

## Confidential Information and Privacy-Related Law in Canada and in International Instruments

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### INTRODUCTION

With rapid changes in technology and communications spurring globalization and the increasing value of information, any demonstrated international consensus around issues central to these changes cannot be independent of power struggles and coercion between nations and multinationals. The history of international-intellectual property instruments illustrates shifting international views on technology and communication as globalization has evolved and the value of information in the new world economy has become evident.<sup>1</sup> This shift has occurred simultaneously with the realization of a borderless communication world and virtual communities. More and more individuals in every society find themselves involved with intellectual-property interests that in the industrial age were in the purview of and preoccupied relatively few.

As intellectual property becomes more democratized in its reach and impact through the new technology and new mass media, its increasing diffusion brings it more frequently into the realm of other interests and values that are the subject of international attention, including privacy, education, and access to information.<sup>2</sup> The novelty and increasing frequency of these intersections should give nations pause before they pursue single-mindedly intellectual-property strategies that proved useful in the industrial era.<sup>3</sup> Where intellectual-property policies have been developed in virtual isolation from consideration of intersections with other areas of law and where

countries have bound themselves to such policies before recognizing or evaluating these intersections, it would seem prudent to put off implementation of undertakings given in the intellectual-property sphere.<sup>4</sup> This chapter will explore these themes with a particular focus on the emerging area, claimed as intellectual property in international instruments, of confidential information. It will explore the intersection between this putative form of intellectual property and the development of personal-data protection (which is a reaction to increased concern over privacy values).

#### CONFIDENTIAL INFORMATION AS INTELLECTUAL PROPERTY

The term “intellectual property” was not known when the earliest intellectual-property devices came into the law.<sup>5</sup> Trademark, arguably the earliest of the devices, has its antecedents in antiquity, in the craftsmen’s mark. Patent and copyright, however, arise directly from the industrial and print revolutions.<sup>6</sup> These three categories form the most widely recognized triumvirate in intellectual property – but they were more frequently separated in the nineteenth century than they are in the popular mind today. Trademark and patent were recognized as “industrial property,” whereas copyright was generally considered on its own.

Patent and copyright were the result of a relatively long line of social, and hence legal, experimentation with attempts to intervene and control various markets.<sup>7</sup> Patent was an exception to a general prohibition against national monopolies: it was recognized that the investments in technology required to advance an industry in the industrial age merited a guarantee of reward.<sup>8</sup> Copyright was also developed as an incentive to the industrial middleman to invest in the technology necessary to compete in the age of the press.<sup>9</sup> Trademark, on the other hand, appears to have developed more or less as a very early form of consumer protection law.<sup>10</sup> But over the years all three have had in common a public interest aspect that continues to distinguish them from other forms of property interest.<sup>11</sup> For example, in patent the Supreme Court of Canada has twice recently reiterated that two of the central objectives of the *Patent Act* are “to advance research and development and to encourage broader economic activity.”<sup>12</sup> Justice Binnie has been explicit about this process: “Having disclosed to the public the secrets of how to make

or use the invention, the inventor can prevent unauthorized people for a limited time from taking a “free ride” in exploiting the information thus disclosed. At the same time, persons skilled in the art of the patent are helped to further advance the frontiers of knowledge by standing on the shoulders of those who have gone before.”<sup>13</sup>

Both patent and copyright are limited-term monopolies, after which the inventions and works to which they pertain enter into the normal competitive marketplace. In patent, the information about the invention is required to be published immediately, to advance the state of knowledge in the area of the invention, even though the right to manufacture, sell, use, and distribute the invention is held in the monopoly for a period of years. In copyright, the ideas and facts that are contained in an expression circulate freely in society throughout the period of the copyright monopoly: only certain uses of the expression of those ideas and facts are limited to the monopoly holder. Of course, not being held in a monopoly does not necessarily mean that it will be possible to access the information for free, but rather it opens up the market to other suppliers of the same expression, which is “an opportunity to produce new editions at a cheaper price and hence with wider circulation.”<sup>14</sup> Making expressions available to the public actually occurs more through depository schemes,<sup>15</sup> through access legislation, and through such mechanisms as Canadian content regulations in broadcasting, than through the presence or absence of copyright protection. But certain uses of a copyrighted work have not been traditionally included in copyright and are thus always available to the public if the work is available in any form – for example, reading a literary work. In trademark, the entire value of the mark rests with the public’s recognition of it and association of it with particular goods: if the mark is unrecognized or no longer associated in the public eye with particular goods, then the mark cannot be defended by its owner against any other user.

