

Course: Confidential Information
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Although great care has been taken to prepare these notes there may be errors and omissions. These notes are no substitute for attending lectures and scrutinizing the suggested and required readings. Enjoy.

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Introduction

The law of confidential information is understood to be a branch of intellectual property law – it forms part of the basic underpinnings of IP law. The first part of the course will deal with the commercial side of confidential information as a valuable asset. Any treatment of confidential information as a subject cannot end at the treatment of information as a commercial asset; you have to start looking at informational privacy. Consider whether or not and how the law deals with issues of privacy.

We generally speak of confidential information as a form of intellectual property. Intellectual Property Law falls generally under the umbrella of commercial law and, as such, is a branch of it. Those things that are protected under IP law while they are understood to be the product of human endeavor will be protected to the extent that they have commercial value. Under IP law itself there are a number of major areas:

1. Trademark Law
2. Copyright Law
3. Patent Law
4. Breach of Confidence Law
 - a. Trade Secrets (In Context)

There is nothing that is IP law in a generic sense. This does not mean that there is not anything that you can refer to as IP law, what is referred to are underlying themes that protect these general areas. The paradigm that defines IP is the product and expression of human creative activity. The classic example is copyright law, which protects artistic and literary expression. The products of human scientific endeavor, opposed to artistic endeavor, are patent law. The context of trademarks protects the distinctive elements of a person's trade, business, or commerce. In breach of confidence we are dealing with something between inventiveness and commercial expression – anything that an individual through his or her creative expression invents, creates, designs, organizes, in such a way as to promote or advance his or her commercial interests and, alternately, the public interest. That creative inspiration, however, needs to remain secret in order to retain its value.

The policy of granting to an author rights over his or her work is to ensure that the work is made public or disseminated. Society's interest is in the expansion of knowledge and to do so we want to encourage the sharing of those ideas. In patent law, for example, the idea is to allow individual's to share their invention (ideas) in exchange for a monopoly over it – the condition, however, is that the invention must be publicly disclosed and after 20 years anyone else may build on or expand upon that invention without recourse. A similar contract is made with a copyright holder – we say to the author that we would like him or her to share their creativity with the world, but the fear is that the work would be reproduced or copied and the other would receive the benefit of that work. Thus, we endeavor to protect the work for the author's lifetime plus 50 years after his or her death during which time nobody else may copy the work unless given the license to do so. In trademarks, the public interest element being protected is the notion that someone else should not be entitled to use your mark or a confusingly similar one in order to free ride on your goodwill.

Threads of IP Law

1. Some human creative endeavor that society deems worthy of protection; and,
2. Public Disclosure

Trade Secret law fits less with the aforementioned threads of IP law. The law protects the secrecy of the information and protects precisely the opposite of what patent law attempts to do. Running through this

body of law is always the concern of understanding the interests one would need to protect and create restrictions only that are necessary to protect that secrecy or confidentiality. There is always the concern that the public needs to know – it is always to the benefit of society that knowledge and information should be free flowing.

Thus, we have an uneasy body of law dealing with the secrecy, as opposed to the disclosure, of information. Note: breach of confidence law is derived from the common law. That is because this is a body of law that is very fact-based resulting in too much discretion and uncertainty in the body of law. Parliament would probably be the best forum for the development of the law for the sake of certainty.

Every time a judge renders a decision, underlying the decision is always a policy consideration. How competing interests are defined and determined is always intertwined with public policy.

Breach of Confidence – Confidential Information

There are two aspects to this body of law:

1. Commercial Information
2. Privacy Law – Human Rights and Charter Implications

Under the privacy law considerations we have the possibility of invoking breach of confidence and the possibility of invoking the tort of invasion of privacy and the misappropriation of personality (publicity rights). These torts, to some extent, protect the commercial interest of the individual. Where privacy issues are clearly at issue is in the area of data protection, where we do have legislative intervention.

Commercial Information
Common Law

Privacy Law
Torts

Data Protection
Legislative Protection

The Law of Breach of Confidence

It has been said that a person ought to keep a secret if s/he has said that s/he will do so. This moral precept has been translated into a legal principle: a person who has said that s/he will keep information secret will be bound by that promise. The law of breach of confidence as we know it originated in one early British decision.

Prince Albert v. Strange (1849)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Etchings had been given to the Royal Printer for private use ○ An employee ran off extra prints, which ended up in the hands of the def who wanted to publish them ○ Prince is suing demanding an injunction without a cause of action 	<ul style="list-style-type: none"> ○ At the time there was no identifiable cause of action – today it would be a copyright infringement ○ Property right does not apply because the Prince has not been disposed of anything tangible ○ The idea of ‘bundle of rights’ did not fit well with the notional paradigm at the time ○ The court grants an injunction and on appeal it is upheld 	<ul style="list-style-type: none"> ○ The right and property of an author or composer of any work, where such work is unpublished and kept for private use or pleasure, entitles that person to withhold the work altogether (Copyright Analysis) ○ This case by no means depends solely on the question of property; for a breach of trust, confidence, or contract, would of itself entitle the plaintiff to the injunction ○ Note: Tawfik explains that had it not been the Prince the court might have turned the other way

This case notes that it could be property in the right circumstances, it could be in contract, it could be in tort – it all depends on the circumstances and the court does not want to pigeonhole itself into one particular area. Sometimes you need to find something else and think about what it is exactly that you are interested in protecting. At the theoretical level it is important to try to identify the underlying the foundation. Property is the most controversial characterization of confidential information.

The predominant Anglo-Canadian view for breach of confidence is founded in equity – the court is protecting individual’s from the behavior of another party (unconscionable). Some courts root the foundation of the action in a sui generis body of law – a body of law unto itself with its own set of principles and rules. This view is not generally yet the best accepted in the judiciary.

We might begin by at least having a model to assess the various cases to be looked at.

Morison v. Moat (1851)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A secret medicine recipe was revealed in confidence to a partner and was later disclosed to the son of the partner ○ The son opened a business using the recipe 	<ul style="list-style-type: none"> ○ The son was bound by the obligation of confidence ○ Son was enjoined from using the information as its use was a “breach of faith” 	<ul style="list-style-type: none"> ○ The use of dispersion of confidential information can be protected on the grounds of a “breach of faith” ○ The court fastens the obligation on the conscious of another

The court deemed the obligation of confidence to have been transferred from the father to the son. Under the circumstances, the son should have known that this was a secret that was not to be disclosed. If we are dealing with the case today we would need to know more facts – in what way was the secret

communicated? In this case, the obligation of conscience fell to the son as much as it would have the father.

Foundation of Cause – Property Rights?

One of the most controversial characterizations of trade secrets is in ‘property’. The property construct has a certain intuitive appeal for the plaintiff. Should breach of confidence law really and genuinely be described in property terms?

On what legal foundation can we build this area of law? Some suggest equity where the relationship of trust is being protected. We also looked at the notion that breach of confidence law sits under the umbrella of intellectual property. Some of the cases speak of information as a property interest – this is controversial for some. Can ‘secrecy’ be considered a property interest protected in the law?

A property right gives you an exclusive right over a thing or object – the crux of the right is that you may exclude the rest of the world from that ‘property’. Property defines a set of interest or bundle of rights that one can assert. The difficulties arise the extent to which intangible constructs can be characterized as property – where you cannot physically possess it.

1. Property is Exclusive
2. Property is Possessory
3. Property is Alienable

What about intangible property interests? Copyright – the law will recognize it and give you an interest. Choses in action – negotiable instruments etcetera – for example a cheque represents a promise of payment



Intellectual property gives an exclusive right to human endeavor. The boundaries are designed to set an understanding that ideas at some level are commonly shared. The law generally will not protect ideas per se – we tend to think of them as common to all humankind. The difficulty in this area of law lies in how we construct the notion of possession.

If we speak of property in terms of ‘interest’ then we may come to a transformed derivation of property rights applicable to confidential information. Any relationship where you can assert exclusive interest against anyone else, where you can be said to have dominion or authority over that interest, we can call that a property right. This might be a bit too broad – because at the highest level of abstraction this encompasses the entire body of law. Law, in general terms, is the right to exclude. This definition should not be pushed too far, but may be pushed far enough to encompass intellectual property. Property rights, then, have to be characterized in a different way where property ‘interests’ are held at the pinnacle. What interests are we speaking of?

R. v. Stewart (1988) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A union was unable to obtain the names, addresses, and telephone numbers of the employees of a hotel ○ The appellants offered a security 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Can confidential information be the subject of theft under s.283(1) CC; and, would the appropriation of the information have amounted to 	<ul style="list-style-type: none"> ○ It is for the legislature and not the judiciary to decide whether confidential information can be included in ‘anything’. For policy reasons it should not be property

<p>guard at the hotel a fee to obtain this information</p> <ul style="list-style-type: none"> ○ No tangible object would have been taken – the security guard reported the offer to his security chief and the police ○ Stewart was charged with counseling the security guard to commit theft, fraud, & mischief 	<p>fraud contrary to s.338(1) of the CC?</p> <ul style="list-style-type: none"> ○ The provisions must be broken down and the meaning of ‘anything’ ascertained ○ Can intangibles other than choses in action be included in the word anything? 	<p>for the purpose of 283(1).</p> <ul style="list-style-type: none"> ○ If one appropriates confidential information without taking the physical object the alleged owner is not deprived of the use or possession thereof. ○ One enjoys and does not own confidentiality. The actus reus cannot be established.
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This case is a landmark decision in terms of the nature of information. In 1983, the Court of Appeal rendered a decision saying that information could be the subject of theft under the Criminal Code. This is a classic case of industrial espionage the object of which was to gather information about the employees of a particular organization so that they may be unionized. The court could not find any authority to extend that word ‘anything’ to confidential information.

There is a subset of confidential information that we call trade secrets – trade secrets, as a narrower characterization of confidential information is more akin to being protected by property rights.

PIPEDA – the focus is the protection of the individual’s right to his or her own information.

If you root the cause of action in equity and base it in an obligation of trust, the only recourse one may have is against persons who are in that relationship of trust. On the issue of remedies, the issues arise because of the distinction or evolution of the common law where we have common law (damages) and equitable remedies (injunction). With the union of the courts of common law and equity, the courts still make the distinction but you can get any remedy that the court deems fit. In effect, the practical distinction that might have caused difficulties does not anymore. Thus, characterization does not matter anymore if the remedy sought can be gotten no matter what.

The Commodity of Information and Ideas

The likely construct in thinking of interests in property relates to the idea that we ought to have some interest in the fruits of our labour. There is a public interest that is protected here – giving a proprietary interest as an incentive to advancement. The interest lies in the secrecy and not in the information itself.

Property and Freedom – Richard Pipes (1999)

Discussions of property from the time of Plato and Aristotle to the present have revolved around four principal themes; its relation to politics, ethics, economics, and psychology.

1. The political argument in favour of property holds that (unless distributed in a grossly unfair manner) it promotes stability and constrains the power of the government. Against property, it is claimed that the inequality, which necessarily accompanies it, generates social unrest.
2. From the moral point of view, it is said that property is legitimate because everyone is entitled to the fruits of his labour. To which critics respond that many owners exert no effort to acquire what they own and that the same logic requires everyone to have an equal opportunity to acquire property.
3. The economic line of reasoning for property holds that it is the most efficient means of producing wealth, whereas opponents hold that economic activity driven by the pursuit of private gain leads to wasteful competition.

4. The psychological defense of property maintains that it enhances the individual's sense of identity and self-esteem. Others assert that it corrupts the personality by infecting it with greed.

Think of these threads in how the courts grapple with trying to characterize the right. We have to wonder whether or not we are treating property, broadly defined, those things we call confidential information and trade secrets.

The Nature of Information

Can and should information be considered 'property'? Why can confidential information not be considered property – does it not depreciate as an asset as more people gain knowledge of it? Knowledge itself does not depreciate – what does depreciate is the market share from an atomistic perspective. With tangible property it is the object itself that diminishes in value – the actual object is of less worth. Access to knowledge does not, however, affect the intrinsic value of the knowledge.

The courts reflect whether or not it is appropriate to ascribe property rights to knowledge and information.

The Civil Action for Breach of Confidence

As a vehicle to effect commercial transactions the largest body of law in this area relates to secrets of one's business and the extent to which one can prevent former employees from competing with the business utilizing information used.

Coco v. Clark (1969) HL

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ Test for establishing breach of confidence: <ol style="list-style-type: none"> 1. The information must have the necessary quality of confidence about it; 2. The information was imparted in circumstances importing an obligation of confidence; and, 3. There must be an unauthorized use of the information to the detriment of the confider. 	<ul style="list-style-type: none"> ○ Breach of confidence is limited by the principle of privity – as between the parties agreeing to keep the information confidential.

One – Information must have necessary quality of confidence

By Confidential Information we mean customer lists, know-how, names, addresses, telephone numbers and etcetera. “Trade Secrets” may be characterized as secret formulas and recipes and etcetera. We might ascribe to ‘trade secrets’ special characteristics and give them stronger protection than we might give to other forms of confidential information. Confidential information may be anything that the plaintiff has acquired in the course of conducting its business that allows it to gain an advantage over its competitors. The necessary quality of confidence depends on a number of factors:

1. Not public property or public knowledge;
2. Not necessarily that it be absolutely secret

Saltman Engineering Co. v. Campbell Engineering Company

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The plaintiff's agent delivered drawings to the defendant on the implied condition of confidence in order to fulfill an order ○ After completing the order, the defendant continued to manufacture the product for their own purposes 	<ul style="list-style-type: none"> ○ Breach of confidence may be infringed without the necessity of a contract ○ Information, to be confidential, must not be public knowledge or property ○ What makes info confidential is the fact that the maker of a document has used his brain and produces a result that can only be produced by someone who goes through the same process ○ Dispensing the necessity of the process is a breach of confidence 	<ul style="list-style-type: none"> ○ Information, to be confidential: <ol style="list-style-type: none"> 1. Must not be public knowledge and property; and, 2. The maker of a document, based on public knowledge, used his brain to produce a result <p>The courts are here concerned with taking advantage of the fruits of someone else's labour – dispensing the necessity of the process</p> <p>They were free to reverse engineer, but not to free-ride</p>

O. Mustad & Son v. S. Allcock & Co. Ltd & Dosen (1963) HL

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Dosen had worked for Thoring & Co. before it had gone into 	<ul style="list-style-type: none"> ○ A patent was disclosed – was not essential to the patent, but rather 	<ul style="list-style-type: none"> ○ The filing of a patent application reveals a secret and the secret, as

liquidation. O. Mustad purchased Thoring along with the benefit of its trade secrets o Dosen left for Allcock and on the advice of Norwegian lawyers broke his obligation of confidence by giving his new employers information pertinent to secret processes implemented while at Thoring	ancillary o Plaintiffs argued that what Dosen disclosed went beyond the particulars of the patent, but also broad know-how o The filing of a patent application reveals a secret and the secret, as a secret, ceases to exist where the subject of the patent encompasses the subject of the secret	a secret, ceases to exist where the subject of the patent encompasses the subject of the secret
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Does a patent application in a different world region create common enough public knowledge to destroy the secret? Relative secrecy versus absolute secrecy:

Franchi v. Franchi (1967) Ch. D.

