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Jones v Tsige: A Banking Law Perspective

Muharem Kianiëff

University of Windsor, Faculty of Law

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Jones v Tsigie: A Banking Law Perspective

MUHAREM KIANIEFF*

This paper considers the recent Ontario Court of Appeal decision in *Jones v Tsigie*. In this unprecedented case, a bank customer was allowed to sue a bank employee personally for the tort of invasion of privacy after the employee surreptitiously accessed her bank account. The case is significant due to its introduction, for the first time, of an American cause of action under the tort of invasion of privacy. In order to fashion the plaintiff with the personal remedy, however, the Court has failed to consider the application of the Tournier doctrine that has established that banks owe a duty of secrecy to their customers. In so doing, it is argued that the Court has undermined an established tradition of law that provides for a better approach in analyzing the issue from a banking perspective than that used by the Court.

Dans cet article, on examine la décision que la Cour d'appel de l'Ontario a récemment rendue dans l'affaire *Jones v Tsigie*. Dans cette cause sans précédent, la cliente d'une banque a été autorisée à poursuivre une employée de la banque à titre personnel pour le délit civil d'atteinte au droit à la vie privée après que l'employée eut subrepticement accédé à son compte de banque. L'importance que cette cause revêt au Canada est due à l'introduction, pour la toute première fois, d'une cause d'action américaine, soit le délit civil d'atteinte au droit à la vie privée. En élaborant ce recours personnel, la Cour a cependant omis d'examiner l'application de la doctrine de *Tournier* selon laquelle les banques ont une obligation de confidentialité envers leurs clients. En décidant de la sorte, la Cour se serait écartée d'une tradition de droit établie qui prévoit une meilleure façon d'analyser des violations dans le contexte bancaire.

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Jones v Tsige: A Banking Law Perspective

MUHAREM KIANIEFF

I. INTRODUCTION

In January 2012, the Ontario Court of Appeal handed down a decision that would have tremendous repercussions on privacy law in Ontario. In *Jones v Tsige* (*Jones*), the Court definitively ruled, for the first time, in favour of establishing an independent tort of invasion of privacy—an action that previous courts had resisted to varying degrees.¹ The case arose from the fact that the defendant, Ms. Winnie Tsige, abused her position as an employee at the Bank of Montreal (BMO) to surreptitiously access the banking records of the plaintiff, Ms. Sandra Jones, who was also employed by the same bank.² In response, the Court held that the only way of giving Ms. Jones a remedy was by allowing her to pursue an action in tort against Ms. Tsige personally, on the basis of an intrusion upon seclusion, a component of the larger tort of invasion of privacy.³ This tort allows individuals to sue other individuals with whom they have no pre-existing relationship and to recover damages for their loss of privacy and various emotional damages associated therewith.

While the Court characterized the adoption of the tort of invasion of privacy as a positive step in light of new and emerging technologies that threaten personal privacy, that step is not risk-free.⁴ The major shortcoming in this case was that the Court chose to undermine the significance of the fact that the actions of the parties took place at a bank, failing to recognize the significance of the banker-customer relationship. As such, the case was decided on the basis of a tort premised upon the fact that one of the parties, as a stranger (or at best, as one who had a tenuous personal relationship with the other), intentionally infringed upon the privacy rights of the other, rather than viewing the issue in the context of a banker-customer relationship. I shall argue that the latter is the better way of characterizing

1 *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241 [*Jones*].

2 See discussion below.

3 *Jones*, *supra* note 1 at paras 69-71.

4 *Ibid* at para 31.

the relationship between the parties. This fact is very significant when considered in the broader context of banking law and the incentives provided therein for banks to be mindful of the interests of their customers—maintaining the confidentiality of their customers' affairs is of the utmost importance, a breach of which may expose them to an action for a breach of confidence. In moving away from actions based upon breaches of confidence and towards actions based upon the tort of invasion of privacy, the Court risks undermining a deep-rooted area of law that has the potential to guide future relationships between people and to further extend professional norms that are more in accordance with individual expectations.

This paper will consider the decision in *Jones* and re-examine the case from a banking law perspective. Part One will set out the facts and holding in *Jones*. The case will be situated in relation to the tort of invasion of privacy as developed in American jurisprudence. Part Two will consider the case with a view to applying the banker's duty to maintain confidentiality, as developed in the common law. This is a fundamental concept of the quasi-contractual banker-customer relationship and provides the foundation for many of the modern banking concepts we take for granted today. This section will draw on Anglo-Canadian sources in order to provide a contrast to the approach chosen by the Court. Part Three will assess the doctrinal implications that result from following either approach and offer some concluding observations.

II. PART ONE: *JONES V TSIGE* AND THE TORT OF INVASION OF PRIVACY

A. Facts and Pleadings

The case arises from events that transpired in July 2009 between two employees of the Bank of Montreal.⁵ The parties did not know each other directly, but the defendant was in a common law relationship with the plaintiff's former husband.⁶ A financial dispute arose between Tsigé and her common law partner relating to the child support payments he was making to Jones. Tsigé claimed that she wished to verify whether or not Jones' ex-husband was making these payments and did so by using her work computer.⁷ Over a period of four years, Tsigé looked into Jones' banking records at least 174 times.⁸ The information contained in these records included personal details such as Jones' date of birth, marital status and address.⁹ At no time did Tsigé "publish, distribute or record the information in any way."¹⁰ Jones argued that Tsigé's explanation was not consistent with the timing and frequency of Tsigé's prying.¹¹

5 *Ibid* at para 2.

6 *Ibid*.

7 *Ibid* at para 5.

8 *Ibid* at para 4.

9 *Ibid*.

10 *Ibid*.

11 *Ibid* at para 5.

When Jones eventually learned of Tsige's espionage, she complained to BMO.¹² After speaking with Tsige, BMO took disciplinary action "by suspending her for one week without pay and denying her a bonus."¹³ However Jones, who was deeply offended by what had transpired, sought retribution from Tsige personally. Jones was reluctant to pursue a remedy against BMO directly since she did not wish to involve her employer by making a complaint under the *Personal Information and Electronic Documents Act (PIPEDA)*.¹⁴ As such, she decided to sue Tsige directly, claiming an invasion of her privacy.¹⁵ It is here we see the case transpire in what, for Canadian jurisprudence, is a novel way of looking at the issue.