What, on the other hand, is the public interest in the protection of confidential information? If no public interest can be identified, then what is the theoretical or philosophical link that binds its protection to the other types of intellectual property? One might point to the fact that works, inventions, marks, and secrets are all products of the mind, of the intellect. In this respect, confidential information finds itself perhaps more closely bound to the ideas and facts that are not the subject of copyright than to the expressions that are so subject.

And the subject matter of confidential information may find itself more often identified with the disclosed information about a patentable invention than with any other aspects of the device of the patent. Furthermore, in defining itself as a product of the mind, confidential information allies itself with many areas of information law that are not defined as intellectual property, such as privacy, libel, and so on. The Supreme Court has clearly shied away from characterizing the protection of confidential information as related to property,<sup>16</sup> because “the action is rooted in the relationship of confidence rather than the legal characteristics of the information confided.”<sup>17</sup> Without a clear philosophical underpinning, Canada may wish to be somewhat cautious about binding international commitments to such an “intellectual-property” device.

Canada might wish to be even more cautious when the device of confidential-information protection has only a comparatively short history in domestic law.<sup>18</sup> Canada's first clear recognition of confidential-information protection was in 1989<sup>19</sup> – and the Supreme Court did not take the immediate opportunity to pronounce the existence of a cause of action in this regard: it did so only when no other new or old device presented itself.<sup>20</sup> Since 1989, Canadian courts will recompense the confider for a breach

- 1 if the subject matter was secret or non-public – and then only –
- 2 if transmitted in circumstances of confidentiality – and then only –
- 3 if the information would save the confidante time, energy, and expense and is used in an unauthorized fashion to the detriment of the confider.<sup>21</sup>

The current Canadian “device” for protection of confidential information has at least three challenges that set it apart from the traditional intellectual-property devices developed in the past: it is a product of judicial decision rather than legislative action<sup>22</sup> and thus at this point cannot be reviewed under the Canadian Charter of Rights and Freedoms;<sup>23</sup> it is an unbounded monopoly that, if the conditions of confidentiality are maintained, can last forever (unlike patent or copyright); and it would appear to have no element of public interest, other than indirectly in terms of the arguable general public interest in the success of the national economy (including the national economy's interaction with the success of multinational and foreign businesses).

CANADA IN THE INTERNATIONAL  
INTELLECTUAL PROPERTY ENVIRONMENT  
FOR CONFIDENTIAL INFORMATION

*The Paris Convention*

The Paris Convention for the Protection of Industrial Property was signed in 1883 and came into force in 1884. It initiated the international intellectual property norm of the principle of national treatment. This principle requires that each member state guarantee to the nationals of other member states treatment in law no less favourable than is accorded the state's own nationals.<sup>24</sup> The convention created a platform of guaranteed minimum standards for patent and trademark protection that each member country would provide and, through it, its members formed the Paris Union.<sup>25</sup> As the Union met from time to time over the succeeding hundred years, new agreements were reached and came into force when a sufficient number of member states ratified them. However, it was not necessary for every member state to ratify later instruments in order to continue as members of the Union. Even in the most recent version of the Paris Convention, there remains language permitting states fairly wide latitude in tailoring patent and trademark protection.<sup>26</sup>

Canada originally acceded to the Paris Convention as a dominion of Britain, which was an original signatory. When Canada began to act as a nation internationally it continued participation in the Paris Union,<sup>27</sup> becoming a party in its own right in 1925. Before entering into the trade commitments that required full adherence to the latest version in the mid-1990s, Canada had adhered only to the administrative, but not to the substantive, provisions of the latest 1967 Stockholm version of the convention.<sup>28</sup>

As the empires of the original architects of the Paris Union unravelled, the texture of the Union changed.<sup>29</sup> Originally, it had had an instant global span precisely because the European powers were able to include their colonies in its scope.<sup>30</sup> This created an effective global economic environment – one of the earliest large, multilateral, and effective ones.<sup>31</sup> As the colonies became fully independent and chose to become members of the Union in their own right, the dominant economic interests of the Union, which operated democratically, began to shift – much of the enlarged membership consisted of economically underdeveloped nations.

The chief point about this consensual environment for international cooperation in the protection of industrial property is, however, that, throughout its history from colonial to post-colonial, protection of confidential information has had no real place in it. The only consensus that ever developed over the century following the creation of the Paris Union related to protection of confidential information was a provision for protection against unfair competition.<sup>32</sup>

### *In the United Nations*

After the Second World War, international instruments of the newly formed United Nations were drafted to include references to the intellectual-property devices represented by the much older international intellectual-property bodies, including the Paris Union, and these United Nations documents reflected both perspectives inherent in traditional intellectual property: the reward for authors and creators but also access to information and innovation for society. Such references occur not only in the International Covenant on Economic, Social and Cultural Rights,<sup>33</sup> where they might be expected, but also in the Universal Declaration of Human Rights, which states:

- 1 Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in the scientific advancement and its benefits.
- 2 Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>34</sup>

Eventually, in 1970 the Paris Union and copyright's Berne Union formed the World Intellectual Property Organization (WIPO),<sup>35</sup> which was formally integrated into the United Nations system (where it remains today).<sup>36</sup> At this point in the 1970s, however, there was no international instrument that specifically addressed confidential information.