Facts	Holding	Ratio
o In 1961, Vincenzo and George agreed that any patent would belong to both. Vincenzo developed a great idea and George saw it and introduced the idea to his new employer o In 1963, the Belgian equivalent of the patent was published	o <i>Issue:</i> whether any duty of confidence remained after Vincenzo’s patent published in Belgium and not Britain o Knowledge in Belgium was almost instantaneous in Britain – patent officers can search Belgian patent information o Applying for the Belgian patent set in train a process that would lead to the process becoming known to competitors	o No one is entitled to claim relief of the wrongful use or disclosure of a trade secret if he himself made the secret public before he sues – however, if relative secrecy remains, the plaintiff may succeed

The plaintiff needs to show that the information sought to protect has the ‘necessary quality of confidence’. There are a number of elements in so proving:

1. The information cannot be public property or public knowledge (in the public domain);
2. The information does not necessarily have to be absolutely secret (relative secrecy may be protected by the courts);
3. Confider must have taken steps to guard the secrecy;
4. The information must be some product of the human brain;
5. Is the confider’s belief as to the quality of confidence sufficient?

Interfirm Comparison v. Law Society of New South Wales (1988) SC Australia

Facts	Holding	Ratio
o Firm was bidding for a contract to conduct a survey – the firm gave to the Law Society a sample of a questionnaire it had developed o The Law Society had another bidder and sent the questionnaire to the second bidder just fyi o The second bidder got the contract and their questionnaire looked a lot like the plaintiff’s sample	o Plaintiff sues based on breach of confidence – defendant asserts that 26 other firms had access to the same questionnaire o These 26 other firms had agreed to participate in the survey and, as such, the group was closed – in other words, the court infers an obligation of confidence among the other firms participating	o There was confidentiality in the questionnaire, which was not lost when circulated to participating law firms o Relative secrecy in the right circumstances will be sufficient to meet the ‘not public property or public knowledge’ prong of the test

The United States has led the way in examining the impact of placing a secret on the Internet. Consider the cases of *Religious Technology Centre v. Netcom Online Communication (1995) US Dist* and *Religious Technology Centre v. Lerma (1995) US Dist*. When you post on the Internet, the quality of the secrecy is destroyed. One may attempt to proceed against the individual that posted the info anonymously, but to what practical effect? There is no recourse under a breach of confidence action. What is the difference between posting information on the Internet and publishing in a paper media or on television? Arguably, it could render breach of confidence law obsolete – we would need to find some other mechanism. One of the things that really influences the court is the way that the individual treats the information. Ultimately, the court is trying to guard against competing interests.

Yates Circuit Foil Company v. Electrofoils Ltd (1976) Ch. D.

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Yates developed an advanced copper foil treatment process ○ Yates had applied for a patent in relation to the core of the process that was developed – but it did not cover all info defs were using ○ Two memos were drafted regarding security measures, but their intent was to control traffic more than it was to control the dissemination of information ○ A number of individuals were shown around the plant and given sensitive information freely 	<ul style="list-style-type: none"> ○ The court held that Yates, on the basis of the two memos, after having shown competitors around the plant and divulging information for some time was not entitled to seek a breach of confidence action ○ The court found that Yates’ interest was to curtail competition and not necessarily the protection of confidential information 	<ul style="list-style-type: none"> ○ Breach of confidence may not be used to restrain competition ○ <i>Restrictive Covenants</i> – the courts will protect legitimate interests – you cannot restrict someone from applying knowledge or skill acquired during the course of employment

Cinabar Enterprises Ltd. v. Richland Petroleum Corp (1998) Alta QB

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Cinabar and Richland had a meeting regarding the status of lands Richland wanted to acquire ○ At the meeting, Richland obtained information regarding the lands ○ Richland claims it acted on information in the public domain ○ Richland learned that the land it was interested in was abandoned and obtained the lease options ○ Richland, surmised by Cinabar’s claim of re-entry plans, that the well was abandoned 	<ul style="list-style-type: none"> ○ The information did not have the necessary quality of confidence: <ol style="list-style-type: none"> 1. Cinabar did not act quickly (laches), only after two years; 2. Cinabar did not consider the information confidential; 3. The information was available through public means on the P.I. Alberta Township Plat and through ERCB; and, 4. There was no confidentiality agreement ○ Industry custom and practice is not applicable to transform something that is not a secret into a secret 	<ul style="list-style-type: none"> ○ Information otherwise available through public sources – even if not necessarily the way it was obtained by the defendant – cannot be protected through breach of confidence

Ridgewood Resources Ltd. v. Henuset (1982) AB CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Farries Report, Clark Letter, and a Forecast of Gas Prices were given to targeted purchasers, who would have the means to purchase the properties 	<ul style="list-style-type: none"> ○ The information asserted as confidential did not have the necessary quality of confidence ○ The action for breach of confidence rests on the allegation 	<ul style="list-style-type: none"> ○ Secrecy of information and the circumstance of confidential disclosure must co-exist. There must be unauthorized use of the information to the detriment of

<ul style="list-style-type: none"> ○ Miles, the principal shareholder of Ridgewood, heard of the Cardo properties and took the above mentioned documents under the condition that he would not attempt to 'broker' a deal ○ Miles, in trying to find partners, discloses the report to Henuset (really brokering a deal) ○ Henuset then goes directly to Cardo to make a deal 	<p>that the confidential information in question was the report that Ridgewood gave to Henuset in confidence – the court says absolutely not</p> <ul style="list-style-type: none"> ○ Farries – copies of the report would be made available to anyone who appeared genuinely interested in acquisition 	<p>the party giving the information</p> <ul style="list-style-type: none"> ○ The higher interest is with the confider attempting to protect information representing the documents origin as opposed to one who does not hold the document originally
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Recall that if the information itself loses its confidential quality, no action by the plaintiff may recapture the quality necessary to found a claim in breach of confidence. Public information can never be confidential information – however, there are exceptions where public information can be considered to have the necessary qualities to found a claim. Note: we have discussed that the information must: (1) not be public property or public knowledge; (2) not necessarily be absolutely secret; and (3) confider must have taken steps to guard the secrecy.

Pharand Ski Corp v. Alberta (1991) AB

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The government of Alberta was trying to Commission some studies to develop a good ski hill for the Calgary Olympics ○ The report the government commissioned identified five commercially viable hills – none struck the committee as great ○ The government made a call for proposals to the private sector ○ The Pharands submit a proposal as per the first proposal call – they saw potential in a hill at Mt. Allan ○ The committee recommended they hear from the Pharands directly ○ Thereafter, information about the proposal started to leak out ○ A second proposal call was made and the Pharands adjusted theirs ○ The government selected none of the proposals, but they did select an individual privy to the entire debate and process to develop Mt. Allan as the Olympic venue 	<ul style="list-style-type: none"> ○ <i>Issue:</i> Could the Pharand proposal be considered confidential information for the purpose of an action against the government of Alberta? ○ The development of the site was confidential information because of the ingenuity – the Pharands were the only ones to see the potential of the mountain (The more original the idea, the more the courts will move to protect it). ○ The Pharands took great pains to ensure that this information remain confidential – the efforts by the plaintiff to guard the secrecy of the information was also important ○ Without the Pharands the government would never have thought of the Mt. Allan site 	<ul style="list-style-type: none"> ○ The site selection and the concept plan developed by the Pharands had not only the quality of confidence, its discovery and disclosure were the very essence of confidence. A great deal of effort and investment of capital were expended by the Pharand Group to originate the idea and then prove it up as required by the second proposals call. These factors, coupled with the ingenuity, insight and innovativeness of the idea, prove the quality of confidence.

Note: to have the necessary quality of confidence, the information must be some product of the human brain. The courts do not want to set the bar too high; they want the flexibility to decide in the appropriate case that even a very simple idea may benefit from the law of breach of confidence. Breach of confidence is seeking to seeking or establishing a moral construct on the relationship between the confider and the confidant. The court is trying to protect the promise of the confidant that s/he will not disclose or use the information. Thus, it matters less that the information have some particular or unique characteristics. Consider *Cranleigh Precision Engineering Ltd. v. Bryant* (1965) WLR: “The mere simplicity of an idea does not prevent it being confidential ... Indeed, the simpler the idea, the more likely it is to need

protection.” And *Coco v. Clark*: “Equity ought not to be invoked merely to protect trivial tittle-tattle, however, confidential. Generally, if it is worth taking it is worth protecting”.

Consider a scale running from:

Ingenuity ←————→ Trivial Tittle-Tattle

Criteria that might influence the court were enunciated in the following case:

Facts	Holding
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ A list of factors to determine if the information has a quality of confidence may be as follows: <ol style="list-style-type: none"> 1. The extent to which the information is known outside the owner’s business; 2. The extent to which it is known by employees and others involved in the owner’s business; 3. The extent of measures taken by him to guard the secrecy of information; 4. The value of the information to him and his competitors; 5. The amount of money or effort expended by him in developing the information; and, 6. The ease or difficulty with which the information could be properly acquired or duplicated by others <p style="text-align: center;">These factors are not exhaustive</p>

Fraser v. Thames Television (1983) QB

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Defendant developed a television program based on the idea of the plaintiff 	<ul style="list-style-type: none"> ○ Not every mention of an idea is protected, the plaintiff must establish that the occasion of communication was confidential, the content of the idea was clearly identifiable, original, or potential commercial attractiveness and capable of being realized in actuality (generally) 	<ul style="list-style-type: none"> ○ Why create the higher threshold of ‘being capable of being realized in actuality’

The courts narrowed the spectrum of protection in the following case:

Promotivate International v. Toronto Star Newspapers (1985) ON CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff in the business of structuring lotteries was approached by the Toronto Star to design a lottery for them ○ The Toronto Star uses the plaintiff’s idea without paying them 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Could the structure of a lottery contain the necessary quality for an action of breach of confidence? ○ Nobody in the context of a newspaper lottery in Canada had ever used the elements proposed ○ The court held that it was too obvious – the Toronto Star did not think of it, but it was too obvious 	<ul style="list-style-type: none"> ○ Only non-obvious ideas will be protected by an action founded in breach of confidence

Breach of confidence is designed to supplement the other areas of intellectual property. The plaintiff ultimately in its simplest construct is only going to be able to sue the confidant. It should not really matter that the idea is somewhat more than trivial – the fear of stifling development and growth may be unfounded because of the restricted nature of the action. Thus, an absolutely ingenious secret formula or

recipe (unique and original) will be protected by a permanent injunction. As we move along the scale, justice may be effected and exacted by adjusting remedies rather than shifting major principles and doctrine. It matters that the plaintiff demonstrate the measures s/he undertook in keeping the information confidential. Is it enough for the plaintiff to come to court and proclaim that s/he guarded the secret with his or her life and the secret is truly information that needs to be protected? The court looks at some objective factor to establish this belief. The court elaborated upon the elements that may be discerned in identifying confidential information in the following case:

Thomas Marshall (Exports) v. Guinle (1978) All ER

Facts	Holding
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ Four elements may be discerned in identifying confidential information in an industrial or trade setting: <ol style="list-style-type: none"> 1. Information must be information the release of which the owner believes would be injurious to him or of advantage to rivals; 2. The owner must believe the information is confidential or secret; 3. The owner’s belief under the previous two heads must be reasonable; 4. The information must be judged in the light of the usage and practices of the particular industry or trade concerned.

Lancashire Fires Ltd. v. SA Lyons (1966) Eng CA: The subjective view of the owner cannot be decisive. There must be something which is not only objectively a trade secret, but which is known, or ought to have been known, to both parties to be so.

We have been looking at the three-pronged test for a cause of action in breach of confidence. We have examined the first prong: the information must have the necessary quality of confidence to it. The second prong must be examined: there must be an obligation of confidence on the confidant.

Two – The Obligation of Confidence on the Confidant

Coco v. Clark: The second requirement is that the information must have been communicated in circumstances importing an obligation of confidence. If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.

One concept that is intertwined with whether the information is confidential in the first place and whether an obligation of confidence should exist is the ‘springboard doctrine’.

Terrapin Ltd. v. Builder’s Supply Co. (1960) CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication and springboard it remains even when all the features have been published 	<ul style="list-style-type: none"> ○ The springboard doctrine may be applied to restrict competition where a breach of confidence arises

Some call this doctrine the equivalent to insider trading in breach of confidence law. The individual with information will be held back if s/he is going to use that information to compete and use it as an advantage over third parties and the plaintiff.

Thus, if you have a case where the plaintiff develops and markets an absolutely novel product, which is impossible to reverse-engineer or authentically develop the question is whether the law should permit/restrict one to use the information that could not otherwise be acquired and to what extent. Breach of confidence law would bar the defendant from ever using the information if the circumstances permit – this, in effect, creates a monopoly interest in the plaintiff.

Take, for example, if the plaintiff markets a novel product that can be reverse-engineered, but instead of doing this the defendant relies on confidential information in order to compete. What is the extent of the recourse that the plaintiff might have? Should the law permit this and to what extent? The courts would surmise the length of the time required to reverse-engineer the product and then prevent the defendant from using the information for a period of time equivalent to that period required to reverse-engineer.

It is not realistic to say that a defendant may never use information at all – this would stifle competition. The courts will attempt to ensure *fair* competition by handicapping the defendant to re-establish them into the position they would have been had they not had the information on which they relied.

Seager v. Copydex (1967) CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ We have a patented product “Klent” for which an improvement was made ○ Plaintiff approaches marketing firm to market the product ○ During the course of negotiation the plaintiff utters the improvement to the firm – the V-Tang ○ The negotiations fail and the defendant begins to manufacture the V-tang grip, calling it the ‘invisigrip’, which the plaintiff asserts is his name for it ○ Defendants claims it was their idea 	<ul style="list-style-type: none"> ○ <i>Issue</i>: who is most credible? ○ The court believes the defendant, but asserts that they had made unconscious use of the idea ○ The difficulty arises when the information is in part public and in part private – the defendant must take special care to use only the material that is in the public domain ○ The defendant should not be in a better position than if he had gone to the public source 	<ul style="list-style-type: none"> ○ He who has received information in confidence shall not take unfair advantage of it ○ An individual should not get a start over others by using the information that s/he receives in confidence ○ Damages: the defendant should have to pay for the value of the information that s/he uses ○ Damages should be assessed on the basis of reasonable compensation for the use of confidential information

The ‘springboard doctrine’ is a neat device to manage competing interest – the defendant, plaintiff, and public interests.

Stenada Marketing Ltd. v. Nazareno (1990) BC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The plaintiff was a franchiser trying to get the defendant to buy a system of line cleaning available in the public domain ○ The plaintiff agreed to demonstrate the machine and would be paid on a commission basis to do so on sale ○ The defendant bought the system from the American company, but 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Whether the defendant used information about the blind-cleaning business that had been disclosed to him while the plaintiff was making a sale – there was a confidentiality agreement ○ In the right case this would constitute confidential information, but in the case at bar the defendant 	<ul style="list-style-type: none"> ○ Even if all of the information is public, if a confidant is enabled by information provided by a confider to gain advantage that he would not have had if he had to check only public sources, he would still be liable for breach of confidence despite the public disclosure

<p>plaintiff assumed that it was the agent for the American company</p> <ul style="list-style-type: none"> ○ The plaintiff was cut out of his commission because the American source was available to the defendant ○ The plaintiff was trying to protect the ‘essential components’ of the business and the unique drying chamber 	<p>obtained the information through public means – through advertising materials distributed by the American principal (all of the information was available in the public domain)</p> <ul style="list-style-type: none"> ○ Interestingly, what the plaintiff was attempting to protect as confidential information was that which the American principle was promoting 	<ul style="list-style-type: none"> ○ The fact that the US manufacturer and plaintiff as agent made it problematic for the plaintiff to assert confidentiality where the US principal wasn’t ○ The essence of the duty is, more likely, in line with not using without paying instead of not using at all
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How can you prevent someone from unduly exploiting and using information to compete? How can you ask them to use only material that is in the public domain – how can one effectively dissociate public from private information? The court expresses doubt as to the ability of a human being to effectively separate public from private domain information. It is not realistic to enjoin a defendant under such circumstances. Heed must be given to the springboard doctrine anytime the defendant asserts that the information use was public – the defendant may still be enjoined from using that information because the obligation of confidence as the confidant may be greater, in general, than third-party strangers. Thus, how does an obligation of confidence arise?