The Court of Appeal agreed with Jones' submission and allowed the cause of action for invasion of privacy to proceed. In so doing, the Court dismissed Tsige's submission that the matter would be best resolved through the *PIPEDA* legal regime rather than the common law.¹⁶ The reasons for so doing, according to Justice Sharpe, are set out as follows:

While BMO is subject to *PIPEDA*, there are at least three reasons why, in my view, Jones should not be restricted to the remedy of a *PIPEDA* complaint against BMO. First, Jones would be forced to lodge a complaint against her own employer rather than against Tsige, the wrongdoer. Second, Tsige acted as a rogue company employee contrary to BMO's policy and that may provide BMO with a complete answer to the complaint. Third, the remedies available under *PIPEDA* do not include damages, and it is difficult to see what Jones would gain from such a complaint.¹⁷

As can be seen, one of the reasons why the court chose to proceed in the direction that it did was that it wished to provide Jones with a personal remedy against Tsige. This was also coupled with a desire not to hold the bank responsible for Tsige's actions since the court attributed the fault entirely to Tsige. I will return to these reasons in the next sections.

B. Tort of Invasion of Privacy

In its reasoning, the Court acknowledged that "the question of whether the common law should recognize a cause of action in tort for invasion of privacy has

12 *Ibid.*

13 *Ibid* at para 6.

14 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

15 See Michael Power, "Ontario Recognizes Tort of Invasion of Privacy" (2012), online: Michael Power <<http://www.michaelpower.ca>>.

16 *Jones*, *supra* note 1 at paras 48-49.

17 *Ibid* at para 50.

been debated for the past 120 years.”¹⁸ The Court mentioned the cause of action for breach of confidence in passing before citing the case of *Ontario (Attorney General) v Dieleman* (1994),¹⁹ and quoted with approval from that case where the Court held “that invasion of privacy in Canadian common law continues to be an inceptive, if not ephemeral, legal concept, primarily operating to extend the margins of existing tort doctrine.”²⁰ The Court subsequently drew upon the seminal American work that is said to provide the foundational basis of the tort, Samuel Warren and Louis Brandeis’ 1890 article, “The Right to Privacy.”²¹ In this work, Warren and Brandeis famously described this right as the “right of the individual to be let alone.”²² This work subsequently influenced William Prosser, who further refined this right into four different torts that encompass this wide-ranging theme.²³ These four torts included:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.²⁴

By virtue of his position as a reporter of the *Second Restatement of Torts*²⁵ (*Restatement*), Prosser’s formulation of these torts was incorporated into the *Restatement* and consequently further enhanced in subsequent American jurisprudence.²⁶ It is this departure point that has resulted in the development of privacy law jurisprudence that seeks to reinforce the paradigm that was first advanced by Warren and Brandeis.

In its holding, the Court classified *Jones* as an example of the tort of intrusion upon seclusion.²⁷ It primarily did so on the basis of the definition of the tort found in the *Restatement*—an individual intentionally intrudes upon the seclusion of another’s private affairs if the intrusion “would be highly offensive to a reasonable person.”²⁸ The Court also noted with approval the comment section, affirming that the tort may be applicable when a person examines a private bank account “even though

18 *Ibid* at para 15.

19 20 OR (3d) 229, 117 DLR (4th) 449 (Gen Div) [cited to DLR].

20 *Ibid* at 688, cited in *Jones*, *supra* note 1 at para 15.

21 Samuel D Warren & Louis D Brandeis, “The Right to Privacy” (1890) 4:5 Harv L Rev 193.

22 *Ibid* at 205.

23 William L Prosser, “Privacy” (1960) 48:3 Cal L Rev 383.

24 *Ibid* at 389.

25 See American Law Institute, *Restatement of the Law, Second, Torts* (St. Paul, MN: American Law Institute Publishers, 1977).

26 *Ibid*, ch 28A at 376; Neil M Richards and Daniel J Solove, “Privacy’s Other Path: Recovering the Law of Confidentiality” (2007-2008) 96 Geo LJ 123 at 150-51.

27 *Jones*, *supra* note 1 at para 21.

28 American Law Institute, *supra* note 25, § 652B at 378, cited in *Jones*, *supra* note 1 at paras 19.

there is no publication or other use of any kind...of the information outlined.”²⁹ The Court then outlined the key features of this cause of action as follows: “first, that the defendant’s conduct must be intentional . . . second, that the defendant must have invaded, without lawful justification, the plaintiff’s private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.”³⁰ One of the overriding concerns for the Court in importing this jurisprudence stemmed from the fact that, as technology becomes more advanced, there exists a greater possibility for invasions of privacy.³¹ With respect to the case before it, the Court stated:

Finally, and most importantly, we are presented in this case with *facts that cry out for a remedy*. While Tsige is apologetic and contrite, her actions were deliberate, prolonged and shocking. Any person in Jones’ position would be profoundly disturbed by the significant intrusion into her highly personal information. The discipline administered by Tsige’s employer was governed by the principles of employment law and the *interests of the employer and did not respond directly to the wrong that had been done to Jones*. In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.³²

Following this discussion, the Court considered the law of damages before proceeding to award Jones \$10,000 for the intrusion on her seclusion.³³

The language used by the Court above would seem to suggest that there was no other applicable cause of action that would result in a personal remedy. But is this necessarily so? While the Court believed that it was expanding the scope of the common law to redress some of the privacy ills that have been made possible due to advances in technology,³⁴ it simultaneously chose to ignore a well-developed body of law that pertains to the duty of confidentiality that banks owe to their customers. Indeed, even though Ms. Jones had not pleaded breach of confidence, it would have been open to the Court to dismiss the action for failure to state a proper cause of action, on the basis that the case was one that would properly be considered under the law of confidentiality. It is this law of confidentiality that will be examined in the next section in order to determine how this approach would have applied to the facts in *Jones*.

29 American Law Institute, *supra* note 25, § 652B at 379, cited in *Jones*, *supra* note 1 at para 20.

30 *Ibid* at para 71.

31 *Ibid* at para 67.

32 *Ibid* at para 69 [emphasis added].

33 *Ibid* at para 90.

34 *Ibid* at paras 67-68.