### *In International Trade Law*

By the end of the 1980s the economically powerful members of the Unions, now joined on all fronts by the United States, which had formerly boycotted the Berne Union,<sup>37</sup> chafed under the consensual

environment of WIPO.<sup>38</sup> As Ronald Bettig points out, “[t]he global proliferation of communications technologies and the expansion of the realm of intellectual property is a process that clearly benefits the advanced economies of the United States, Europe and Japan.”<sup>39</sup> When the opportunity arose, encouraged and abetted by increasingly globalized multinational corporations, especially in the pharmaceutical sector,<sup>40</sup> these leading states shifted the conversation about intellectual property away from WIPO and into the modern trade environment.

The Uruguay Round of multilateral trade negotiations, launched in 1986 by the contracting parties of the General Agreement on Tariffs and Trade,<sup>41</sup> included a mandate to negotiate in the area of intellectual property.<sup>42</sup> The Uruguay Round was concluded in 1994 with the creation of the World Trade Organization (WTO) and the inclusion of intellectual property in its mandate through the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This agreement, which forms part of the WTO Agreement, contains provisions protecting undisclosed information, particularly secret information with commercial value and data submitted for the purpose of regulatory or marketing approval. This development will be reviewed below.

The strategy of the industrialized nations in moving the international coordination of intellectual-property protection from the consensual environment of WIPO to the trade negotiation environment in the WTO initially proved very successful.<sup>43</sup> Although various issues of disagreement between the industrialized nations that had become apparent during negotiation largely remained unresolved when TRIPS emerged, the overall approach of the developed nations prevailed, and “the developing countries’ proposal was all but forgotten.”<sup>44</sup> Throughout this period, Canada’s domestic intellectual-property policy reflected the pressure of the United States as it drove forward to strengthen international intellectual-property protections in order to protect its exports:<sup>45</sup> “the main impetus for change in Canada has come ultimately from U.S. corporate and political forces seeking to strengthen IP protection at the expense of IP dissemination ... Canada initially resisted such pressures but then ultimately adopted them as being in the *national interest* [emphasis added] in the new innovation age.”<sup>46</sup> In every area of intellectual-property policy-making, “by the late 1990s the federal government, in response to pressure and arguments from its industry and trade departments, was gradually adopting the view that the global agenda was in Canada’s interests”<sup>47</sup>

While in the areas of patent and copyright, TRIPS<sup>48</sup> drew on over a century of global experience, cooperating internationally to harmonize domestic intellectual-property devices by using the texts of the Paris and Berne Conventions as the threshold for patent protection and copyright protection, respectively, in the new trade environment, the international parameters of confidential-information protection were laid out for the first time in the coercive conditions of trade negotiations.<sup>49</sup> Through its inclusion in TRIPS,<sup>50</sup> confidential information has become classed for the first time as intellectual property (whereas Canada's Supreme Court has declined to declare it to be such.)<sup>51</sup>

Article 39 of TRIPS provides that

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 business practices,<sup>52</sup> so long as such information:

- a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within circles that normally deal with the kind of information in question;
- b) has commercial value because it is secret; and
- c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Article 39(3) provides that "Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use."

#### THE CLASH OF CONFIDENTIAL INFORMATION WITH PERSONAL-DATA PROTECTION

Meanwhile, just as WIPO emerged and the move toward intellectual-property protection through international trade instruments got



under way, another area of law was emerging as a response to the developing information economy and information society: personal-data protection.<sup>53</sup> By the late 1970s challenges were being recognized in the looming results of computerization – and, particularly in Europe, there was starting to be a nascent movement toward implementation of “data privacy” legislation. The value of “privacy” had been recognized and included in public international instruments that were created following the Second World War.<sup>54</sup> But international consensus about how to operationalize “privacy” was not necessary, since none of these instruments<sup>55</sup> were concerned about actually integrating information systems between nation-states or about actually guiding information flows that inevitably occur with the development of multinationals spanning jurisdictions. European countries began to seek domestic legislative implementation of privacy values in the face of the emerging data aggregation possibilities that occurred with increasing memory capacity, processing speed, and the ubiquity of computers. In less information-rich quarters than Europe, a concern emerged in reaction to the developing notions of data privacy that enclosing information within nation states through “privacy” restrictions would doom information-poor countries to even less opportunity relative to information-rich countries in the emerging “computer age,” and that portability of data between states was very important to ensuring that all nations could participate in the anticipated information economy.<sup>56</sup>