Information must have been imparted in circumstance importing an obligation of confidence. This obligation arises where there is:

1. **Contract** – there is a contractual relationship between the defendant and the plaintiff (either express or implied), such as:
 - a. The Employment Contract;
 - b. The Independent Contractor;
 - c. The Joint Venture or Partnership; or,
 - d. The Licensee/Licensor Agreement
2. **In Equity** – he who has received information in confidence shall not take unfair advantage of it:
 - a. Generally; and
 - b. The Fiduciary Duty

Contractual Relationship

1. The Employment Contract

During the course of employment, the employee owes a duty of good faith and fidelity including an obligation not to disclose employer’s confidential information. Once employment ceases, the former employee is free to use and disclose confidential information as set out under the *Faccenda Chicken* test, which has been adopted by Canadian law as if it had been decided in Canada. *Faccenda Chicken* sets out three categories of information to be considered by the courts – each with varying degrees of protection:

Faccenda Chicken Ltd. v. Fowler (1986) Eng CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Co. went door to door and sold chicken. Faccenda hired Fowler, who devised a system of refrigerated vans that would take chicken to the customers 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Could Faccenda enjoin Fowler from using ‘know-how’ information obtained through his employment at Faccenda? ○ Plaintiff was trying to protect 	<ul style="list-style-type: none"> ○ You can, as an employer, protect against the disclosure of ‘know-how’ if you have your employee sign a restrictive covenant that is <i>reasonable</i> (both geographically

<ul style="list-style-type: none"> ○ Fowler increased Faccenda's business immensely, but was accused of stealing some of the chickens and arrested ○ Fowler resigns and is acquitted ○ Fowler opens up his own refrigerated chicken business in the same competing region and ads that he needs employees (8 from Faccenda apply) under a box no. ○ This had an impact on Faccenda, so they sue on breach of contract (including breach of use of info) 	<p>customer information, delivery information, price charts, etc., - knowledge that Fowler would have had just by having worked there</p> <ul style="list-style-type: none"> ○ Faccenda would have to show that the information was category 3 information – trade secrets ○ Category 2 info can be used by a former employee ○ There are three categories of info that an employee might acquire during the course of employment: <ol style="list-style-type: none"> 1. Trivial, public information that reasonable person would not consider to be confidential.¹ 2. Information that employee is either expressly told is confidential or is obviously so by its very nature – know-how.² 3. Trade secrets.³ 	<p>and in terms of their duration because they are exceptions to general competition rules) – but in general terms, an employee may freely use 'know-how' information in the absence of such a covenant</p> <ul style="list-style-type: none"> ○ An employee may be bound by an obligation of confidence regarding trade secrets in perpetuity
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1. Employee is free to use and disclose at any time after the employment ceases;
2. An employee is bound to maintain the confidentiality during the course of employment but can use or disclose once employment ceases UNLESS expressly bound by a non-competition/restrictive covenant that is reasonable in time and space;
3. An employee can NEVER use or disclose trade secrets during or after employment REGARDLESS of whether expressly bound by non-competition clause/restrictive covenant

R. L. Crain Ltd. v. Ashton & Ashton Press Mfrg Co. (1949) ON CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Business dealt with manufacture of continuous form presses ○ Ashton was hired as an employee ○ Ashton was skilled and rose through ranks to director ○ While employed, Ashton developed a variation of the press that was integral to the growth of the plaintiff's business ○ Through his own skill and ingenuity he continued to develop ○ Ashton left and worked for self – even contracted with plaintiff ○ For Ashton to start his business, he borrowed the design drawings of the continuous presses ○ Arrangement between the parties became difficult ○ Ashton returned the drawings and blueprints and started to solicit the plaintiff's customers 	<ul style="list-style-type: none"> ○ The court started with the presumption that one cannot be prevented from earning a livelihood ○ Independently of any express covenant or contract, an ex-employee who, in the course of his employment, acquired a knowledge of a secret process belonging to his employer, arising out of the confidential relation between an employer and his employee, is under an implied obligation not to use that knowledge upon leaving his employment. 	<ul style="list-style-type: none"> ○ Premise: The law will not permit former employers to restrain former employees from using skill and knowledge to compete ○ The onus is on the plaintiff and it is fairly high

Jiffy Foods Ltd. v. Chomski (1973) ON CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Former employee goes into competition with employer and begins to solicit business based on customer contacts etc., ○ The employment contract contained a non-disclosure clause 	<ul style="list-style-type: none"> ○ <i>Issue:</i> Is the restrictive covenant is enforceable? ○ A valid covenant must meet three considerations: <ol style="list-style-type: none"> 1. It must be reasonable; 2. It must be founded on good consideration; and, 3. It must not be too vague 	<ul style="list-style-type: none"> ○ The party supporting a covenant in restraint of trade must show that it goes no further than is reasonably necessary to protect the interest of the covenantee ○ The onus is on the employer to remain vigilant

Matrox Electronic Systems Ltd. v. Gaudreau (1993) Que

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff developed graphics controller known as IMPRESSION ○ During course of developing the controller, the plaintiff's employees acquire expertise ○ Employees had signed a standard form confidentiality agreement ○ Defendants started their own business competing directly with plaintiff developing TRUC 	<ul style="list-style-type: none"> ○ <i>Issue:</i> were the defendants entitled to the technical knowledge they gained in developing the IMPRESSION source code for the plaintiff? ○ The classification of human knowledge is unrealistic in today's information economy ○ What should be protected is the original process of mind ○ The courts have to look at things a little differently in the area of software – the more we move into a pure science secret, if it is not patented it is in the public domain ○ An obligation of good faith and loyalty continues even during the employee's spare time – employee should avoid competing with the employer directly or indirectly ○ The covenant here was a reasonable extension of the obligation of good faith 	<ul style="list-style-type: none"> ○ The test for whether there has been a breach of confidence consists in establishing three elements: <ol style="list-style-type: none"> 1. That the information conveyed was confidential; 2. That the information was communicated in confidence; and, 3. That the information was misused by the party to whom it was communicated ○ Where a written agreement fixes the period of confidence or otherwise modifies the nature of the confidence, a court should not grant an injunction for a longer period or one which is inconsistent with the terms of the agreement

2. The Independent Contractor

Winnipeg Livestock Sales Ltd. v. Plewman (2000) Man CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ An independent contractor agreed that for 18 months following termination of his services he would not solicit business from or to any person in Manitoba who is likely to be in competition with his former employer ○ Plewman was a very well-known auctioneer 	<ul style="list-style-type: none"> ○ <i>Issue:</i> Is the covenant reasonable? ○ On the face of it, the covenant would appear to be extremely broad and at trial an injunction was granted ○ As between an independent contractor and employer, the court will not inquire as deeply into the covenant as in an employee relationship 	<ul style="list-style-type: none"> ○ The court will look at the factors listed below in considering whether a restrictive covenant will be considered 'reasonable' ○ The clause must be only what is 'reasonably necessary' to protect the interest of the covenantee

	<ul style="list-style-type: none"> ○ Court found a power imbalance that brought Plewman closer to the employment situation than an independent contractor relation ○ There is nothing to support the contention that there were exceptional circumstances requiring a restraint on Plewman 	
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The following circumstances will generally be relevant in determining whether a case is an ‘exceptional’ one so that a general non-competition clause will be found to be reasonable:

1. The length of service with the employer;
2. The amount of personal service to clients;
3. Whether the employee dealt with clients exclusively, or on a sustained recurring basis;
4. Whether the knowledge about the client which the employee gained was of a confidential nature, or involved an intimated knowledge of the client’s particular needs, preferences, or idiosyncrasies;
5. Whether the nature of the employee’s work meant that the employee had influence over clients in the sense that the clients relied upon the employee’s advice, or trusted the employee;
6. If competition by the employee has already occurred, whether there is evidence that clients have switched their custom to him, especially without direct solicitation;
7. The nature of the business with respect to whether personal knowledge of the clients’ confidential matters is required;
8. The nature of the business with respect to the strength of customer loyalty, how clients are ‘won’ and kept, and whether the clientele is a recurring one; and,
9. The community involved and whether there were clientele yet to be exploited by anyone

3. The Joint Venture or Partnership

DiGiacomo v. DiGiacomo Canada Ltd. (1989) ON HC

Facts	Holding
<ul style="list-style-type: none"> ○ Two brothers developed artificial rock under a joint venture to manufacture and sell in Canada ○ There was a problem in that some of the confidentiality agreements remained unsigned – however, court found that the parties considered themselves bound ○ A letter of intent had been signed with the view of providing the artificial rock in Canada ○ A licensing agreement had been entered into, which was to be automatically renewed unless a notice of termination was served ○ The plaintiff served the notice ○ Defendant fulfilled the contracts it had already entered into and then sought other contracts for the manufacture of artificial rock 	<ul style="list-style-type: none"> ○ Defendant argues that there is nothing in the manufacture of the rock that is secret – the plaintiff’s process involves common items ○ The combination of general or common items in a novel way may have the necessary quality of confidence to found an action ○ The obligation of confidence arose through the licensing agreements ○ DiGiacomo used the basic process as a ‘springboard’ for his own new process – which is unfair ○ DiGiacomo had entered into similar agreements in other joint ventures, which shows an acceptance and acknowledgment of the validity of the terms of the agreement

Suppose the defendant only used the confidential information to complete the contracts that had already been entered into. Would the court react any differently? The court would probably create for the defendant some sort of licensing agreement with the plaintiff as consideration for the use of the process and then prevent the defendant from any use thereafter.

4. The Licensor/Licensee Relationship

Should the court treat the Licensee/Licensor relationship any differently than the partnership or joint venture relationship as examined above?

Chicago Blower Corp. v. 141209 Canada Ltd. (1990) Man QB

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A licensing agreement was entered into that was to last 5 years ○ The agreement was not renewed ○ The defendant continued the manufacture of fans ○ Plaintiff provided the know-how about the process of manufacturing ○ During course of the agreement defendant paid royalties for the permission to use the information 	<ul style="list-style-type: none"> ○ Defendant argues that it has already established a business ○ Defendant could carry on business ○ <i>Critical Factor</i>: The agreement entered into was silent as to what would happen after the 5 years ○ The defendant should not be cut-off from his established business ○ Because the contract was silent, the court refused to impute terms 	<ul style="list-style-type: none"> ○ Since there was no duty spelled out in the agreement to keep the information confidential at the end of the term, the licensee could use the information for his own purposes – not realistic to stop the defendant <p>The court struck down the existing clause of non-competition as unreasonable and restrictive</p>

There is a difference between partnerships and licensing agreements to the extent that each partner is supposed to bring something new into the agreement. A licensing arrangement does not anticipate that type of sharing of resources to bring about a particular business result.

In Equity

1. Generally

You do not need to show that there was a contract between the parties. From *Seager v. Copydex* (1967): The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it.

Coco v. Clark (1968) Eng HCJ

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff had developed a prototype for a new moped ○ Defendant wanted to manufacture the moped ○ Coco showed Clark the prototype and disclosed information about the way he constructed it and showed some design drawings ○ There was no confidentiality agreement signed and nobody spoke of the information being confidential ○ Talks broke down – Coco found that Clark was manufacturing a similar moped to the prototype ○ Coco sought an interlocutory injunction for breach of confidence 	<ul style="list-style-type: none"> ○ Equity may intervene to cover gaps if gaps exist in the determination of whether there is an obligation of confidence ○ Coco was not successful in this case as the other elements of the cause of action were not made out 	<ul style="list-style-type: none"> ○ There is, in the right case, even in the absence of contract an equitable obligation of confidence that may be imposed on the defendant

Pharand Ski Corp. v. Alberta (1991) AB CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Pharands went to great lengths to ensure the confidence of the information in their proposal ○ Plaintiffs made the proposal public when they held a press conference about their plans at the Alberta site 	<ul style="list-style-type: none"> ○ Contractually there was an obligation under the first and second proposal call ○ By the time the Pharands had gone to press, the government had already breached its obligation of confidence ○ An obligation of confidence, given the nature of the relationship between the parties, arises out of equity as well 	<ul style="list-style-type: none"> ○ Equity will intervene to properly protect the parties and cover the gaps

In cases where the confider himself makes the information public to the world, then there can be no protection. However, where a third-party or confidant has made the information public, then equity may prevail. If, by the time, a defendant posts or makes known information, the confider has divulged sensitive information; there will be no protection – you cannot hold a defendant under an obligation of confidence under those circumstances.

The Fiduciary Duty

Frame v. Smith (1987) SCC, Wilson J (dissent): Relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics:

1. Scope for the exercise of some discretion or power;
2. That power or discretion can be exercised unilaterally so as to affect the beneficiary’s legal or practical interests; and,
3. A peculiar vulnerability (beneficiary) to the exercise of that discretion or power.

It could be that the vulnerability arises as a result of information imparted unto the beneficiary – one does not need to establish this pre-existing relationship for a breach of confidence action. However, the advantage of proceeding under both actions is that once you establish that there is a fiduciary relationship and the defendant has breached it, then the court will *imply* that harm has arisen. Under the law of breach of confidence showing harm is the very important third element. The nature of the obligation of confidence will be read into the fiduciary relationship. As such, the highest burden is establishing that there was a fiduciary relationship.

The fiduciary relationship itself involves a relationship of confidence. In order to meet the burden of proof to construct a breach of fiduciary obligation, one must establish first that a fiduciary relationship existed (This is different than the burden in a breach of confidence claim). Once you manage to establish that there was a fiduciary relationship, then you have an easier burden – you do not, in the cause of action, need to show *harm* or *damage*.

The disadvantage, until very recently, was that the fiduciary obligation was a purely equitable cause of action, meaning that only equitable remedies were available for the breach. The action for breach of confidence arises both in law and in equity – thus, the common law actions for breach of confidence are there available. The issue of the different remedies available resulted in the SCC decision of *Lac Minerals Ltd. v. International Corona Resources* where the court considered the two actions.

The fiduciary relationship is built upon a relationship of trust. The moment there is a breach there is deemed to be harm because the law wants to preserve the integrity of that relationship.

Lac Minerals Ltd. v. International Coronal Resources Ltd. (1989) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A junior mining company was investigating properties that it though it would want to acquire for the purposes of carrying on the mining business – did not have the capital to do so ○ The company published prelim findings concluding that particular areas would be very appealing ○ Lac Minerals, a senior company with a lot of capital resources, saw these results and approached Corona to finance exploration ○ Reps met with each other for the purposes of working together ○ The Williams Property, the most promising – Lac Minerals advised Corona to aggressively pursue it ○ Lac Minerals, however, used the info and pursued the land itself – Lac Minerals purchased it 	<ul style="list-style-type: none"> ○ Issue 1: Was there a breach of confidence? ○ <i>Coco v. Clark</i> test applied ○ It was clear in terms of the relationship of the parties that the info was imparted in confidence ○ There was unauthorized use to Corona’s detriment ○ Any property that the defendant acquires from a breach of a fiduciary duty may be transferred through a constructive trust – this was not known as a remedy in breach of confidence law. The appropriate remedy here is a constructive trust ○ Sopinka (dissent): Constructive trust is not an appropriate remedy ○ Issue 2: Was there a breach of fiduciary duty? ○ Majority held no breach of fiduciary duty ○ Laforest (dissent): there was a fiduciary relationship – Corona made themselves vulnerable through financial dependence and an expectation through industrial custom that Lac Minerals would not pursue themselves 	<ul style="list-style-type: none"> ○ You can invoke the remedy of constructive trust in an action for breach of confidence ○ This renders a breach of confidence and fiduciary duty action virtually interchangeable – the only judgment call to be made is whether the appropriate burden would be met ○ Sopinka: Corona should not have made itself so vulnerable ○ You cannot just expand fiduciary law because the court feels that the plaintiff has been wronged ○ The arrangement and relationship of breach of confidence and fiduciary law runs along a spectrum dependent on the facts, more than it does as two separate cause of actions ○ Since you can get a constructive trust in both circumstances, if the action can be framed in breach of confidence it should be so framed

Frame v. Smith extended the notion of fiduciary to suggest the finding the requisite elements may lead to a proper assertion that there was a fiduciary relationship in a commercial setting.