III. PART TWO: THE *TOURNIER* CASE AND THE BANKER'S DUTY OF CONFIDENTIALITY

A. The *Tournier* Doctrine

The law of professional confidences has a long history that spans a number of different legal systems and finds its roots in antiquity applying to specific relationships that society wished to protect. One of the earliest such examples is the physician-patient relationship and the Hippocratic oath that dates back to 400 BC.³⁵ Over the years, other professions have developed their own norms of confidentiality in order to foster confidence between professionals and their clients so that a full and frank exchange of information can take place between the two. For example, the solicitor-client relationship in the English common law context can trace its roots back to 1577.³⁶

Obligations of confidentiality apply to almost all professional relationships because “[t]he nature of a number of professional relationships imposes on the professional person who is consulted, or whose services are engaged, an obligation to respect the confidentiality of disclosures made to him or her in their professional capacity.”³⁷ The aforementioned obligations have been held to apply to professionals such as lawyers, doctors and dentists.³⁸ Due to the sensitive nature of personal financial information, the banking profession was also one of those professions on which the law sought to impose positive duties.³⁹ Indeed, these professions are said to occupy a *special position* in the law of confidential communications, since the extent of the obligations conferred upon them is said to “vary with the special circumstances that is peculiar to each class of occupation.”⁴⁰

With respect to the banking context, one of the earliest cases in the English common law was the 1868 case of *Hardy v Veasey and Others*, a case of the Exchequer Court.⁴¹ Here the Court set out that a bank has an implied moral obligation that it will not disclose the financial affairs of its customers to third parties.⁴² Although this was not precisely a legal duty, this was the first step towards recognizing that bankers had an obligation to their customers to keep personal financial affairs confidential.

35 See Daniel J Solove, Marc Rotenberg & Paul M Schwarz, *Information Privacy Law*, 2d ed (New York: Aspen Publishers, 2006) at 350 (This oath reads as follows: “Whatever, in connection with my professional service, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret”).

36 Richards & Solove, *supra* note 26 at 134; see e.g. *Berd v Lovelace* (1577), 21 ER 33.

37 Francis Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984) at 143.

38 *Ibid.*

39 *Ibid.*

40 *Tournier v National Provincial and Union Bank of England Ltd* (1923), 1 KB 461 at 486, cited in *supra* note 37 at 144.

41 (1868), LR 3 Exch 107 [*Hardy*]. See also *Tassell v Cooper* (1850), 137 ER 90; *Foster v Bank of London* (1862), 176 ER 96.

42 See *Hardy*, *supra* note 41 at 111-112, Kelly CB, concurring.

This was met with some approval by *The Bankers' Magazine* who declared that the approach was “entirely in harmony with common sense and common usage [...] that bankers would responsibly exercise the trust reposed in them and there was no need for a legal duty.”⁴³

This would change with the landmark case of *Tournier v National Provincial and Union Bank of England Ltd (Tournier)* in 1923.⁴⁴ It is here in the headnote of the case where the modern *Tournier* doctrine finds its expression:

It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it.⁴⁵

The case is of particular significance to banking lawyers throughout the common law jurisdictions, as it is one of the most cited cases in and arguably one of the foundational cases of banking law.⁴⁶ Indeed, the case is so important that it remains to this day, “the only case to deal at any length with the principle underlying its statement of the law.”⁴⁷

The facts of the case are as follows: Mr. Tournier had run into some financial difficulties, having overdrawn his bank account by a small amount.⁴⁸ He had reached an agreement with the bank to pay off the debt by weekly installments of one pound prior to commencing employment with the firm of Kenyon and Co. as a probationary employee.⁴⁹ Tournier had listed the name and address of his new employer on the agreement with the bank. Unable to meet the terms of the agreement as stipulated, Tournier raised the attention of the acting bank manager, a Mr. Fennell. Fennell contacted Kenyon and Co. via telephone in order to ascertain Tournier's private address. In the course of the conversation between Fennell and Mr. Kenyon, Fennell disclosed that Tournier:

43 “Bankers and their Customers”, *The Bankers' Magazine* 28:288 (March 1868) 217 at 219; Ross Cranston, *Principles of Banking Law*, 2d ed (New York: Oxford University Press, 2002) at 168.

44 *Supra* note 40.

45 *Ibid* at 461.

46 Cranston, *supra* note 43 at 169.

47 Bradley Crawford, *The Law of Banking and Payment in Canada*, loose-leaf (consulted on October 2012), (Toronto: Canada Law Book, 2008) at § 9:20:30 (5)(a).

48 *Tournier*, *supra* note 40 at 467.

49 *Ibid* at 467-468.

- a) had an overdrawn account,
- b) made promises to the bank that had not been fulfilled,
- c) made cheques that passed through his account payable to book-makers, and
- d) was betting heavily.

A conversation to this effect also took place between Fennell and another director of the firm, Mr. Wells. The implication on both occasions was that Tournier was an undesirable individual to employ and was not a person fit to conduct business on behalf of the firm or to be entrusted with money.⁵⁰ Not surprisingly, Tournier's employers chose not to retain his services before his probationary period came to an end. Consequently, Tournier went to the courts for relief but was denied at trial. Eventually the case found its way to the Court of Appeal.

It was definitively decided at the Court of Appeal that bankers did in fact owe their customers a legal duty to maintain confidentiality. In the course of rendering his judgment, Lord Bankes held that the duty was a legal, not a moral, one arising out of contract as opposed to tort.⁵¹ Moreover, his Lordship held that the duty was not to be framed exhaustively, but rather all a court could be expected to do was to classify the qualifications before it and indicate their limits.⁵² His Lordship continued to define the well-known *Tournier* qualifications as constituting instances where banks may be excused from their duties. These instances include:

- (a) [w]here disclosure is made under compulsion by law;
- (b) where there is a duty to the public to disclose;
- (c) where the interests of the bank require disclosure; [and]
- (d) where the disclosure is made by the express or implied consent of the customer.⁵³

It should be pointed out that many banking law texts refer to the qualifications as "exceptions" to the duty of confidentiality. As Professor Cranston rightly points out, this characterization is incorrect as it has considerable repercussions on what the duty entails.⁵⁴ In particular, when it is said that the duty is subject to exceptions, it is easy to interpret this to mean "disclosure is the duty and that disclosure overrides duties" that would otherwise prevail.⁵⁵ Rather, the correct interpretation is that the duty of confidentiality must be strictly observed and if one of the qualifications applies, the duty is said to no longer exist with respect to that particular fact

50 *Ibid* at 468.

51 *Ibid* at 475.

52 *Ibid*.

53 *Ibid* at 473.

54 Cranston, *supra* note 43 at 175.

55 *Ibid*.

scenario.⁵⁶ While this is the traditional scope of the duty, as defined in most banking law textbooks, there are a number of additional features of the *Tournier* case that may be of interest in the analysis of *Jones*.

