for the compelled information cannot be used against them).[46]

International cooperation: The Charter does not apply to the actions of foreign authorities

Suppose a Canadian regulator asks a foreign regulator to obtain documents. The foreign regulator does so, using conduct that, if it were done by the Canadian regulator, would violate s. 8 of the *Charter*. For example, suppose that the foreign regulator engaged in a warrantless search. The foreign regulator then sends the documents to a Canadian regulator, which accepts the information and documents.

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[44] *R. v. Stucky*, [2006] O.J. No. 108 (S.C.J.).

[45] R.S.C. 1985, c. 1 (5th Supp.).

[46] *Branch v. British Columbia (Securities Commission), supra*, n. 18; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451.

The Supreme Court has held that s. 8 of the *Charter* is not infringed in such a circumstance.[47] The conduct of the foreign regulator – the use of a warrantless search – was independent of any conduct by the Canadian regulator. The *Charter* applies only to Canadian state action, not foreign state action.[48]

However, two exceptions must be mentioned.

First, if the Canadian regulator had a sufficient level of involvement in the activity of the foreign regulator that, for all intents and purposes, the conduct of the foreign regulator was really the conduct of the Canadian regulator, then the *Charter* would apply. In law, the conduct would be Canadian state conduct. So, for example, if the Canadian regulator instructed that the search be warrantless, dictating exactly how the search was to be done, the foreign regulator would be nothing more than an instrumentality at the complete behest of the Canadian regulator.

Second, the Supreme Court has held that although the *Charter* does not apply to the foreign conduct (in the above example, the warrantless seizure by the foreign regulator), it can apply to the use in Canadian criminal proceedings of the evidence obtained by the foreign regulator. Sections 7 and 11 of the *Charter* require that criminal proceedings be fair. If the admission of the evidence would render the proceedings unfair, ss. 7 and 11 of the *Charter* would be violated.[49]

In the case of foreign regulators seeking evidence from Canadian regulators for the purposes of an offence in the foreign jurisdiction, the provisions of the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.) apply. Providing information originally compelled from a person to the foreign regulator for criminal purposes without following the Act may be an infringement of s. 8 of the *Charter*.[50] The Act does not apply, however, to informal exchanges of information outside of formal criminal investigations.[51]

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[47] *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841. See also *R. v. Terry*, [1996] 2 S.C.R. 207; *R. v. Harrer*, [1995] 3 S.C.R. 562.

[48] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570.

[49] *Supra*, n. 47.

[50] *Massachusetts (Attorney General) v. Dynacor Investments Inc.*, [1996] O.J. No. 3341 (Prov. Ct.).

[51] *Global Securities Corp. v. British Columbia (Securities Commission)*, *supra*, n. 3, at para. 29. The Supreme Court approved of the effectiveness of such informal exchanges between regulators in different international jurisdictions.

The primacy of the facts: relevant to s. 24 remedies

In the end, if evidence is improperly shared by one regulator with another regulator, the most important issue for the regulator will be whether the evidence will be excluded under s. 24(2) of the *Charter*.

As is well known, this is a threefold test that examines the fairness of the trial, the seriousness of the *Charter* breach and whether the admission of the evidence into the proceedings would bring the administrative of justice into disrepute.[52] This is a factually-based test and issues such as whether the evidence was conscripted from the individual, the good faith of the regulator and the seriousness of the offence can all come to bear in this assessment.

Frequently it will be the case that the nature of the evidence (documentary evidence that exists without conscription of the accused) and the seriousness of the offence will prevent the evidence from being excluded under s. 24(2) of the *Charter*.[53]

Obviously, regulators can enhance their positions under s. 24(2) of the *Charter* by writing memoranda to file explaining their reasons for acting they way they did, describing in detail the good reasons (if any) why cooperation with other regulators is necessary, exercising all possible due diligence including the seeking of legal advice, and trying to minimize any deleterious effects on the potential *Charter* complainant.

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[52] *R. v. Collins*, *supra*, n. 42 at 278; *R. v. Stillman*, *supra*, n. 42 at para. 25.

[53] *R. v. Murdock*, *supra*, n. 34.