Under corporate law, directors of corporations sit in a fiduciary relationship with the company and ultimately the shareholders. This means that the director may not act in a way that may harm the interest of the corporation, including using information acquired as a result of being the director of the corporation. It is now statutorily entrenched in the CBCA and OBCA.

Canadian Aero Service v. O’Malley (1973) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Directors were looking to negotiate some sort of contract ○ While on business, they received information regarding a site that they decided to pursue on their account ○ Left the employ of plaintiff and bid for the contract using information they received and obtained the contract 	<ul style="list-style-type: none"> ○ Court expanded the notion of corporate agents in the fiduciary context to encompass both corporate directors and senior officers 	<ul style="list-style-type: none"> ○ A director or senior officer is precluded from obtaining for himself, either secretly or without the approval of the company any property or business advantage either belonging to the company or for which it has been negotiating and especially is this so where the director or officer is a participant in the negotiations on behalf of the company

Thus, both directors and senior officers may be held liable for breach of fiduciary duty after *Canadian Aero*. One should be able to impose fiduciary obligations based on the facts of the relationship between the parties even in corporate/commercial settings:

Quantum Management Services v. Hann (1992) ON CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ An employment placement agency ○ The defendants were headhunters ○ Three employees left the firm and started a placement service in competition with the plaintiff ○ These employees were not senior officers of the firm ○ Majority of their new customers came from Quantum (New company undercut Quantum) 	<ul style="list-style-type: none"> ○ These employees owed fiduciary obligations to the employer b/c they were 'senior' employees ○ Particular relationships, within this enterprise, with individuals who have expertise that is not transferable – their loss would cause such a serious hardship to the former employer that the court would give a remedy ○ These employees had a fiduciary obligation b/c only they could access sensitive information ○ Court issued an 9 month injunction against Hann so Quantum could aggressively seek clients to recover from the loss and prevent the former employees from taking advantage of information acquired to compete unfairly 	<ul style="list-style-type: none"> ○ While an employee may not be restrained from moving on and applying the knowledge acquired, former employees in a fiduciary relationship will be enjoined from actively competing against his/her employer ○ The fiduciary relationship may be extended to 'senior employees'

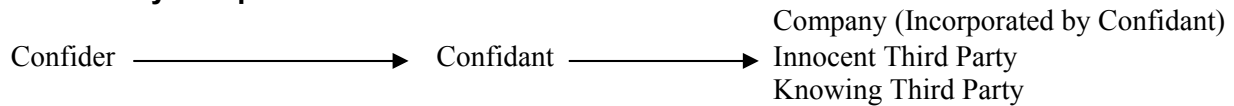
Note: A former employee has the right to compete against an employer with the following exceptions:

1. *Trade Secrets* – You cannot use trade secrets to compete with former employers;
2. *Trade Connections* – The employee may not solicit any customer whose name is contained on a list which the employee has taken from the employer; and
3. *Top Management* – The law imposes a duty on senior employees not to take advantage of economic opportunities that they become aware of by reason of their employment with their former employer.

McCormick Delisle & Thompson v. Ballantyne (1999) ON CA

Facts	Holding
<ul style="list-style-type: none"> ○ A management consulting firm ○ The defendant's were management consultants who developed an established clientele 	<ul style="list-style-type: none"> ○ The plaintiff was selling a service and to do so often required a 12-18 month nurturing period before it was secured ○ In the context of the plaintiff's business, there may not be 'mere employees' – each defendant by reason of their particular relationship with the clients had acquired much confidential information that would elevate them beyond a 'mere employee'. ○ Defendants had a fiduciary duty to the plaintiff and a concurrent duty not to exploit confidential information obtained in the course of their employment

Third-Party Recipients



What recourse does a confider have against a third party who receives information from a confidant? Where is the confider left if the third party publishes or makes publicly known the information? The common law has addressed this issue.

Speed Seal Products Ltd. v. Paddington (1986) ER

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ Under what circumstances can the confider still maintain the obligation of confidence where the confidant has made known? ○ Where the confidant has made known with confider's consent, the confidant is freed from the obligation of confidence. ○ Where the publication is made with the consent of a third party, the court will uphold the obligation of confidence and a remedy will be granted even where the information (technically) has become public ○ Where it is the confidant who has either disclosed publicly or gave permission to someone else to do so, the confider still has a remedy against the confidant – if disclosed to a third party, but confidant did not give permission to the third party to publish but s/he does, the confider still has an action against the confidant 	<ul style="list-style-type: none"> ○ Whether or not a remedy will be given to the confider depends on the nature of the cause of action (obviously), culpability exists insofar as there is a breach of the confidence to maintain the obligation of confidence

However, how do you deal with situations where the third party is truly an innocent? In other words, what do you do with an innocent third party? *Indirect Disclosees* – will be liable if knew that information imparted was in breach of confidence. Third party is deemed to be under an obligation of confidence. See *Morison v. Moat*.

Liquid Veneer Co. Ltd. v. Scott (1912) RPC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ Can an injunction go to restraining a third party? ○ There is jurisdiction to restrain a third party from using info 	<ul style="list-style-type: none"> ○ The jurisdiction to restrain by injunction extends to enabling the Court to restrain a third party from using secret information which has been to his knowledge obtained or communicated in breach of trust or in breach of confidence

Stevenson, Jordan & Harrison v. MacDonald & Evans (1951) Ch.D

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Publisher agreed to publish a book written by the plaintiff's employee ○ The author, in the book, had used confidential information about the company of the plaintiff 	<ul style="list-style-type: none"> ○ Court finds the publisher liable ○ By the time the second employee had alerted the plaintiff, the defendant publishers had had notice that there was a breach of confidence 	<ul style="list-style-type: none"> ○ The wrong to be restrained is not the entry into the contract to publish, but the act of publishing, and an innocent mind at the time of the former

<ul style="list-style-type: none"> ○ Defendants entered into a contract with the employee ○ Firm did not know the book contained confidential information ○ Another employee, in preparing the index for the book, noted that some of the information was confidential and he proceeded to notify the publisher 		cannot overcome the consequences of full knowledge at or before the time of the latter
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Suppose the book had been published and there was no other employee who had gone through the index. Could the plaintiff still proceed against the publisher? Should bona fide purchasers for value without notice be held liable? Should third parties who have, in good faith, changed their position in reliance on the information be liable?

As between the person who holds title to a chattel and the person in possession of the chattel who believes to have purchased it in good faith, the third party may have better title than the principal. The bona fide purchaser will get the higher interest, this is not to say that the owner will not be given a remedy, but the third party will have the higher right.

Wheatley v. Bell (1982) WLR (Aust)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ The defense of bona fide purchaser for value only deals with title to property and who has better title as between the owner of the property and the innocent third party ○ The defense is an equitable defense directed towards the resolution of priorities in relation to property rights 	<ul style="list-style-type: none"> ○ Even if a man obtains the confidential information innocently, once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence

Canadian courts have not found in favour of a bona fide purchaser for value, as in Australia. However, some principles have been adopted.

International Tools v. Kollar (1968) ON CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ The defendant came by a secret in one of two ways: (1) As a bona fide purchaser for value; or, (2) in circumstances subjecting an equity against him 	<ul style="list-style-type: none"> ○ Canadian courts would entertain in the right circumstance the bona fide purchaser argument (never has been done, though)

Polyresins Ltd. v. Stein-Hall Ltd (1971) ON Hcj

Facts	Holding
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ An injunction will lie against a third person who has acquired information to which he is not entitled even assuming he does not have notice of a breach of duty on the part of the person who imparted it to him (this is a very broad principle)

If the innocent purchaser defense is available in Canadian law, it will not preclude the confider from proceeding against the third party for some remedy. For notes on remedies and injunctive relief, see page 320 of course materials.

In Canada and in England, there were law reform proposals that were never adopted. A working paper done by the *Alberta Institute of Law Research and Reform* recommended legislating as the US has. However, their position with regard to the innocent purchaser was to recommend a very flexible type of remedy where the courts can order a lump sum payment equivalent to the value of the future use and the ability to make an order as to how the information would be managed as between the third party and the confider. This area of the law is still uncertain. It is possible under Canadian law to invoke the innocent purchaser defense, but one would have to have a really good case to make that claim.

Is there a duty on a third party to inquire where the information originated?

Three – Unauthorized Use (To The Detriment Of)

Coco v. Clark – “... detriment ought to be present if equity is to be induced to intervene”

Detriment does not need to be shown in every case. In the right sort of case a plaintiff could succeed in establishing a cause of action even where there was no quantifiable harm. However, what do we mean by the term ‘detriment’?

Cadbury Schwepps Inc., v. FBI Foods Ltd (1999) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Not Done 	<ul style="list-style-type: none"> ○ It is clear that you need to show detriment under Canadian law, however, detriment is a broad concept large enough to include the emotional or psychological distress that would result from the disclosure of intimate information 	<ul style="list-style-type: none"> ○ From <i>Spycatcher</i>: “It is a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way”

From *Spycatcher* – could you ask a secret agent from withholding information for all eternity? The government cannot prevent an individual from holding all secrets – magnitude counts. In this case, a book had been published with a number of secrets made known by a secret agent and the English courts could not do anything to stop the publication or provide a remedy under breach of confidence. The mere fact of disclosing, though, might be sufficient for future courts to find detriment. In most cases, the courts want ‘active harm’ to be shown.

Adobe Properties Ltd. v. Schikedanz Bros (1999) Alta QB

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A joint venture to develop land in Alberta was talked about ○ Defendant allegedly used info acquired during negotiations ○ Plaintiff disclosed its offer price but defendant purchased the land 	<ul style="list-style-type: none"> ○ Plaintiff did not suffer detriment in the sense of actual harm ○ Defendant let the plaintiff’s transaction go through its normal course of events – it lapsed ○ Defendant did not intervene during the process between the plaintiff and vendors 	<ul style="list-style-type: none"> ○ Detriment is a required element (of this third step) – consider, but for the defendant’s action analysis ○ Here, the plaintiff would not have acquired the land <i>regardless</i> of the defendants action – not, but for the defendant’s action the plaintiffs would have acquired

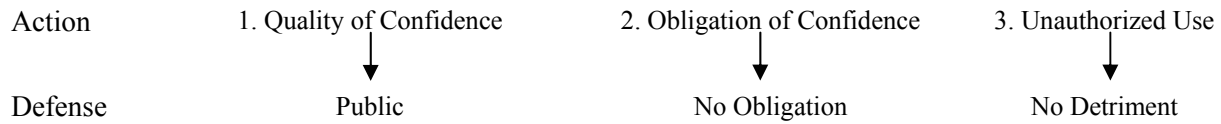
Note, as in the following case, a plaintiff may be successful against a defendant who claims that s/he has not used the information. Here we are dealing with the notion of 'subconscious use'. The courts have to grapple with a plaintiff who can demonstrate the development of a secret idea that was imparted to the defendant against a very credible defendant maintaining s/he developed the idea on his or her own.

Talbot v. General Television Corp. Pty. Ltd. (1981) RPC

Facts	Holding	Ratio
<ul style="list-style-type: none">○ Individual pitches an idea for a television program – a highlight of Australian millionaires○ Plaintiff maintains he met with reps of the defendant○ Not long after, defendant puts on tv show with identical concept	<ul style="list-style-type: none">○ In the right sort of case you can argue that the defendant has subconsciously used your information without permission○ Court finds for plaintiff○ Producer of program did not have a flash of inspiration, but through talking to person who was present the idea was leaked and he later resurrected and appropriated it	<ul style="list-style-type: none">○ The courts are prepared to take <i>judicial notice</i> of the fact that a person may come out with a suggestion which he honestly believes to be a novel suggestion of his own, but which can properly be attributed to his mind having subconsciously used information which he had been given in the past and of which he has no conscious recollection

Defense of Public Interest

1. Generally



Where the plaintiff is able to establish all three elements of the action and none of the defenses are available, the defense of public interest is the only defense left.

Gartside v. Outram (1856) ER

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ An employee discloses accounting information showing the defrauding of customers 	<ul style="list-style-type: none"> ○ One cannot be made a confidant of a crime or a fraud and then be made to refrain from disclosing the information 	<ul style="list-style-type: none"> ○ There is no confidence as to the disclosure of 'iniquity' ○ 'Iniquity' may be defined as gross injustice or a wicked act (crime or fraud)

Initial Services Ltd. v. Putteril and Another (1967) ER CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ There was collusion to create a price-fixing arrangement uncovered by a former employee ○ Employee gives the information to the press ○ Employee is sued 	<ul style="list-style-type: none"> ○ There can be no confidence as to the disclosure of iniquity ○ Though an employee is under an obligation of confidence, loyalty, and good faith – there may be an overriding element of public interest ○ The defense of iniquity may be extended beyond the limited definitions of crime or fraud – it extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others ○ If the defendant disclosed the information out of malice or spite, or if he was paid to do so, there arise questions of the legitimacy of the defendant's conduct 	<ul style="list-style-type: none"> ○ Iniquity extends beyond crime or fraud and into any misconduct against the public interest ○ A defendant who sells the story to the press or discloses it out of spite or malice, finds him or herself in a different fact scenario with, perhaps, a different outcome – why do we hold the individual to such a standard? Is it reasonable to assume that s/he would know to go to the relevant body? ○ The important point is to consider the confidant's intention in going to the body that s/he goes to

What might have been considered iniquity in 1856 had to be looked at through the lens of 1967 – in fact, it must be reviewed as each decade passes.