In specifying precisely what type of information a banker must keep secret, the Court provides an expansive definition of what the duty of confidentiality entails. Lord Atkin, for instance, states that the duty of confidentiality extends to the state of the customer's account and any transactions that have been processed through that account.⁵⁷ Moreover, this duty extends beyond the time an account is closed or ceases to be active.⁵⁸ Lord Atkin goes further and states that the duty applies not only to the actual state of the customer's account, but also to information that is derived from the account itself, including information from sources beyond the customer's account, such as another customer's account.⁵⁹ Moreover, Lord Bankes states:

I cannot think that the duty of non-disclosure is confined to information derived from the customer himself or from his account. To take a simple illustration. A police officer goes to a banker to make an inquiry about a customer of the bank. He goes to the bank, because he knows that the person about whom he wants information is a customer of the bank. The police officer is asked why he wants the information. He replies, because the customer is charged with a series of frauds. Is the banker entitled to publish that information? Surely not. He acquired the information in his character of banker.⁶⁰

Interestingly, one of the unique features of the duty of confidentiality here is that it applies to a commercial relationship—one that I have argued elsewhere is a welcome development in maintaining consumer privacy.⁶¹ Part of what the court is attempting to establish is that there is an implied standard of conduct that bankers are legally required to follow (more on this below). In the years proceeding, the judgment has been well received in a number of jurisdictions. Even in the United States, where the tradition of the tort of invasion of privacy originated, the tort has yet to displace the *Tournier* doctrine.⁶² In England, the core concepts underlying

56 *Ibid.* See also Roy M Goode, "The Banker's Duty of Confidentiality" (1989) J Bus L 269; Robert Stokes, "The Genesis of Banking Confidentiality" (2011) 32:3 J Legal Hist 279.

57 *Tournier*, *supra* note 40 at 485.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.* at 474.

61 See Muharem Kianieff, "The Evolution of Consumer Privacy Law: How Privacy by Design Can Benefit from Insights in Commercial Law and Standardization" (2012) 10 CJLT 1 at 21-22.

62 See Thomas P Vartanian, Robert Ledig & Lynn Bruneau, *21st Century Money, Banking and Commerce* (Washington: Fried, Frank, Harris, Shriver and Jacobson, 1998) at 291. See also *Peterson v Idaho National Bank*, 367 P (2d) 284 (Idaho 1961) (held that an implied duty of confidentiality exists between a bank and its depositor).

the *Tournier* doctrine continue⁶³ with the courts considering the case as recently as 2005.⁶⁴

The basis upon which the obligation of confidence attaches in the profession of banking is quite distinct from other professions that may be said to derive duties from fiduciary obligations. In these other professions, the “obligation of confidence attaches to a confidant only in respect of confidential information disclosed to him by the confider.”⁶⁵ However in the banking context, the banker is in a different position, one analogous to “an employee who will be bound to respect the confidentiality of information which he acquires in his capacity *qua* employee, even though this information is not directly derived from their employer.”⁶⁶ In this sense then, one could argue that even though the banker’s duty flows from the law of confidential communications, it forms a distinct branch of this area of law with its own particular mode of analysis that is consistent with the particular circumstances of the banker-customer relationship. Indeed, this is further reinforced by the fact that unlike some of the other professions described above, the *Tournier* duty finds its origins as an implied contractual term rather than a duty that emerges from a fiduciary relationship *per se*. This is also generally true in the Canadian banking law context, which has long held that the banker-customer relationship is akin to a debtor-creditor relationship. As such, “special circumstances”⁶⁷ must be met in order to transform that relationship into a fiduciary relationship.⁶⁸ Moreover, as noted by Crawford, the decisions of the Supreme Court of Canada on the identifying characteristics of a fiduciary relationship and the determination of the extent of the fiduciary duty in any individual case, as espoused in the *Lac Minerals Ltd v International Corona Resources Ltd*⁶⁹ mode of analysis, have not involved banks.⁷⁰ Thus, any analysis of a breach of a *Tournier* duty can be conducted independently using *Tournier* itself without having to consider the fiduciary duty test in *Lac Minerals* that would otherwise guide the analysis.

63 For some more recent cases, see *Barclays Bank plc v Taylor*, [1989] 3 All ER 563; *Christofi v Barclays Bank plc*, [1999] 4 All ER 437; *Turner v Royal Bank of Scotland plc*, [2001] EWCA Civ 64.

64 See *Jackson and another v Royal Bank of Scotland plc*, [2005] UKHL 3, [2005] 2 All ER 71..

65 Gurry, *supra* note 37 at 146.

66 *Ibid.*

67 Crawford, *supra* note 47 at § 9:50.10 (Crawford describes these special circumstances to mean that “a bank may prefer its own interest in the same way as any other entrepreneur, until it ‘crosses the line’ and undertakes a fiduciary duty to the customer. That undertaking arises only when the actions or statements of its responsible officials... are sufficient to justify a court in imposing fiduciary obligations upon the bank in accordance with the same principles that apply to all other persons”). See also *Scavarelli v Bank of Montreal* (2004), 69 OR (3d) 295 at paras 27-39, 128 ACWS (3d) 349; *Accursi v Hong Kong Bank of Canada* (1997), 73 ACWS (3d) 819, 49 CBR (3d) 226 at para 53; *Standard Investments et al v Canadian Imperial Bank of Commerce*, 52 OR (2d) 473 at 495-96, 22 DLR (4th) 410 [*Standard Investments*].

68 Crawford, *supra* note 47 at § 9:50.10. See also *Bank of Montreal v Duguid* (2001), 47 OR (3d) 737, 185 DLR (4th) 458; *Toronto Dominion Bank v Forsythe* (2000), 47 OR (3d) 321 at para 14, 183 DLR (4th) 616, per Finlayson JA; *Seaboard Life Insurance Co v Bank of Montreal*, 2002 BCCA 192, 166 BCAC 64 at para 53-55, per Newbury JA; *Canadian Western Bank v Hanson* (1995), 10 BCLR (3d) 259 at para 7, 63 BCAC 24. *Standard Investments*, *supra* note 67.

69 *LAC Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14.