Fraser v. Evans & Others (1969) Eng CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Defendant was bound by an express obligation of confidence to the Greek government to maintain 	<ul style="list-style-type: none"> ○ The plaintiff is owed no obligation of confidence ○ The person or entity to whom an 	<ul style="list-style-type: none"> ○ Iniquity is merely an instance of just cause or an excuse for breaking confidence

<p>confidentiality</p> <ul style="list-style-type: none"> ○ The report, somehow, was leaked ○ A version of the report made its way to England ○ Plaintiff, consultant, sues the newspaper for breach of confidence 	<p>obligation of confidence was owed was the Greek government and not to the plaintiff</p> <ul style="list-style-type: none"> ○ The plaintiff could not assert a breach of confidence because he could not establish an obligation of confidence ○ There are some things which are of such public concern that the newspapers, the Press, and, indeed, everyone is entitled to make known the truth and to make fair comment on it 	<ul style="list-style-type: none"> ○ There are some things, which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret
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Hubbard and another v. Vosper and another (1972) End CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A former member of the Church of Scientology writes about the entity and proposes to publish the book to expose it and some of its practices ○ The defendant hoped to public the Church’s rules where any member breaching a rule would be considered ‘fair game’ 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Should the publication be allowed to proceed? ○ The law will not intervene to suppress freedom of speech except when it is abused ○ To what extent should the plaintiff be entitled to prevent the defendant from writing? ○ The courses contain such dangerous materials that t is in the public interest that they should be made known 	<ul style="list-style-type: none"> ○ An individual is entitled to publish, based on a reasonable defense of public interest, because if the propositions are true, the law will not intervene to suppress freedom of speech except when it is abused ○ There is here evidence that the plaintiffs are or have been protecting their secrets by deplorable means – they do not come to the court with clean hands

Lion Laboratories Ltd. v. Evans and Others (1984) Eng CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff’s breathalyzers, which the police were using, were allegedly not accurate based on manufacturing methods ○ The police were using these readings to convict ○ Former employees took the information to the press ○ Manufacturers bring an action against former employees 	<ul style="list-style-type: none"> ○ The public interest defense will avail in breach of confidence cases where there is just cause or excuse to disclose. ○ There are four basic guidelines that should govern this decision: <ol style="list-style-type: none"> 1. There is a distinction between ‘interesting to the public’ and ‘in the public interest to make known’; 2. The media have a private interest in publishing what appeals to the public – they are vulnerable to confusing their own interest with what is ‘in the public interest’; 3. There are circumstances where it is not appropriate to go to the press, rather to the police; and, 4. There is no confidence to serious misdeeds or grave misconduct 	<ul style="list-style-type: none"> ○ Iniquity is merely an instance of a just cause or excuse ○ The defense can be raised where there is just cause or excuse for the disclosure – iniquity is one type of cause or excuse that will relieve the defendant of responsibility for breach of confidence ○ The defense is not restricted to showing misconduct on the part of the plaintiff – it has to, generally, be present for a successful defense. ○ One must also analyze what motivated the defendant to disclose the information

Thus, once the plaintiff has established the three elements of the breach of confidence action, the defendant has only the defense of public interest. The defense of public interest will be applied only where the defendant can show the need to disclose particular information in the instance of some just cause or excuse.

When giving advice you need to be able to say with some certainty that the defendant had some just cause or excuse. Ideally, you will want to identify some misconduct on part of the plaintiff, though the defense may nevertheless be raised. Be wary, however, by the conduct of your own client also – what was it that motivated your client to disclose?

Another issue these cases give rise to is that of disclosing to the press and the competing interest between retaining the confidentiality of the plaintiff versus freedom of the press.

2. Freedom of the Press

Blackstone (1756): “The liberty of the Press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications.”

The press should not be stopped from publishing – censoring the press would stifle the very idea of the freedom. Corrections and retractions may be printed and damages thereafter sought.

The following cases are generally applications for interlocutory injunctions – the plaintiff attempts to stop a publication and the defendant press attempts to raise the public interest defense in the context of freedom of the press.

Schering Chemicals v. Falkman Ltd. (1982) Eng CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff is trying to stop the broadcast of a documentary ○ The plaintiff produced a drug alleged to cause birth defects ○ The company was being sued ○ Litigation was highly publicized and plaintiff got a lot of bad pr ○ Falkman was hired as a consultant to provide public relations training who contracted with a number of trainers to provide workshops etc., ○ Elstein, one of the trainers, receives disclosure from the plaintiff a deal of information concerning the situation ○ Plaintiff expressly bound Falkman under an obligation of confidence ○ Falkman, in turn, bound Epstein ○ Elstein approaches Thames TV to produce a documentary 	<ul style="list-style-type: none"> ○ Plaintiff argues that the documentary contains information imparted to Elstein in confidence ○ Defendant, Elstein, argues that a great deal of independent research was done and the information in the documentary is public ○ Defendant, Thames TV, argues that it has freedom of the press ○ There are a number of factors that one needs to look at in analyzing freedom of the press ○ The freedoms of liberty do not include a license for the mercenary betrayal of business confidence ○ By allowing freedom of the press we want to ensure we do not encourage the disclosure of business confidence ○ The doctrine of previous restraint requires that the court allow the press to publish without hindering ○ Majority grants an injunction 	<ul style="list-style-type: none"> ○ There is no absolute right to publish – it can be overridden, but only in exceptional circumstances ○ Breach of confidence is one way in which freedom of the press may be limited ○ The kernel of the idea for the documentary itself arose because the defendant was hired by the plaintiff ○ The defendant did precisely what he was hired not to do – he had an undertaking to help the company save face and deal with their public image ○ The court was unhappy with the fact that the defendant, Elstein, broke a trust

We do not, however, want to encourage freedoms that will allow the ‘mercenary betrayal of business confidence’. Freedom of the Press will not override breach of confidence where the press itself has undertaken an obligation not to disclose – ie this is ‘off the record’, unless the information disclosed is of such a serious nature that it should be released.

British Steel Corp v. Grenada Television (1981) ER

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ There was a national steel strike by the plaintiff’s employees ○ Defendant broadcast a program on the strike using 250 secrets and confidential documents ○ There was an informant at British Steel that gave these documents to the press ○ The plaintiff did not know the identity of the informant 	<ul style="list-style-type: none"> ○ The defendant must be compelled to disclose the source ○ The public interest in ensuring a continued flow of newsworthy information is not absolute ○ Compelling to disclose source might stifle disclosure 	<ul style="list-style-type: none"> ○ Freedom of the press is not absolute ○ There is a difference between public interest and what the public finds interesting

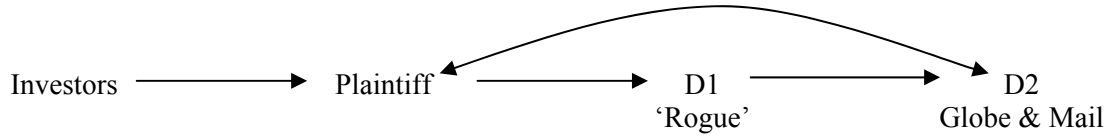
Peat Marwick Thorne v. Canadian Broadcasting Corporation (1991) ON Ct. Gen Div

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ CBC was proposing to broadcast a 5th Estate program dealing with the fall of the Ceausescu family in Romania and the efforts of the new government to investigate corruption ○ Plaintiffs were the representatives of the Romanian government and they are trying to stop the CBC from broadcasting citing that their disclosure of information to the CBC was imparted under the understanding that no information would be used without prior permission ○ CBC refuses to let the plaintiff’s view the documentary ○ Plaintiff was interlocutory injunction and an order of viewing 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Could the integrity of the program remain ○ The court does not know whether or not there are any offending portions or even if those offending portions could be severed and leave behind a worthwhile program ○ Injunction granted pending a determination of these issues ○ Court relied heavily on <i>Schering</i> ○ It is important to the public that the media be held accountable to what and how it disseminates ○ The plaintiff objected to three elements that the court, thereafter, did not feel was worthy of furthering the injunction 	<ul style="list-style-type: none"> ○ You really have to deal with the defense of public interest through the British case law

BW International v. Thomson Canada Ltd (1996) ON Gen Div.

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A report was leaked to the Globe and Mail and thereafter a series of articles was published ○ Plaintiff wants absolute prohibition regarding the citing of articles to the court 	<ul style="list-style-type: none"> ○ Judge refuses to grant the injunction ○ The public interest defense raised by the defendant had no merit ○ The Globe and Mail was publishing what was interesting to the public and not that which was in the public interest ○ Three levels of analysis for breach of confidence cases: <ol style="list-style-type: none"> 1. The obligation of confidence relating 	<ul style="list-style-type: none"> ○ This case provides a non-sensical analysis

	to the information disclosed by investors interviewed; 2. The incorporation of the raw data into a report; and, 3. Where the recipient of the information is the Globe	
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Remedies

Part of the problem with remedies is trying to understand the foundational basis upon which the action is based. For example, if rooted in equity only equitable remedies are available and if rooted in contract one may seek damages. However, the merger of the courts of common law and equity along with the terms of the various statutes have rendered this analysis moot – one can seek both remedies under the same action.

Thus, particular remedies are no longer dependent upon establishing the foundation of the right. The remedy for breach of confidence includes both equitable and common law remedies as well as proprietary remedies, such as the constructive trust.

Whatever the foundation of the action, the courts mission is to find a remedy to rectify the situation. Remedies should be designed to bring the plaintiff back into the position s/he would have been in but for the breach.

The question of whether a remedy is available does not necessarily depend on the case. There are a number of general issues to consider.

1. Permanent Injunction

For example, a plaintiff who asks for a permanent injunction will be granted one only in the extreme case. This may otherwise impose restraints on the defendant that are too onerous. In the spectrum of information, the closer the information moves towards being considered a trade secret, the more likely will one be able to convince the court that the permanent injunction is the most appropriate. Note: we do not want to foster anti-competitiveness, so we must be very careful with the permanent injunction. The courts are generally reticent to apply as a remedy a permanent injunction.

2. Damages

The award should reflect the amount of loss in the case of a breach of confidence. In dealing with a case rooted in property or contract uncovers no problem for damages. The problem arises where the action is rooted in an equitable cause of action. As a result of statutory enactment, however, most jurisdictions have alleviated any impediments to seeking damages. The only problem that remains is the proper quantification of damages. How do you assess the damages in an action for breach of confidence?

In *Seager v. Copydex* the court divided information into three categories:

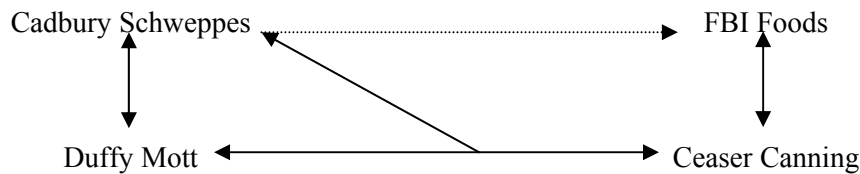
1. Information with nothing very special about it;
2. Special information; and,
3. Very special information

When dealing with information with nothing very special about it (involved no very inventive step) the quantum of damages to be awarded is the equivalent of what the defendant would have paid the consultant to uncover the information on his or her own.

Moving along the scale, if the information is unusual and the consultant could not have discovered it by applying his or her knowledge, the quantum of damages would be the price that a willing buyer would pay for the information. Finally, where the information is very special we must undertake to consider a much more severe quantification. Moreover, one might also apply the principles of *Faccenda Chicken* one may seek damages along with a permanent injunction.

Cadbury Schweppes Inc., v. FBI Foods Ltd., (1995) Trial

Facts	Holding
<ul style="list-style-type: none"> ○ Cadbury acquired Duffy Mott, which made clamato juice ○ Caesar Canning was licensed by Duffy Mott to bottle the product ○ FBI Foods would also manufacture clamato juice for Caesar Canning and also distribute for Duffy Mott ○ Cadbury terminated the license with Caesar Canning ○ In the license there was a clause talking about what would happen if the license was terminated ○ Clause: For a period of a five years Caesar would not to produce a clamato that included clam juice ○ Once the license agreement was terminated, Caesar developed a clamato juice without using any clam juice – their new product was very similar in taste to clamato ○ Caesar went bankrupt and was acquired by FBI Foods ○ Cadbury’s market share diminished in Canada 	<ul style="list-style-type: none"> ○ In the drafting of the contract and by making it so specific they assumed that nobody would come up with a competing product – the assumption was that nobody would compete with them for 5 years ○ Cadbury’s lawyers told them that there was nothing they could do ○ <i>Issue</i>: Was there something that gave the defendant an advantage that they would not have had but for the breach with the plaintiff? ○ Caesar acquired also know-how regarding amounts and temperatures etc., aside from the novelty of claim juice in the recipe ○ Breach of confidence will cover know-how that has not specifically been covered in a contract ○ The better advice to Cadbury was to have looked at all of the information that Duffy Mott had provided to Caesar Canning and determine whether there was something else outside of the contract that could be looked at ○ Caesar had an advantage over all other competitors based on the information gotten from Duffy Mott ○ The information that Caesar got was considered “not so special” and, thus, no injunction would be granted ○ An assessment was made of a 12-month head start and provided for damages was a fee for consultant



Cadbury Schweppes Inc., v. FBI Foods Ltd., (1996) BC CA

Facts	Holding
<ul style="list-style-type: none"> ○ Trial judge granted only damages and no injunction 	<ul style="list-style-type: none"> ○ This is a case for an injunction

Cadbury Schweppes Inc., v. FBI Foods Ltd., (1999) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ CA affirmed damages and ordered an injunction 	<ul style="list-style-type: none"> ○ The head start period was 12 months, but the damages should not be based on the cost of a consultant, but rather also on the lost opportunity – the actual sales that Clamato lost as a result of the unfair competition posed by FBI ○ Case sent back for an assessment ○ The plaintiff must lead evidence to show their loss can be attributed to the unfair competition by Caesar 	<ul style="list-style-type: none"> ○ The plaintiff must be able to show that loss is directly attributable to the unfair competition of the defendant rather than any other factor

A number of principles have come out of this case. The *Sui Generis* concept, for example, was adopted to recognize the flexibility that has been shown by courts in the past to uphold confidentiality and in crafting remedies for its protection.

The court dismisses the argument of the plaintiff that there was a fiduciary obligation on the part of Caesar Canning to use the information. Unless the circumstances are extreme you really are not talking about a fiduciary relationship. Consider the judgment in *Lac Minerals v. Corona Resources Ltd.* In this case, there is nothing in the relationship between a juice manufacturer and a licensee to suggest that the former surrendered its self-interest or rendered itself 'vulnerable' to a discretion conferred on the latter.

Breach of confidence is designed to address the vulnerability of disclosure; it is not the vulnerability of a kind that should trigger the fiduciary relationship. This case gets at exactly what the 'springboard' doctrine is designed to do. This case deals with the possibility of expanding fiduciary law into commercial contexts like breach of confidence.

There will be the right case where the nature of the information or the nature of the relationship between the parties is such where it will demand the construct of a fiduciary relationship between the parties. In those circumstances, the remedies are much more severe. However, when talking about the not-so-special information we are really talking about preventing the competitor from getting a head start.

Industrial Espionage

Up until this point all of the cases have dealt with people who are in direct contact or conversation with each other – a confider/confidant relationship. In the case of a third party, this scheme applies and the confidant then confides information in a third party. However, where the plaintiff and defendant have never come into contact, but the defendant has acquired sensitive knowledge, we run into the potential problem of the industrial thief – someone who never came into contact with the plaintiff, but nevertheless acquired the information.

Canadian Common Law

Franklin v. Giddins (1977) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The plaintiff had developed a particular type of nectarine ○ He developed it and wanted to keep the trees to himself ○ A friend of the plaintiff's son volunteered to pick the nectarines off of the trees – he knew that the plaintiff wanted to keep the nectarines to himself ○ The defendant snuck in at night and cut off a piece of the bud-wood and budded the trees in his own orchard to produce the particular nectarine ○ The plaintiff's son visited the new orchard and thought it to look quite similar to his father's ○ Approximately seven years after having taken the bud-wood had the plaintiff realized the bud-wood had been taken ○ The defendant had been charged with theft, but to get an injunction for the removal of those trees from the orchard the plaintiff sues for breach of confidence 	<ul style="list-style-type: none"> ○ The defendant argues that there is no proof that the information in the bud-wood was imparted under an obligation of confidence – the defendant never came into contact with the plaintiff ○ The judge found this argument to be unconscionable ○ The remedy sought was ordered ○ You could argue there was an obligation of confidence because the defendant did know that the plaintiff wanted to keep the information confidential 	<ul style="list-style-type: none"> ○ A contract or obligation of confidence need not be expressed ○ The knowledge factor is one of the more important ones – if a reasonable person should have known the information to be confidential, then s/he may be enjoined from use if coming upon it in an improper or mischievous fashion

In the 1980s the legislature of Alberta made a number of proposals so that the industrial thief would be caught by legislation. We are looking here at trade secrets acquired by improper means, but not necessarily through a breach of confidence.