70 Crawford, *supra* note 47 at §9:50.20.

B. *Tournier* in Canada

In the years following Confederation, Parliament took the matter of banking law confidentiality quite seriously by incorporating various provisions into the *Bank Act*.⁷¹ This is an important development because the *Bank Act* forms the basis for all bank charters that are granted in Canada and “[t]he use of a comprehensive statute as the common charter for all banks doing business in Canada is a distinctive feature of banking in Canada in contrast to other common law countries.”⁷² A bank charter defines the types of activities that a bank is permitted by law to engage in and also relates to matters that pertain to the internal or indoor management of banks as corporations.⁷³ From 1871 until 1913 the *Bank Act* contained the following provision:

46. The books, correspondence and funds of the bank shall, at all times, be subject to the inspection of the directors; but no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank.⁷⁴

When this section was first enacted, the provision stated: “no shareholder not being a Director shall be allowed” to view the various documents referenced above.⁷⁵ One of the reasons for the strictness of the rule was the need to build up confidence in the banking system, which was manifested in very strict rules on shareholders, including double-liability on their shares for a time.⁷⁶ When the section was considered judicially, Justice McLaren observed that the original intention was “to prevent a shareholder as a member of a banking corporation from asserting a right to inspect and examine at his pleasure the accounts of persons dealing with the bank.”⁷⁷ As Crawford notes, “it had been held at an earlier date that a shareholder of a bank, merely as such, had no right to inspect the stock books or other books of the bank.”⁷⁸ As can be seen, right from the start, Parliament wished to preserve bank confidentiality by enacting limits on which individuals had the right to access customer information.

The *Bank Act* was subsequently amended in 1917 and Parliament removed the aforementioned provisions.⁷⁹ This resulted in tremendous legal uncertainty until the *Tournier* decision was handed down, providing the legal foundation for

71 *Bank Act*, SC 1991, c 46.

72 MH Ogilvie, *Canadian Banking Law* (Scarborough: Carswell, 1991) at 27.

73 John Delatre Falconbridge, *Banking and Bills of Exchange*, 6th ed (Toronto: Canada Law Book Company Ltd, 1956) at 68.

74 *An Act relating to Banks and Banking*, 34Vict 1871, c 5, s 37, as re-enacted by *Bank Act*, SC 1890, c 31, s 46.

75 *An Act relating to Banks and Banking*, *supra* note 74.

76 See generally Muharem Kianieff, “Private Banknotes in Canada From 1867 (and Before) to 1950” (2004) 30 Queen’s LJ 400.

77 *Montgomery v Ryan* (1908), 16 OLR 75 at 97, 11 OWR 279, (Ont CA).

78 *The Bank of Upper Canada v Baldwin* (1829), Draper 55 (CA) as cited in Crawford, *supra* note 47 at § 9:20.30(5)(b).

79 See Crawford, *supra* note 47 at § 9:20.30(5)(b).

the bankers' duty.⁸⁰ Indeed, the modern legal landscape in Canada following the adoption of *Tournier* would seem to suggest that the core concepts enunciated therein have remained intact.⁸¹ The recent judicial history of the application of *Tournier* in Canada has even had its scope somewhat expanded. In the 1983 Ontario case of *Guertin v Royal Bank*, the Court held that the duty of confidence extended not only to prevent disclosure of a customer's affairs, but also to prevent the use of consumer information by a bank manager for his or her own advantage.⁸² This principle along with the core principles of *Tournier* were recently affirmed in the 2003 case of *Rodaro v Royal Bank*.⁸³ The discussions of *Tournier* in the Canadian literature and case law have focused on the expansion of the qualifications enumerated by Lord Banks above.⁸⁴ However, these qualifications do not apply to the case at hand.

Moreover, in the Canadian legislative context, the rules developed in *Tournier* have found their way into bank charters because of their incorporation in subsequent revisions of the *Bank Act*.⁸⁵ The rules in *Tournier* are indirectly recognized through various sections, including those that mandate that as a part of their duty to "supervise the management and business affairs of the bank"⁸⁶ the directors of a bank must "establish procedures to resolve conflicts of interest, including techniques . . . for restricting the use of confidential information."⁸⁷ In addition, the directors are also mandated to "designate a committee of the board of directors to monitor [such] procedures."⁸⁸ Further, a bank has a statutory duty to prevent the unauthorized access to bank records.⁸⁹ It is evident that Parliament has taken the framework adopted in *Tournier* quite seriously, so much so that elements of the rule now apply to the internal management practices of banks as matters of fundamental importance. This is no small feat—rather than being a matter of good practice or compliance with the

80 *Ibid.*

81 See e.g. *Guertin v Royal Bank of Canada* (1983), 43 OR (2d) 363, 1 DLR (4th) 68 [*Guertin*, cited to OR], leave to appeal to CA refused, (1983) 47 OR (2d) 299; *R v Spencer* (1983), 145 DLR (3d) 344, 2 CCC (3d) 526; *Canadian Imperial Bank of Commerce v Sayani*, [1994] 2 WWR 260, 83 BCLR (2d) 167; *R v Lillico* (1994), 92 CCC (3d) 90, CarwellOnt 4176 (WL Can); *Murano v Bank of Montreal* (1998), 41 OR (3d) 222, 163 DLR (4th) 21. See also MH Ogilvie, "Bank and Customer: The Five Year Review, 2005-2010" (2012) 27 BFLR 345 at 364-365.

82 *Guertin*, *supra* note 81 at 374-75. See also the American case of *Djowharzadeh v City National Bank and Trust Company*, 1982 OK Civ App 3, 646 P2d 616 [*Djowharzadeh*]. In *Djowharzadeh*, the Court held that a bank employee could not disclose confidential information about a customer to his president and senior vice-president even if such disclosures were pursuant to bank custom. Moreover, the bank employee's conduct could not be said to be outside of the scope of their employment as their conduct is directly chargeable to the Bank.

83 *Rodaro v Royal Bank of Canada* (2002), 59 OR (3d) 74, 157 OAC 203.

84 See e.g. MH Ogilvie, "From Secrecy to Confidence to the Demise of the Banker and Customer Relationship: *Rodaro v Royal Bank of Canada*" (2003) 19 BFLR 102.

85 See e.g. Jacob Ziegel, Benjamin Geva & RCC Cuming, *Commercial and Consumer Transactions: Cases, Texts and Materials*, 3d ed (Toronto: Emond Montgomery, 1995) vol 2 at 261.

86 *Bank Act*, *supra* note 71 s 157(1).

87 *Ibid.*, s 157(2)(c).