US Trade Secret Law

The legislation in the US makes clear and could extend the law of breach of confidence to trade secrets that have been acquired by improper means. One need not establish a pre-existing obligation of confidence, all one needs to show is that the information was acquired through improper means.

E.I. duPont deNemours v. Rolfe Cristopher (1971)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A method for identifying methanol in production was developed by the defendant through aerial photography ○ Plaintiff maintains that these photographs contain trade secrets in that it showed the method of production ○ Defendant argues that it never had an obligation of confidence upon them – the case law requires the direct relationship 	<ul style="list-style-type: none"> ○ Court looks at the restatement of torts and holds that breach of confidence is only one avenue to address the misappropriation of trade secrets – wherever a secret is uncovered through improper means, there is a separate action (Restatement of Torts comment f) ○ <i>Issue</i>: Is aerial photography of a plant under construction an improper means of obtaining another’s trade secret? ○ A secret may be uncovered through reverse-engineering, a process may be used by uncovering the process – however, one may not obtain knowledge of a process without spending time and money to discover it independently ○ Although the flying was not in itself an offense, its use in obtaining the information was improper 	<ul style="list-style-type: none"> ○ One may not obtain knowledge of a process or idea without spending the time and money to discover it independently

Furr’s Inc v. United Specialty Advertising Co. (1960) Texas

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ An advertising scheme had been revealed to the public 	<ul style="list-style-type: none"> ○ A public idea is not a cause of action for a breach of confidence 	<ul style="list-style-type: none"> ○ The use of someone else’s idea is not automatically a violation of the law. It must be something that meets the requirements of a ‘trade secret’ and has been obtained through a breach of confidence in order to entitled the injured party to damages and/or injunction

Uniform Trade Secrets Act

The US has a statutory regime outside the restatement of torts. The UTSA is a legislative model that, for states that adopted the statute, covered the field of misappropriation of trade secrets under US law. The language of the statute is that of acquiring a trade secret through *improper* means or through some breach of confidence.

Review the Act (Pages 319-321) – Very Short Act. 1(2)(b)(ii)-(iii) – deal with obligations of confidence where the defendant had reason to know that an obligation of confidence exists. The key in this area is the acquisition of information by improper means.

DVD Copy Control Association v. Andrew Bunner (2001) Cal CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A Norwegian boy developed decryption software, DeCSS, so that he could play a DVD on his own player ○ The boy published the code for DeCSS, which was disseminated widely throughout the world over the Internet ○ The allegation was that the publication of the code was an infringement of trade secret law ○ Trial judge granted the preliminary injunction 	<ul style="list-style-type: none"> ○ CA reversed the decision on the basis the DeCSS was protected speech, which would tend to override other interests except for obscenity, libel, and fighting words ○ The statutory right to protect its economically valuable trade secret is not an interest that is ‘more fundamental’ than the First Amendment ○ The plaintiff’s were successful under Copyright Law 	<ul style="list-style-type: none"> ○

Criminal Liability in Canada

The Criminal law context, because we saw in R. v. Stewart that you cannot steal information as per the Criminal Code, requires some other action – mischief, trespass, theft, etcetera. However, we do not really have a crime of theft of trade secrets, while the US does under a statutory scheme. Where we do deal criminally with information are through acts of economic espionage – an element of treason and spying for a foreign government is here covered.

An Act Respecting the Security of Information (2001)

Generally speaking, economic espionage deals with spying for the government – taking secrets for the benefit of some foreign entity. In Canada, *An Act Respecting the Security of Information* developed under Bill C-36 deals with economic espionage. More specifically, trade secrets for the benefit of a foreign entity are dealt with. The definition of trade secret provided is generally accepted in international trade regimes and under the US Economic Espionage Act – we will probably see this definition more and more.

The defenses to economic espionage are covered in section 19(3)(1), a trade secret:

- (a) Obtained by independent development or by reason only of reverse engineering; or,
- (b) Acquired in the course of the person’s work and is of such a character that its acquisition amounts to no more than an enhancement of that person’s personal knowledge, skill or expertise

Liability in the US

Federal Economic Espionage Act (1996)

American Economic Espionage allows for the criminal pursuance of individual’s for economic theft.

Similar to what we target in terms of economic espionage, the Americans do deal with the appropriation of a trade secret for the purposes of giving it over to a foreign government. The lesser charge of commercial theft of a trade secret is also covered. The statute, passed in 1996, is the first act providing for criminal sanctions for taking trade secrets. Up until then, the US situation was to deal with the acts under the civil common law.

Because of the sophistication and importance of confidential information within the commercial setting, the US government felt that it was important that they make clear that it would be considered a crime to steal trade secrets.

The US characterizes a trade secret as what we would identify as a sub-species of confidential information.

It is not just that information that is a trade secret, but there is a three-pronged test:

1. It must be information, but you need to be able to show that you have taken reasonable measures to keep it secret;
2. The information itself is valuable because it is secret; and,
3. The owner claiming the secret is the rightful developer – it originated with that person.

American Case Example - CHIP

Facts	Holding
○ Accused was an employee in a company who copied an electronic customer list (database) and used it for himself	○ Under US law this act is a crime ○ Accused sentenced to a term of imprisonment of one year and one day

A criminal sanction such as imprisonment would certainly have a deterring effect. Of course, the criminal elements of a crime would have to be established, but the possibility for incarceration does not exist for the misappropriation of commercial information. Often, these cases arise with respect to computer hacking.

International Trade Considerations

In both NAFTA and the WTO TRIPS accord, trade secrets is part of the range of intellectual property rights. These treaties, by including specific provisions, make it clear that a trade secret is a form of intellectual property. While the agreements themselves do not require that member states treat trade secrets as property.

NAFTA

Article 1711(1) – Each party shall provide the legal means for any person to prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of the person lawfully in control of the information in a manner contrary to honest commercial practices.

It is only where the defendant has taken advantage of knowledge to unfairly compete that the law intervenes.

There is a definition of ‘honest commercial practice’ *Article 1721 Definitions* – practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by other persons who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

Confidential information includes trade secrets, privileged information and other materials exempted from disclosure under the Party’s domestic law.

TRIPS

There is a notion that there is some kind of tortious act. The TRIPS characterization is not that important until it is challenged.

Article 39(2) – Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices.

The model expressed in the treaty covers the sort of things that Anglo-Canadian constructs would cover.

Note: There is a clause in NAFTA where a complainant can choose a forum to proceed under. If the obligations one wants to uphold are clearer under one forum, then the appellant may there go.

Other Torts

Breach of contract is one way of dealing with the disclosure of confidential information. Breach of confidence law is broader than this as it will catch other instances. In the appropriate case one can proceed for breach of fiduciary duty – where the breach of confidence involves a fiduciary. Most of the time, a plaintiff will proceed under every cause of action that is available on the understanding that if one cause of action cannot be met, it will be covered in another. However, the remedies in each of the actions are now more or less the same.

The action for breach of confidence is the broadest of the three. If you cannot show either a contract or a fiduciary relationship, you are precluded from an action based on breach of contract or fiduciary obligations.

What we have been looking at is where the element of an obligation of confidence is somewhat questionable. There might be other torts that may be invoked to deal with where one is worried about the element where it is not clear that the breach of confidence may be invoked. The two tort alternatives are:

1. Civil Conspiracy; and,
2. Intentional Interference with Economic Relations

Conspiracy requires more than one person to conspire and that the plaintiff proves the predominant purpose of the defendant’s action was to cause harm to the plaintiff. Alternatively, the plaintiff must show that the defendant’s actions were unlawful. The defendant must have done something that was against the law and this unlawful act, which was directed towards the plaintiff, caused the plaintiff harm that the defendant’s ought to have known would have caused injury to the plaintiff.

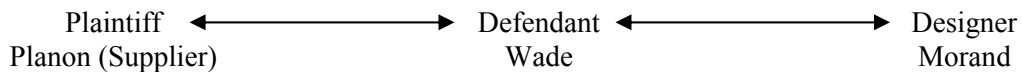
Planon Systems Inc., v. Norman Wade Co. (1998) ON

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The plaintiff and the defendant had a long-standing contract for the supply of filing cabinets ○ Wade was not satisfied with the filing cabinets and recommended that they contract with an engineer to correct the errors (Morand) ○ Wade cancelled the agreement and 	<ul style="list-style-type: none"> ○ The confidential information is that Planon retained Morand and he made the designs – the fact that he was actually hired was the information that the court deems to be confidential ○ The use of the information was having hired Moran after being 	<ul style="list-style-type: none"> ○ An unlawful act may trigger the action for conspiracy ○ For a conspiracy to exist there must be an agreement or an arrangement

subsequently contracted with the third party designer, Morand, to make filing cabinets	dissatisfied with the last version of the filing cabinets	
----------------------------------------------------------------------------------------	-----------------------------------------------------------	--

Paragraph 47: Wade knew that Morand had been engaged by Planon to assist in the designing of Planon’s new system. That knowledge gave Wade reason to know or to infer that Morand had confidential information from Planon which Morand would not be free to disclose to or employ for Wade. By retaining Morand to design the system it required, Wade induced Morand to breach its duty of confidentiality to Planon.

It was almost as though Morand was a spy for Wade in the sense that he was introduced to Planon by Wade for the purposes of designing a particular filing cabinet.



The tort of intentional interference with contractual relations and economic interests requires the plaintiff to prove:

1. An intention to injure the plaintiff;
2. Interference with another’s method of gaining his or her living or business by illegal means; and,
3. Economic loss

Reach MD Inc., v. Pharmaceutical Mfrs Assn of Canada (1999) ON

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff designed Herman calendars that were circulated to doctors as a way of advertising ○ At some point, the PMAC (def) developed a code of ethics prohibiting pharmaceutical companies from using attractive advertising in order to promote their products as a matter of professional conduct ○ One company produced calendars that infringed this code of conduct ○ The person that represented this calendar was also on the board of PMAC and when he received the letter enjoining him from the use of the calendar, he decided to ensure that no others could use the same technique to advertise ○ Impact was devastating as the plaintiff’s business was the productions of such calendars 	<ul style="list-style-type: none"> ○ There was a finding of intentional interference ○ At the time the letter was sent, without authority, which was an illegal act – in a month’s time a legitimate letter was taken with all the relevant authority 	<ul style="list-style-type: none"> ○ Note the three-step test: <ol style="list-style-type: none"> 1. An intention to injure the plaintiff; 2. Interference by illegal means; and, 3. Economic loss.

The Law of Privacy

Privacy issues are very much intertwined with commercial information. However, the emphasis that the law has placed on protecting some aspects of secrecy, there has been a greater inclination to protect commercial secrecy opposed to personal secrecy.

Disclosures to and by the Press

Blackstone (1756): “The liberty of the Press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications.”

We saw that the notion of freedom of the press that Blackstone had enunciated took a different tone in the more modern times as is evidenced in *Schering*:

Shaw LJ in *Schering*: “The law of England is indeed, as Blackstone declared, a law of liberty, but the freedoms it recognizes do not include a license for the mercenary betrayal of business confidences.”

Freedom of the Press and Privacy

As we saw within the context of commercial information, the notion of freedom of the press has certain limitations. The courts, in England, had a very difficult time of transposing the *Schering* principle into personal privacy. The most significant development was largely situated within the United States. In 1890, Samuel Warren reacted strongly against the Press publishing information about his family.

“...the existing law affords a principle form which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possess of any other modern device for rewording or reproducing scenes or sounds.” *Warren and Brandeis* at page 7.

“We have as yet no general remedy for infringement of privacy, the reason given being that on balance it is not in the public interest that there should be.” Lord Denning, *Re X* (1974) CA

The idea in England was that there is no such thing as a right to privacy at common law while the United States law found a reason to protect privacy.

Kaye v. Robertons (1980) Eng CA

Facts	Holding	Ratio
Well known actor is in hospital suffering from a head injury There is a sign on the hospital door requesting that he is not disturbed Reporters from a British tabloid enter his room and take a photo	Should the law protect the plaintiff's interest to stop the publication of the photograph? Other causes of action indicate that there is an implicit protection of privacy in the common law Instant photos have threatened the sacred precincts of life An injunction was granted on the basis of malicious falsehood	There is hesitance in enunciating a clear and decisive protection of personal privacy in founding an action

Why would it be problematic to recognize a right of privacy? It is difficult to set the limits – how do you define the threshold for the right? In England, the thought was that we do not need a specific action of invasion of privacy because we have other substantive areas of law that do deal with the similar

protection – something else will catch the wrong. The standard argument, though, is that privacy cannot be defined and it is too vague and uncertain. The law cannot expand to create new entitlements.

In the U.S., this case spawned a very developed body of law called invasion of privacy. Ultimately, through the various causes of action the common law always recognized that there was something inherently worthy of protection in privacy. Although a court had come out to say it, there was recognition that there could be recourse in relation to privacy. The British view is that you should only look at the categories established and the common law should not develop new categories without precedent and established doctrine. You cannot read into other causes of action anything more than the substance of the original cause. Where does Canada fit in this?

When you do not have the technological means to intrude, you do not need to think about whether the law should step in to protect privacy. It is only when the mechanism exists that you have to think about how far the law has to go in intervening. Is there fundamentally something that infringes upon the right of the person? If you look at the facts of various actions, the interest that the court is targeting is really one of privacy. It is a matter of understanding that the entitlement was always there and because of emerging technologies it may manifest itself in ways that the court had never seen before.

Page 12 – New England Life Insurance

Facts	Holding
A photograph was used without the individual's permission in a newspaper advertisement	The right of privacy is not a property right and does not depend on physical interference, rather it is a personality right that vests with the person as a person The right is part and parcel to the right to freedom and liberty

Under a civil law method, a right of personality is much more deeply entrenched than at common law. This is natural law driven and is part and parcel to fundamental human dignity and right. Tracking it from the civil law makes it easier to say that part of the rights of the person is the right to privacy. This is then looked at through the lens of common law precedent – other substantive actions protect, fundamentally, elements of privacy.

The pivotal expression of what the law is comes from a piece written in 1960 by the Dean of the University of California, Berkeley.

Privacy (1960)

Building from the notion that the law does recognize a right to privacy, we should look at the types of cases decided in relation to specific privacy concern. Four specific torts could be invoked:

1. Intrusion upon the plaintiff's seclusion or solitude or into his/her private affairs (territorial or spatial zone of privacy) – trespass, privacy of the home, nuisance, assault, battery;
2. Public disclosure of embarrassing private facts about the plaintiff (zone of informational privacy) – invasion of privacy. Here there is no intrusion on any particular property interest, the court finds that some concept of privacy would need to be invoked for a remedy;
3. Publicity that places the plaintiff in a false light in the public eye (zone of privacy of the person, zone of informational privacy – defamation); and,
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness (zone of informational privacy, zone of privacy of the person – misappropriation of personality).

There were also developments at other levels of legal discourse that indicate both in the context of international treaties and constitutional principles, Canadians would in principle recognize a right to

privacy. For example, the Universal Declaration of Human Rights Article 12 protects against public intrusion and arbitrary interference with a person’s privacy.

Charter Protection

Privacy is a basic human right recognized in various constitutions. In Canada, privacy is recognized and protected under section 8 of the Charter – right against search and seizure. This Charter right relates to any right of the human being (both physical and non-physical) to be let alone in terms of personal privacy.

There is a constitutional recognition – the notion of privacy is entrenched constitutionally and incorporated into section 8 of our Charter.

R. v. Dyment (1988) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A blood sample was taken from the accused while unconscious after a car accident – for medical purposes ○ The sample was given to the police with Dyment’s permission ○ It was found to have a high alcohol level and he was charged with impaired driving 	<ul style="list-style-type: none"> ○ <i>Issue</i>: Whether the use to which the sample of blood was put in order to charge him was justified ○ Section 8 deals not only with physical interference, but also if authorized not using the sample in a way not already contemplated ○ There are various ‘zones’ of privacy <ol style="list-style-type: none"> 1. Territorial or spatial aspects 2. Invasion of physical space 3. Informational privacy 	<ul style="list-style-type: none"> ○ Charter section 8 includes the appropriation of information and informational privacy as much as it does physical interference ○ Privacy under section 8 transcends physical privacy

To some extent, these zones roughly coincide with the four torts that Prosser has identified. The categories are not sharp and distinct, but they help to identify those cases where you can find some precedent to rest your head on.

Recourses at Common Law

Can we make the same argument as in the US that we in Canada recognize a right to privacy? In the US, it was found that what underlies a number of actions is the right to be let alone.

In Canada, you could make the claim that Canadian common law recognizes a right to privacy. Although our courts are not as comfortable as they were in the US to establish this in a clear and unequivocal way. In Canada, how can you protect information about yourself?

1. Breach of Confidence

Common law recourse was mostly applied in the commercial sector – we don't have a large body of law in the private sector. The case of *Prince Albert v. Strange* was the first case dealing with the breach of confidence. The court held that he could restrict particular etchings of himself from being made public.

Duchess of Argyll v. Duke of Argyll (1965) WLR

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Duchess argues that her information about her marriage should be kept private ○ Duchess and Duke were divorcing, the Duke was interviewed by newspaper and in it she believed he would make statements that were contrary to marital confidences ○ The cause of action was rooted in breach of confidence ○ Defendant argued that breach of confidence law applies to commercial confidences 	<ul style="list-style-type: none"> ○ Breach of confidence applies equally to personal confidences ○ The policy of the law strongly favors the inclusion of personal correspondence 	<ul style="list-style-type: none"> ○ There is an obligation of confidence within personal correspondences so long as the elements for a breach of confidence action can be met ○ Breach of confidence will avail personal information

Stevens v. Avery (1988)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff had disclosed to defendant her sexual orientation and the defendant made it public 	<ul style="list-style-type: none"> ○ Plaintiff is successful – he should never have let the cat out of the bag 	<ul style="list-style-type: none"> ○ Breach of confidence can be used as a tool against breaches of personal confidence

2. Defamation

There is a strong connection between defamation and breach of confidence. The main difficulty with defamation is that you have to assert as the plaintiff that the information stated against you is false. It might be embarrassing – for one reason or another, you don't want people to know it. Nevertheless, defamation is only successful where the information parlayed is false. Particularly, if you are a public figure, you are going to have a much more difficult time within this context because the argument is that you open yourself up to publicity such that the free speech rights or the public's right to know will be much stronger than the right to prevent defamatory publicity about you.

Woodward v. Hutchins (1977) CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Two very well known British singers had public relations officers to manage 	<ul style="list-style-type: none"> ○ The courts are very reticent in defamation cases to grant an injunction – 	<ul style="list-style-type: none"> ○ There should be truth in advertising and so there

<p>their public profile</p> <ul style="list-style-type: none"> ○ These people were paid a salary and were privy to a great deal of sensitive information ○ Hutchins was asked to sign a confidentiality agreement not to make any statement or pass any information concerning the group ○ Hutchins tore up the contract ○ Few years later, Hutchins is released from his employment and approaches a number of newspapers with the ‘dirt’ ○ Jones is appalled by the negative publicity he gets and he proceeds for an injunction on the basis of defamation, breach of confidence, and breach of contract 	<p>if the statements are true, it is a full defense to the defamation action</p> <ul style="list-style-type: none"> ○ If the defendant cannot rebut the presumption that the statement is false, the plaintiff will get an award in damages ○ He who puts himself in the public light should expect publicity, both good and bad ○ The court dismisses, also, the breach of contract action ○ Issue: Could there be a breach of confidence action made out? ○ The court held that this event was public – everyone on the commercial airliner witnessed it ○ The incident on the jumbo jet occurred in the public domain 	<p>should be truth in publicity – the public should not be misled</p>
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If the facts of this case involved the average person, should we not be concerned at all with embarrassment or impact upon the individual? The individual private citizen does not put his or her private life into the public limelight. We will generally take the view that the public’s right to know is paramount – there is nothing you can do to stop them unless you can show that they are defamatory.

The problem with defamation is that it doesn’t cover personal embarrassing statements that have truth to them.

3. Misappropriation of Personality

In the US, this is called the right of publicity. Is there some commercial value in an individual’s ability to exploit his or her own image? In exploiting the image, is another person doing something that we should consider as being wrong?

Krouse v. Chrysler Canada Ltd et al (1973) ON CA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Chrysler developed a campaign to attract the tv audience to buy cars ○ Chrysler took photos of players from the Hamilton Tiger Cats ○ Krouse’s jersey number remained identifiable on the photo ○ Krouse argues that by being identified and associated with the product, the public would think he is endorsing Chrysler – image used to commercial advantage without permission 	<ul style="list-style-type: none"> ○ Issue: Will the law recognize an entitlement? ○ In principle, the common law will recognize the type of tort that is being claimed here – first expression in Canadian law that such a right could exist ○ The claim for misappropriation of personality may be made out, but does not here exist ○ The law will recognize in the right case the tort for misappropriation of personality ○ It is not reasonable to assume that just because the plaintiff is associated with Chrysler that he actually is endorsing Chrysler 	<ul style="list-style-type: none"> ○ The right to misappropriation of personality may exist ○ In order to claim for misappropriation of personality, the plaintiff must prove that some undue damage occurred ○ There is indeed some support on our law for the recognition of a remedy for the appropriation for commercial purposes of another’s likeness, voice or personality ○ In the right sort of case the common law will recognize that where one uses another’s likeness or image for commercial gain, especially where it appears to be an endorsement, the plaintiff may have a cause of action for misappropriation of personality.

The court reviews a number of dangers inherent in the action for misappropriation of personality: The court does not want too many people to bring this action – it shouldn't cause unreasonable disruption to the community at large and the freedom of commerce.

Athans v. Canadian Adventure Camps Ltd (1977) ON HCJ

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A photograph of a well-known water skier was used ○ Athans himself commissioned the photo and it became his trademarked image ○ In preparing promotional material to attract campers, someone made an image of a waterskier and they used as their design of this drawing the trademarked photograph ○ Argues that the waterskier image would be identified by him and he should be able to bring an action because he has worked very hard to develop and maintain a particular image 	<ul style="list-style-type: none"> ○ Does the cause of action meet the criteria for a misappropriation of personality? ○ There is a clear attempt by the plaintiff to market his image/himself ○ The plaintiff was not identified, named, or within the newly created image itself ○ Nobody in the relevant scene would identify Athans within that newly created image ○ There is no direct endorsement or misrepresentation about the involvement of Athans in this camp ○ The use of the image in and of itself is wrongful if used for commercial advantage (p. 52) 	<ul style="list-style-type: none"> ○ The law will recognize and protect a plaintiff in the endorsement cases, or in the right case where the use of the image itself, whether it is in relation to advertising or where the likeness is used for the defendant's commercial advantage ○ The use of likeness can be actionable in the right circumstances

Should a plaintiff, in principle, have a right to control how his or her information is used in the public sector?

In the endorsement cases, part of the concern of the court is the impression that is being given to the public by the defendant that the plaintiff somehow pushes or endorses the product – truth in advertising. The *Athans* decision extends the subject of the tort beyond public confusion and directs that the defendant should not be able to ride on the plaintiff's persona for commercial gain. The essence of the law here is to protect the interest of the plaintiff. We can take from these two cases that the common law will recognize this tort.

If you are going to recognize a right in your persona, should it not die when the individual dies? Should personality rights be extinguished at the time of the individual's death? The following two cases deal with this precise question. In both of these cases, the defendant's are not commercial entities and do not use the likeness for 'commercial' purposes.

Gould Estate v. Stoddart Publishing Co. (1996) ON HC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ 14 years after Gould died, a book was published about him ○ 400 photos were taken by Carroll, the individual who interviewed Gould and later published a book including them ○ Carroll was the photographer, so he 	<ul style="list-style-type: none"> ○ The claim was dismissed by the trial judge ○ You have to divide the cases between 'sales versus subject' ○ 2 Prong Test: <ol style="list-style-type: none"> 1. Leading public to believe that plaintiff has endorsed 	<ul style="list-style-type: none"> ○ Sales: the commercial exploitation of likeness or personality – the use of the image was to promote the sales of the product ○ Subject: the likeness or personality is the actual subject of the product

<ul style="list-style-type: none"> ○ had copyright in the photographs ○ Estate argues that the fact that the photos were published without permission constituted a tort of misappropriation of personality – Gould never would have agreed that the photos be published as part of the book ○ Gould was an intensely private person who guarded his privacy 	<p>defendant’s products or services</p> <ol style="list-style-type: none"> 2. Use of the plaintiff’s image to defendant’s commercial advantage <ul style="list-style-type: none"> ○ Sales constitute commercial exploitation and invoke the tort of appropriation of personality – this is in contrast to situations in which the celebrity is the actual subject of the work or enterprise ○ The estate did have standing because the tort can be transferred to Glenn Gould’s heirs 	<ul style="list-style-type: none"> ○ The tort is limited only to those situations where the plaintiff’s image is exploited in order to actively promote the sales of a product ○ The right of appropriation of personality will pass to the heirs of the individual
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Note: This case was appealed on other grounds. The CA accepts what the trial judge did with respect to misappropriation of personality – the decision was successfully overturned on the copyright issue.

The issue that grows out of the *Gould* case is: where do you draw the line, or how do you deal with particular scenarios? Moreover, should the heirs of the *Gould* estate hold this right in perpetuity? It is problematic to deal with a right in perpetuity – no IP interest runs that long. However, if a duration is ever set (for the purposes of this case) it will unlikely be less than 14 years, which is the time period in this case.

Horton v. Tim Donut Ltd. (1997) ON HC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Tim Horton’s widow did not want posters created by Danby from slides of her late husband to be sold in a fundraising event for the Tim Horton’s children’s foundation ○ The defendant’s use of the image was for the purpose of a fundraising event ○ The commissioning of the portrait was purportedly authorized by TDL, Tim Horton’s former partner ○ The widow is suing TDL 	<ul style="list-style-type: none"> ○ You have to be careful about who you proceed against ○ Regardless of that issue, the court does not think that there is any cause for claiming appropriation of personality in this case ○ The court thinks that this fits under the ‘sales versus subject’ distinction ○ The court does not deal with the issue of standing here – they assume that there is standing ○ The predominant purpose of the portrait is charitable and commemorative – it is neither exploitative nor commercial 	<ul style="list-style-type: none"> ○ There are some categories of cases that will fall outside of the tort – commissioning for charitable, non-commercial purposes will fall outside of the tort ○ The individual who created the painting added his own creative expression to it for a non-commercial purpose

US Right of Publicity (common law)

1. The defendant misappropriated the plaintiff’s name or likeness for the value associated with it and not in an incidental manner or for a newsworthy purpose;
2. The plaintiff can be identified from the publication; and,
3. The defendant derived some advantage or benefit

As Canadian laws develop, we will likely move more and more to define what it is that *Krouse*, *Athans*, *Gould*, and *Horton* are getting at. We will recognize that there are competing interests that need to be

addressed. The tort will be dealt with in a narrow construction – commercial exploitation. The way in which personality rights are manifesting themselves today is the appropriation of people’s names in domain names. Should someone be able to proceed against another who registers a domain name?

An organization has been established to deal with domain name disputes in a cost-effective and speedy way in the international context. The concern expressed related to sending domain name disputes through the court system under trademark law. The international community felt that there should be some redress for cyber-squatting. The response was to set up, through a body called ICANN, an Internet Corporation for Assigning Names and Numbers and established the UDRP, a uniform dispute resolution process. ICANN had jurisdiction for any domain names ending in .com, .org, and .net. There is a lot of controversy about this system. For example, Professor Geist tracked the decisions of these bodies and determined that depending on which of the private corporations you go to you might be more or less likely to favor trademark owners. eResolution and WIPO decisions would differ – it did not seem to be an impartial body for dispute resolution.

McClellan v. SmartCanuk.com (2000) ICANN/UDRP

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ McClellan is a public figure (politician), but not a celebrity in the sense of a performer or athlete ○ McClellan proceeds against the registrants of annemclellan.com and annemclellan.org ○ The website reverted the user to a brief history of the McClellan family name 	<ul style="list-style-type: none"> ○ UDRP sets out principles that should govern the panels rendering the claims, the complainant must prove: <ol style="list-style-type: none"> 1. The domain name is identical or confusingly similar to a trademark 2. The respondent has no legitimate interests in respect of the domain name 3. The domain name has been registered and used in bad faith ○ This policy is seemingly designed for trademark infringement type cases ○ What is ‘bad faith’ 	<ul style="list-style-type: none"> ○ Evidence of bad faith shall include: <ol style="list-style-type: none"> 1. Registering a domain name in order to prevent the owner of a trademark from using the trademark in a corresponding domain name; and, 2. By using the domain name, one has intentionally attempted to attract, for commercial gain, Internet users to the web site or other on-line location

4. Invasion of Privacy?

We have been looking at whether a common law action can be brought before the Canadian courts alleging an invasion of privacy. Up to this point we have seen that the courts have been most comfortable with framing an action so that it corresponds with other recognized actions, such as defamation or breach of confidence. Historically, the English courts and Brandies recognized that the tort of nuisance could be used as a relevant action.

The notion of nuisance has been looked at in the property context and extended in order to meet the action for privacy related claims.