88 *Ibid.*, s 157(2)(d).

89 *Ibid.*, s 244(d).

common law, banks are not allowed to shirk any of their responsibilities relating to matters of confidence, as this concept is at the core of their basic operations.

C. Information Obtained Surreptitiously and the Law of Confidentiality

Having established that bankers owe their customers a duty of confidentiality, questions still remain about the applicability of the rules developed in *Tournier* to *Jones*. First, are these rules binding on individuals that act in a manner inconsistent with the terms of their employment? That is to say, given the surreptitious nature of the breach of privacy, does this constitute some sort of implicit exception to the rule in *Tournier*? Second, as a related issue, can Tsige be held responsible for her own actions or must the bank, as a whole, be considered responsible for Tsige's actions? The answers to these questions can be found in the law of confidentiality upon which the rule in *Tournier* is based.

What poses a particular challenge for the law of confidentiality is the fact that Tsige obtained Jones' financial information through espionage. Is an individual that obtains information improperly bound by an obligation of confidentiality in the same manner as the original person to whom the information was voluntarily entrusted? One of the difficulties with proceeding with a remedy in tort is that a conventional remedy in tort, as that proposed by the Court, may not provide justice to the parties. Francis Gurry, a leading scholar on the law of confidence states that an approach founded in the law of confidence provides a better theoretical basis for recovery since an action for a breach of confidence recognizes the fact that the damage caused by someone who accesses information surreptitiously relates to the intangible substance of the ideas that are appropriated.⁹⁰ Moreover, the law

90 Gurry, *supra* note 37 at 163-64. Here, Gurry states: "It is clear that technology has developed for espionage the means of gathering information without attracting liability in tort [...] Even if such devices are not used, and the clandestine means used to acquire information involves the commission of a tort, tortious remedies are usually inappropriate. The damage done by a spy who enters another's premises to photograph documents resides not so much in the act of entering the premises in the acquisition of the information contained in the documents. Likewise, the damage suffered by the theft of physical documents is not to be found in the conversion of the physical property but in the intangible substance of the ideas recorded on the documents. The remedy which is most appropriately directed towards the damage caused by the surreptitious acquisition of information is obviously the one which has been cognizant of the value of information to its possessor – the action for breach of confidence." Later on, at 164-65 he continues: "The confider has not deliberately communicated any information to the spy, so how can it be said that the spy is abusing a *confidence*? The spy has, however, used means to force an unwanted communication, or, at least, transmission, of the information on the confider. Because of those means he has placed himself in the position of one who receives confidential information, and the means also indicate that he is aware that the confider wishes to keep the information confidential – otherwise, he would not have needed to employ the means but could have asked the confider for the information. He should, therefore, be attributed with the obligation of confidence, which is imposed on a confidant who receives confidential information knowing and recognizing that the confider wishes to preserve its confidentiality. The problem of espionage can thus be accommodated within the action for breach of confidence without doing violence in the way in which the action has developed, nor to the notion of confidence which lies at the heart of the action" [footnotes omitted].

of confidence can address the issue of espionage by finding that an individual who *de facto* compels a confider to disclose confidential information through surreptitious means, can be deemed to have known that the information in question was confidential since they would otherwise not have had to rely on these questionable means as they could simply ask the confider outright. The fact that surreptitious means are employed is indicative of the fact that the spy knew that the information was confidential and, as such, the spy should be held to owe the same obligation of confidence “imposed on a confidant who receives confidential information knowing and recognizing the fact that the confider wishes to preserve its confidentiality.”⁹¹

Along the same lines, Toulson and Phipps argue that an individual that acquires information “by dishonest or discreditable means [...] should be, and is, in no better legal position than if the information has been imparted to him voluntarily in confidence.”⁹² Such a position, they argue, is justifiable with reference to the law of equity that acts upon the conscience.⁹³ Consequently, an individual “who obtains confidential information improperly is as reprehensible to the conscience as that of a person who violates the confidence in which he received it.”⁹⁴ This principle is not an abstract one and also finds its expression in the case of *Ashburton v Pape*, where Lord Swifen Eady stated that courts have historically restrained “the publication of confidential information improperly or surreptitiously obtained or of information that is imparted in confidence which ought not to be divulged.”⁹⁵ Indeed, as Toulson and Phipps quite rightly point out, this is the only logical outcome since the duty “must apply with added force where it has been obtained improperly. It would be absurd if a duty were owed in equity by a finder of a private diary dropped in the street, but not by a pickpocket, whose conscience should be more greatly affected.”⁹⁶ As can be seen, rather than being forced to decide the *Jones* case anew⁹⁷ as the Court has alluded to above, there does exist a rather substantial body of law that could have adequately addressed the situation before it in a manner consistent with established legal traditions. That is to say, rather than approaching the case as a novel one, the Court could have applied the *Tournier* doctrine—its genealogy from the law of confidence and treatment of surreptitious acquisitions of confidential information—maintaining continuity with banking law doctrines without introducing some of the uncertainties to banking law (more on this below) which flow from the Court’s approach in *Jones*.

91 *Ibid* at 164-165.

92 RG Toulson and CM Phipps, *Confidentiality*, 2d ed (London: Sweet & Maxwell, 2006) at para 2-023. See also *Djowarzadeh*, *supra* note 82 at para 28-30.

93 Toulson and Phipps, *supra* note 92 at para 2-023.

94 *Ibid*.

95 [1913] 2 Ch 469 at 475.

96 Toulson and Phipps, *supra* note 92 at para 3-043.

97 Or, in legal jargon, “de novo” as defined in the *Black’s Law Dictionary*, 9th ed, *sub verbo* “de novo”.

D. Application of *Tournier* to the Facts of *Jones*

Having outlined the rules that apply with respect to the banker's duty of confidentiality, it may be helpful at this time to apply these rules to the facts of *Jones* and reimagine how the case could have been decided under banking law principles rather than tort law principles. Recall that Ms. Jones was a customer of BMO and as such, had a contract with BMO to provide her with banking services. One of the implied terms of this contract (reinforced in BMO's charter by virtue of the operation of the *Bank Act*) was that the bank, as Ms. Jones' agent, was bound, subject to certain qualifications, to keep her personal financial affairs confidential. Ms. Tsige, as an employee of a bank, was bound by the same duty of confidentiality towards all of the bank's customers by virtue of her employment contract with BMO and the rule in *Tournier*.⁹⁸