Motherwell v. Motherwell

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Plaintiff proceeded on the basis of nuisance and invasion of privacy ○ Plaintiff’s sister was making 	<ul style="list-style-type: none"> ○ Court added a new category to nuisance, extending it beyond neighbouring rights cases 	<ul style="list-style-type: none"> ○ The common law is willing to broaden traditional concepts so that actions in the invasion of

<p>numerous calls to family members along with letters – both had fairly nasty content</p> <ul style="list-style-type: none"> ○ At one point, a brother-in-laws answering machine was so flooded that he had to change his phone number, the woman found the new number and continued ○ Plaintiff’s argue that this harassment amounts to nuisance as they can no longer peacefully enjoy their property 	<ul style="list-style-type: none"> ○ Nuisance must be a flexible concept ○ Invasion of privacy is a type of nuisance, which should include the invasion here by telephone ○ Although the sister-in-law did not own the property, the court held that there was a close enough nexus between herself and the property that she could exercise a right ○ Do these four areas cover the field for invasion of privacy? 	<p>privacy context can be dealt with</p>
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Saccone v. Orr (1982)

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ The plaintiff wants a remedy for invasion of privacy ○ The defendant recorded a phone conversation that he had with the plaintiff – nothing defamatory, was simply gathering evidence ○ The defendant was able to vindicate himself with the recorded conversation during a public playing ○ Plaintiff claims that he became stressed and lost his job as a result of the tapes being played in public ○ Plaintiff claims he was embarrassed and personally harmed by the disclosure 	<ul style="list-style-type: none"> ○ The court finds a way to give a remedy by first concluding that the plaintiff deserves one – the court needs to find a way to get there ○ A person ought to have the right to make a claim as the result of a taping of a private conversation against his knowledge and the publication of it ○ The plaintiff must be given some sort of right of recovery for what the defendant has done 	<ul style="list-style-type: none"> ○ This case may be made out to state, although indirectly, that there might be something that we may call a tort of invasion of privacy

Aubry v. Duclos (1998) SCC

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ A photo of the plaintiff was taken and published in a magazine ○ Quebec Charter – Article 1053 – Everyone has the right to their private life ○ Plaintiff was embarrassed by the photo’s publication ○ It took 10 years for the case to get to the SCC 	<ul style="list-style-type: none"> ○ Freedom of Expression does not trump all other actions in every situation ○ The photographer should have gotten the woman’s consent – there was no reason for the photographer not to obtain consent ○ The right to privacy is equal to the right to free expression (these are two equally valid rights) ○ A remedy was ordered, but no damages as the plaintiff could not show any integral harm 	<ul style="list-style-type: none"> ○ The respondent’s right to protect her self-image is more important than the defendant’s right to publication without obtaining the permission of the plaintiff

Province of NB was studying whether or not to pass an invasion of privacy scheme and heard the press’s arguments including the aftermath of *Aubry*; [the small art magazine was assisted by other media

organizations because the issue was thought to be of great importance for freedom of expression and the press] the art magazine wound up going bankrupt, partly because of the this litigation

In balancing these interests, does society at large lose more [like this magazine] in exchange for the protection of one individual's feeling embarrassed because her friends laughed at her

In Ontario, we have these separate torts, including misappropriation of personality type claims OR you can cut the debate entirely and legislate like other provinces; see model on p. 107 s. 2 it is a tort actionable without proof of damage for a person wilfully and without claim of right to violate the privacy of another person (auditory or video surveillance whether or not accomplished with trespass, listening to or recording a conversation, use of the name, likeness or voice for the purposes of advertising, promoting or the sale of ...).

Access, Privacy & Law in Canada

Lecture presented by Ken Anderson, Director of Legal Services, Information and Privacy Commissioner of Ontario.

Reinventing Privacy – The author begins with a number of horror stories regarding ‘tracking’. “Smart-dust” – pin-sized sensors that emit information. What are the implications? The products pick up information and transmit it to satellites. The product can be dropped just about anywhere and like technology can be adapted to a number of products through its packaging – consider a transmitter on a coke can and its effects.

What is Privacy?

A starting point may be “The Right to Privacy” authored by US SC Justices Brandeis and Warren published by the Harvard Law Review, vol. 4 (1980).

The article speaks of moving this issue through society. It used to be that in talking life, liberty, and property we were speaking of very specific notions and ideas. However, we have started to say that ‘life’ means the right to enjoy one’s life and ‘property’ includes both tangibles and intangibles. Privacy does not require a huge change in law, but rather through notional changes the law will be sufficiently transformed. Louis Brandeis suggests that, “Privacy is the most comprehensive of all rights ... the right to one’s personality.” Thomas Cooley, a contemporary of Louis Brandeis, suggests that, “Privacy is the right to be let alone.”

Professor Alan Westin’s View of Privacy

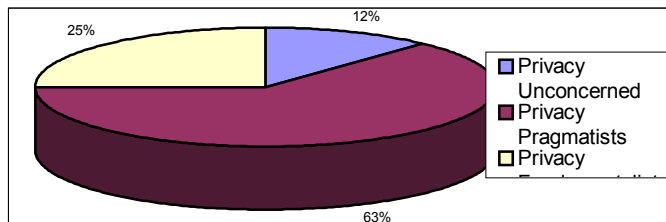
Four States of Privacy	Four Privacy Functions
<ul style="list-style-type: none"> ○ Solitude – absolutely alone ○ Intimacy – with others we feel close in sharing with ○ Anonymity – public figures lose this ability ○ Reserve – the layer of information people may keep to themselves 	<ul style="list-style-type: none"> ○ Personal Autonomy – democracy requires autonomy ○ Emotional Release – safety valve (ie times of sorrow) ○ Self-Evaluation – chance to sit and reflect ○ Limited and Protected Communication – different zones and types of formality (letting our hair down)

Anita Allen’s Four Types of Privacy

Allen is a professor in Philadelphia who takes about four types of privacy

1. Informational – dealing with recorded information and public files
2. Physical – dealing with search and seizure and bodily integrity
3. Decisional – dealing with personal choices and preferences, such as abortion, suicide, gender
4. Proprietary – deals with information such as publicity, control, and property

The public divides on privacy in the following ways:



Those unconcerned with their privacy do not have any inhibitions regarding the release of their personal information. The pragmatists have a concern, but they will release information on a reasonable basis. Those that want strict privacy will hold on to their privacy rights without question.

Constitutional Law, Torts & Codes

There are a number of privacy protections that exist in various declarations, covenants, constitutions, and charters around the world.

For example, although Canada is a signatory to a number of International Declarations, we do not have privacy protections entrenched in our Constitution or in our Charter of Rights and Freedoms. In Europe, on the other hand, people in individual countries have a level of protection that we do not get.

Do people have a reasonable right to an expectation to privacy? What do we make of terrorists? What do we make of an employer who does not think that an employee should have a right to privacy and monitors email? The unreasonable search and seizure provisions of our *Charter* are not catch-alls for the protection of privacy.

Privacy does not trump everything else, it is only an important value in finding the balance.

Privacy, Where do we Draw the Line?

Proponents of privacy have attempted to entrench privacy rights in our Charter of Rights and Freedoms. Privacy has taken on a multitude of dimensions – the right to enjoy private space, be free from surveillance, and have one's body respected. Privacy is fundamental to the concepts of liberty and democracy, yet Canada has no comprehensive legislative framework for the protection of privacy. Canadians must rely on a "patch-work" of privacy protection sources, which lack the ability to deal with emerging technologies. Privacy, in recent times, has become more oriented with economic and commercial interests rather than human rights.

A proposed "Privacy Charter" was submitted to the Senate, which received the provisions fairly positively. Schemes for redress, however, raise a number of significant issues: The Privacy Act should sufficiently handle the issues.

Tort Law

There are a number of privacy legislations in various provinces. Although there is an Act that speaks to the Tort of Privacy, when you come to use the actual legislation (in BC in particular) the action has been very difficult to use.

Jurisdiction	Legislation and Powers
Federal	○ Constitution, Privacy Act (Public), PIPEDA (Private)
Ontario	○ Freedom of Information and Personal Privacy Regimes (Referring only to the Public Sector) ○ PPIA – private sector legislation coming into effect

In the 1960s a number of groups got together in the US and they put out some privacy legislation, which included 'fair information practices'. This way of processing information was brought to Europe where the OECD developed "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980)" including:

- Collection Limitation
- Use Limitation
- Data Quality
- Security Safeguards
- Purpose Specification
- Informational Accuracy

A number of issues were dealt with through the EU Directive, “Member States shall protect the fundamental rights and freedoms of natural persons”

At the same time, a number of Voluntary Privacy Codes had been developed:

Canadian Standards Association Model Code (1996)

CSA working with a number of industry players, in use by the Canadian Medical Association Code and the Canadian Marketing Association Code. The CSA Code included 10 privacy principles:

- Accountability
- Identify Purposes
- Consent
- Limiting Collecting
- Limiting Use, Disclosure, and Retention
- Accuracy
- Safeguards
- Openness
- Individual Access
- Challenging Compliance

Despite these guidelines we have found that we are still under siege!

Privacy Issues and Technology

The notion that we have with technologies is that it can be a friend of privacy. The Ontario office has been a world-leader. The most effective means to counter technology’s erosion of privacy is technology itself. PETS – Privacy Enhancing Technologies can be used to enhance technology through:

1. Data Minimizers;
2. Encryption;
3. Anonymizers; and,
4. Assess Privacy Risks

The issues for us with new technologies are that advertisers can track what it is that we are doing. Privacy includes security. There are more descriptions of privacy disasters through technology. The Privacy Commission believes that technology can be a great benefit on technology.

Privacy Legislation

The statutory regimes that deal with privacy (at every level of government) relate to the specific issue of personal information that is collected by governments. A great deal of identifying information is forwarded to the government in various forms. Every time we engage in a relationship where we are disclosing information to government officials, legislation is in place to protect the way that information is collected, used, and disclosed. The regime that has been set up to make the government accountable involves a number of reinforcing statutes.

Federal Legislation	Provincial Legislation
<ul style="list-style-type: none"> ○ Privacy Act ○ Access to Information Act ○ PIPEDA 	<ul style="list-style-type: none"> ○ Freedom of Information and Protection of Privacy Act ○ Municipal FIPPA ○ PPIA

Privacy Act – seeks to ensure that personal information that is collected by the government is collected in a manner that safeguards the privacy rights of the individual (responsible collection of information).

Access to Information – in a democracy, individuals should have access to government information. An element of the government’s accountability to its citizenry as people should have access to the information held by the government.

Each of these statutes is regulated by the respective privacy commissioners – they ensure that the statutes are being adhered to and through the commission is where the complaints arise.

At the federal level we have the Privacy Commissioner of Canada who investigates complaints and advocates for privacy. Moreover, the Commissioner publishes reports regarding information handling and so forth. The federal Commission is an ombudsman; the Commissioner cannot make orders and stop a practice. The federal Commissioner can only make recommendations that relevant parties may choose to follow or seek recourse through the judicial system.

On the private side, the federal government got together with some players that put together the CSA Code. They put together legislation that would address the European concern – information leaving the country can only leave if it will be protected abroad in the same domestic fashion. PIPEDA was then developed to effect private concerns, but limited to the extent that it occurs through the public sector. The Commissioner’s Annual Report breaks down the types of complaints:

<i>Type of Complaint</i>	<i>Share</i>
○ ISP	4
○ Transportation	12
○ Banks	44
○ Communication and Broadcasting	24
○ Other	6

Legislative Update

Privacy is incredibly complex. There are large forces that are against privacy – commercial interest forces are well-informed and unified.

Federal Privacy Act

2. The purpose of the Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

The Act does not apply to any entity other than a government institution. The Act provides access only to the individual's own personal information. The right of access to someone else's personal information is covered under the *Access to Information Act*.

What constitutes personal information? "Personal information" means information about an identifiable individual that is recorded in any form including a number of particular itemized subjects and identifiers.

4. No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution.

In other words, the government can only collect what is necessary for its own functioning.

6. The government is obliged to ensure that when it does collect information, it is accurate.

There are three separate activities that are targeted by the legislation:

1. Collection;
2. Use; and,
3. Disclosure

Note: 8(2)(m) Personal information may be disclosed 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

There are a number of circumstances under which the institutions are either bound or not bound to disclose. Even where the statute would permit disclosure, these sections (20-28) give the government discretion as to whether or not disclosure should be made in particular circumstances. Thus, it would appear that there is a general rule and then a carve out of limitations. The jurisprudence that follows seeks to find the appropriate balance by managing the access concerns and the privacy concerns.

27. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that is subject to solicitor-client privilege.

Privacy Act v. Privacy Act (2000) FCA

Facts	Holding	Ratio
<ul style="list-style-type: none"> ○ Customs Canada had disclosed information that it collected from an individual ○ The individual was collecting Unemployment Insurance and was supposed to be looking for work in the country ○ Information was exchanged and UI found that the complainant breached his obligation of looking for work 	<ul style="list-style-type: none"> ○ Issue: Could the departments exchange personal information for the purpose of tracking? ○ Is the disclosure of personal information authorized by section 8 of the Privacy Act? ○ 8(2)(b) – personal information shall not be disclosed except in accordance with this section, but may be disclosed where statute authorizes disclosure ○ Customs Act 108 fulfilled the dictates of 8(2)(b) of the Privacy Act, which allowed for the disclosure of personal information that 	<ul style="list-style-type: none"> ○ Where there is a competing legislative instrument authorizing disclosure, then information may be disclosed

	would otherwise be prohibited by the general principles of the Act	
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Access to Information Act

This Act imposes limitations on the public’s rights to access particular information. For instance, an individual cannot request the disclosure of the trade secrets of a third party. If what is being asked for disclosure constitutes a trade secret, the head of the government may refuse to disclose it. It is important to look at the language of the statute.

The two statutes are linked through section 19: Anything that does not constitute personal information under the *Privacy Act* may be disclosed, everything else may not be disclosed.

Dagg v. Canada (Minister of Finance) (1997) SCC

Facts	Holding
<ul style="list-style-type: none"> ○ An individual sought disclosure of shift logs of employees at a particular government department wanting to know how many people in the department were working overtime ○ They wanted to know whether the unionized employees were claiming payment for overtime or whether they were expected to work with proper compensation ○ The information is gathered by the department for ensuring employee safety (main purpose of signing in and out or track work) ○ People seeking information needed the names of the individuals to cross-reference with disbursement records 	<ul style="list-style-type: none"> ○ Issue: Do the names in the logs constitute ‘personal information’ as defined in the Privacy Act?; do the names fall within the exception at 3(j) of the Privacy Act?; and, did the Minister exercise his discretion properly in refusing to disclose the information pursuant to 8(2)(m)(i) of the Privacy Act? ○ Did the logs fall within the section 8(j) exception or was it personal information that could not be disclosed under the Access to Information Act? ○ Neither statute predominates – they are to be given equal weight based on the facts of the particular case ○ The fundamental right of privacy is as important as the right of access and so they must be read together ○ The names of the individuals on the sign-up logs did not fall within the exception as 8(j) – not something that should be disclosed ○ The names were essential because they related to the position of the individual rather than the employee ○ Consider 3(1)(j)(iii) ○ Issue 3 – Discretion – the Minister needed to look at the file and weigh the factors and make a decision, not leave it to the party seeking the information

Ontario Freedom of Information and Protection of Privacy Act – This statute applies only to information held by public institutions. Note, these structures are now being brought into the private sector: PIPEDA.

PIPEDA

The objective of this statute is to control, regulate, and provide safeguards to the collection, use, and disclosure of information that is held by the public sector. The statute has a phase-in period:

- Immediately – Federally incorporated private business
- January 1, 2003 – People who collect personal health information
- January 1, 2004 – Every commercial enterprise that operates within Canada

The Privacy Principles are espoused in Schedule I of the statute – Principles set out in the National Standard of Canada entitled Model Code for the Protection of Personal Information, CAN/CSA-Q830-96

- Accountability
- Identify Purposes
- Consent
- Limiting Collecting
- Limiting Use, Disclosure, and Retention
- Accuracy
- Safeguards
- Openness
- Individual Access
- Challenging Compliance

Provincial Legislation

In Ontario, the Commissioner cannot make final binding orders, but does have a wide capacity for mediation. This commission is better able to give people redress as privacy issues arise. Ontario has three pieces of legislation: Public sector protection through *Freedom of Information and Personal Privacy Act* (FIPPA) followed three years later by *Municipal FIPPA*; and, private sector protection through the *Personal Protection of Information Act* (PPIA); there is a segment of society where privacy is not protected – the private companies that are operating day-to-day around us.

There has been a lot of consultation regarding Ontario's Draft *Privacy of Personal Information Act, 2002*. The Bill, however, is very complex, inconsistent, long, and filled with redundancy. The Bill applies to all private sector businesses as well as health care providers. The purpose of the Bill is to protect the individual's privacy and govern organizational activity.