As a result of some personal difficulties that involved Ms. Jones' former spouse, Ms. Tsige relied on her position as a bank employee to access the bank's computer and view Ms. Jones' financial records. Ms. Tsige in her character as *banker* violated the duty owed to her *customer*, Ms. Jones, thereby violating the rules in *Tournier* and *Guertin* by misusing the information she obtained. This misuse occurred when Tsige used the information for a purpose other than that for which it was imparted to the bank⁹⁹ and did so for her own advantage.¹⁰⁰ It might be argued that when these violations took place, Ms. Tsige stepped outside of the scope of her agency relationship with her employer and acted as an individual, rather than a bank employee, or acted in a manner that was not authorized by her employer. In either event, the legal result is the same: as per the rule in *Ashburton*, the duty of confidentiality owed by the bank to Ms. Jones also applies to Ms. Tsige as an individual.¹⁰¹ This is the case since Ms. Tsige, as a bank employee, knew that Ms. Jones' banking information was confidential, took steps to obtain this information surreptitiously and misused it for her own benefit. Having known that Ms. Jones' banking information was imparted in confidence, the law does not allow Ms. Tsige to argue that any requirements of confidentiality that are imposed upon the bank are inapplicable to her as a third party, as the rule in *Ashburton* ensures that these same confidentiality obligations are attributed to individuals who obtain such information by improper means. As such, Ms. Tsige and BMO (as Tsige's principal) are liable to Ms. Jones in an action for a violation of a breach of confidence.

One will notice that there are some subtleties that differentiate the analysis here from the one used by the court in *Jones*. For instance, rather than basing the

98 For an interesting take on some of these concepts generally as they apply to the trial level decision in *Jones*, see generally David Vaver, "Snooping, Privacy and Precedent in Ontario" (2011) 23:3 IPJ 243 at 243-245.

99 See Gurry, *supra* note 37 at 5.

100 See generally *Guertin*, *supra* note 81.

101 Vaver, *supra* note 98.

outcome on the premise that the two parties are strangers or unacquainted colleagues that owe duties not to harm one another,¹⁰² the quasi-contractual relationship between the two parties is what brings them within the requisite proximity that results in the application of professional norms and standards of conduct. I submit that this is a better characterization of the facts than the one in *Jones*. That is to say, it is only in her character as “banker” that Tsige was given the opportunity to access Jones’ account. This never would have occurred *but for* the fact that Tsige was employed by the very bank where Jones was a customer. Had Jones not been a BMO customer, Ms. Tsige would not have had the same opportunity to access Ms. Jones’ account.¹⁰³

Indeed, this would provide for a better account for the facts than a stranger committing a tort analysis would provide. What makes the conduct in question so repugnant here is the fact that Ms. Jones, as a customer of the bank, was asked to provide it with certain informational privileges in order to provide her with banking services. In order for this relationship to function as intended, customers must have trust in their banks that their information will be protected from unauthorized access or disclosure. The only way a breach of trust of this sort can be included in the analysis is if we consider the fact that Ms. Tsige sought to take unfair advantage of her employment privileges to flagrantly breach the trust that her customer, Ms. Jones, had implicitly placed in her as her banker. The most appropriate means of doing this is by considering how the effects that the pre-existing business relationship between the parties has affected the facts of the case. While an action for breach of confidence takes this into account, the torts analysis as presented by the Court here does not take the relationship and its maintenance into account.

IV. PART THREE: THE CONSEQUENCES OF FAVOURING THE TORT BREACH OVER THE RULE IN *TOURNIER*

The question remains: if the banking law analysis leads to the same result as the tort analysis, does it really matter if we choose one over the other? In order to answer this question, one must consider the ramifications of choosing one course over the other for future law and policy development.

As mentioned earlier, one of the reasons why the Court chose to use the breach of privacy approach was that it felt that BMO should not be held responsible

102 See e.g. *Somwar v McDonald's Restaurants of Canada Ltd*, (2006) 79 OR (3d) 172, 263 DLR (4th) 752.

103 It should be mentioned that in its decision, the trial court found that although Jones had accounts with BMO, they were not managed by Tsige. As such, Tsige had no authority within BMO to examine Jones’ account. However it should also be pointed out that even though Tsige lacked this authority, she still knew that the information that she was accessing was confidential and, as such, could be attributed to possess the same duties as the bank vis-à-vis Ms. Jones by virtue of this fact. Moreover, the fact that she could only access this information through her employer would be analogous to compelling her employer to disclose confidential information to her through electronic means in the same manner described by Gurry above. *Jones v Tsige*, 2011 ONSC 1475 at paras 2, 62-63, 333 DLR (4th) 566.

for Tsige's actions. As such, it was motivated to give Jones a personal remedy that would also serve to compensate her for the emotional damages she had sustained as a result of Tsige's actions.¹⁰⁴ It is quite possible that the Court felt that previous cases pertaining to the law of confidentiality would place too great a limit on the types of awards it could make.¹⁰⁵ However, when one looks at damages assessed outside of Canada for a violation of the *Tournier* duty, one will find that this is not necessarily the case. To quote from Ross Cranston:

Breach of the duty of confidentiality can give rise to damages (as in *Tournier's* case) or an injunction [...] Damages will have a strong pecuniary element in a commercial context, but if a personal confidence is breached, the claim will involve a non-pecuniary element covering matters like distress. A trivial disclosure may lead to only nominal damages. Arguably exemplary damages are a possibility.¹⁰⁶

As can be seen, it was certainly open to the Court to reaffirm the holding in *Tournier*, fasten individual liability on Tsige, the wrongdoer, and assess damages on the bases that were stated in *Jones*. Had they wished to go further and address non-economic damages, presumably they still had the remedy of punitive damages available to them.¹⁰⁷

A. Developing Standards in Keeping with Consumer Expectations

What is not clear following *Jones* is whether a breach of confidence by a bank and its employees will no longer be considered using a *Tournier* analysis and instead, will henceforth be considered under a tort law analysis. As Crawford points out, the current state of the common law does not bar or exclude the application of other causes of action, such as the tortious violation of another's privacy.¹⁰⁸ Indeed, one could even posit that *Jones* gives potential plaintiffs the ability to elect which cause of action they wish to proceed with. However, by introducing a tort claim under a fact scenario that is properly suited to the *Tournier* analysis, by virtue of the fact that a bank was involved (albeit indirectly), the Court has not made clear whether the two are intended to co-exist or whether the tort will now supplant the *Tournier* duty in actions against banks generally.

Ultimately, one of the reasons why the decision proves troubling is its lack of recognition of the relationship between the parties themselves. Even though

104 *Jones*, *supra* note 1 at para 50.

105 *Ibid* at paras 71, 75-86.

106 *Supra* note 43 at 186.

107 *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449, cited in *Vaver*, *supra* note 98 at 245.

108 Crawford, *supra* note 47 at §9:20.30 (5).

Ms. Jones is provided with a remedy in this case, the conditions that give rise to it are not ideal from a policy perspective. For example, by making the cause of action a personal one between the litigants, the court deliberately removes the bank from the legal equation. This distinguishes *Jones* from cases such as *Tournier*, *Guertin* and *Rodaro* that name the bank as a party to the action. By not considering the role of the bank, the Court undermines the obligations the bank may have had under the legal regime of confidentiality. Banks under the *Tournier* regime are given a legal incentive to remain ever vigilant in monitoring the activities of their employees.

Henceforth, a bank could conceivably argue, as was accepted here, that the issue is one that is governed by principles of employment law or *PIPEDA* and have limited applications to banks. A bank could argue that an employee was acting in a rogue manner and therefore outside of the scope of their agency in a manner that does not bind the bank to any liability. An aggrieved customer would then be forced to pursue their remedy against individual employees rather than the bank. However, rather than minimizing the potential for these types of arguments to succeed, the Court has unintentionally given more judicial support for them since litigants are now able to pursue remedies against each other without involving the bank. In other words, by making the action a personal one, it is now much easier for banks to shift the blame to third parties and absolve themselves of responsibility. This potential is minimized if the bank must adhere to a strict duty of confidentiality that extends to all facets of its activities and those of its agents.

Rather than viewing Jones' situation as a harm caused to one party by another where the parties had no previous dealings with one another, the confidentiality approach, I submit, is the better approach to addressing these types of grievances. This is the case since the degree of the harm caused is amplified in the analysis by the fact that this was not some unfortunate encounter between strangers, but was an abuse of power by one party who engaged in a pattern of behavior that most individuals who are bank customers would find egregious. In other words, the nature of the harm caused cannot be put into context unless the nature of the pre-existing business relationship between the parties is factored into the analysis. Otherwise, the development of the law going forward will lack the legal incentives that provide the substance behind many of the confidences that our society relies upon in the professional and commercial contexts.

Moreover, by placing a renewed emphasis on the law of confidentiality rather than relying on a torts approach, the Court could better develop the emergence of professional standards of behavior in banking. The confidentiality approach, based upon a pre-existing relationship, allows courts to specify what types of expectations customers of banks have when dealing with their banks. While the bank may not have directly been at fault in *Jones*, it must still bear some responsibility for the actions of its employee. The standards of conduct envisaged in cases such as *Tournier* specify the principles and practices that consumers and courts expect banks to espouse when dealing with information that has been entrusted to them by their customers. While statutes such as *PIPEDA* bring a certain code of conduct to apply

to commercial entities generally, the development of the *Tournier* doctrine provides an opportunity to go beyond generic codes of conduct and move towards industry specific rules and regulations that are designed to take into account particular sensitivities that a generic approach may lack. That is to say, confidentiality allows the law to adapt to particular business practices in a specific industry and address issues that are of heightened importance to consumers as a result of technological advances or greater opportunities for individuals within an organization to violate the trust reposed in them. It is these standards and practices that have served to build the consumer confidence essential to the functioning of the banking system that we all take for granted today.

Indeed, making individual employees liable for their actions rather than the bank would generally serve as a poor substitute for consumers generally speaking. Rather than being able to look to the resources of a large bank to satisfy a damage award, an aggrieved customer would be forced to collect a remedy from a party that in all likelihood lacks the resources to satisfy a significant damage award. While the Court's point is well taken that plaintiff's in Ms. Jones' position may not wish to sue their own employer over the actions of their co-worker, more plaintiffs would be assured of being able to satisfy their judgments if courts were to rule against banks who could then seek compensation from rogue employees. Once again, while Ms. Jones is an employee of the bank, the litigation arises in her capacity as a bank customer rather than as a bank employee. Since Ms. Tsige was acting in her capacity as banker when she obtained information that she knew was confidential, Ms. Jones could still pursue a remedy against her under the breach of confidence framework.

V. CONCLUSION

Technology and new developments in aggregating information have put a strain on consumer expectations and have exposed them to greater risks of privacy violations. In dealing with these new threats, there exists the temptation to try to refashion legal issues as new ones. Such a situation presented itself to the court in *Jones*. Here, it is clear that the Court felt the existing legal approaches could not provide an adequate remedy to the plaintiff. While it may very well be the case that establishing a tort for the invasion of privacy will serve individuals well in the long run, the fact that *Jones* does take place within the confines of a bank makes the factual context less than ideal for the development of these types of actions. The solution proposed by the court is troubling since it fails to take into account almost a century of banking law doctrine. Substituted in its place is the right to privacy approach that can be protected through the application of tort law.

What the Court did not consider in *Jones* was that proceeding with this approach will have tremendous implications on existing banking law doctrine by importing a completely different paradigm that may result in unintended juridical consequences. Indeed, our highly-regarded banking system has been well served by decisions such as *Tournier*, and it would be most unfortunate if decisions such as

Jones have the effect of undermining established Canadian legal traditions. As *Tournier* shows us, there is much to be learned from these decisions and we should not seek to discard them so easily. Ms. Jones is certainly not the first bank customer to have her privacy violated and, unfortunately, in all likelihood, she will not be the last. While the action for breach of confidence is an older concept, it also proves to be a much more adaptable concept in the banking context than the invasion of privacy concept in addressing situations involving both direct and indirect relationships. Consequently, previous experience can prove to be a valuable guide to fashioning legal remedies particularly where, as in the case of commercial relationships, certainty and predictability are essential to maintaining the relationships that help support certain activities such as banking. While it is quite admirable that the Court sought to assist Ms. Jones, the consequences to our banking system, along with the fact that there existed a legal remedy that was perfectly capable of remedying the situation without the negative externalities that flow from a change in approach, makes this a decision that leaves much to be desired. Much as it may have pained the Court, the long term effects on existing legal frameworks would suggest that the better approach would have been to turn Ms. Jones away due to a failure to state a proper cause of action and perhaps consider the issue again in another case where the facts may prove more favourable.