The resulting compromise between these two reactions to emerging telecommunications and computer globalization occurred in the Organization for Economic Cooperation and Development (of which Canada has been a member since its inception in 1960). The OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data were published in 1981<sup>57</sup> and were intended to achieve two purposes: (1) to protect personal information<sup>58</sup> and (2) to ensure the free flow of data between countries.<sup>59</sup> Over time, and with familiarity, the second of these two purposes has been routinely overlooked and forgotten.<sup>60</sup> However, it is important to recall the dual nature of the purposes the OECD Guidelines were developed to serve, if only because the connection of the OECD Guidelines to privacy is convoluted.<sup>61</sup>

The OECD Guidelines were developed through consultation and are voluntarily adopted: not surprisingly, the guidelines do not dictate to states what information they may seek from their inhabitants.

Their tenets are relevant only if a state or organization has decided to seek information from an individual.<sup>62</sup> What is clear is that the guidelines are intended to give an individual who is a data subject controls on the use of information when the information identifiably pertains to her or him and the information is in the hands of either public or private sector organizations.<sup>63</sup> Organizations that fall under personal-data protection regimes are required to adhere to the dictates of national legislation implementing the OECD Guidelines so long as the information they hold continues to be identified with an individual.<sup>64</sup> This responsibility arises and continues whether or not the individual subject is even aware either of the information's existence within that organization or of the contents of that information. Moreover, in all Canadian jurisdictions, this responsibility continues for a number of years after the death of the subject individual.<sup>65</sup> The guidelines' eight principles<sup>66</sup> relate to the *collection* of personally identifiable information (not *whether* it can be collected but *how* it is to be collected and *from whom*), the organization's *use* of such information, the *dissemination* of such information, the *retention* of the information, and the *disposal* of the information:<sup>67</sup> legislation flowing from the guidelines will control the entire life cycle of a record containing personally identifiable information while in the hands of an organization.

Since confidential-information law is intended to protect *any* information held in confidence by organizations and since personal-data protection legislation gives individuals control over information about themselves held by organizations,<sup>68</sup> there is inherent potential for conflict, or at least overlap, between these two legal developments.

#### COMPARING THE LEVELS OF INTERNATIONAL CONSENSUS SURROUNDING PERSONAL-DATA PROTECTION WITH THE INTERNATIONAL COERCIVE ENVIRONMENT IN CONFIDENTIAL INFORMATION

While the WTO has a current membership of 153 states, the OECD has a current membership of only 30 and while the WTO is a trade initiative with mandatory dispute settlement and sanctions available, the OECD has neither of these enforcement mechanisms. On the face of it, why would any country pursue personal-data protection in line with the OECD Guidelines with any vigour?

Two reasons may explain the rapid spread of personal data protection in Canadian law. First, it is largely for domestic political reasons that access to government-held information legislation was initiated across the country – and it was expedient and perhaps inevitable that personal-data protection legislation, also for the public sector, became linked with access legislation.<sup>69</sup> Second, the European Union was still the dominant force in the realm of privacy in the world, and it developed a directive that was worded to convey an extraterritorial effect.<sup>70</sup>

In the result, Canada has responded fully to its obligations under the OECD Guidelines, albeit in the private sector largely spurred on by the European Data Directive.<sup>71</sup> The United States, on the other hand, has largely ignored the personal-data protection initiative – dodging it entirely for the private sector.<sup>72</sup> And, indeed, recent legal developments in the United States such as the *Patriot Act*<sup>73</sup> have undermined any possibility of personal-data protection in the private sector such as is legislated in Canada. Clear evidence of the incompatibility between the current Canadian and American environments in this respect is the decision of the government of British Columbia to forbid personal-data processing by any of its provincial or any municipal government bodies through any agency or operation in the United States.<sup>74</sup>

IS THERE EVIDENCE THAT CANADA'S  
BETTER INTERESTS LIE IN AVOIDING  
FULL IMPLEMENTATION OF ITS  
INTERNATIONAL OBLIGATIONS?

*The Supreme Court in H.J. Heinz Co. of Canada Ltd.  
v. Canada (Attorney General)*

Canada's domestic experience with the parallel existence of both confidential-information protection and personal-data protection in the private sector is less than a decade old. Already there are challenges within this experience. Two examples will be discussed as illustration. The first is the 2006 decision of the Supreme Court of Canada in *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*<sup>75</sup> involving the subtle interplay of protection of confidential information with personal-data protection in the context of the federal access legislation. The second is Canada's evolving environment for innovation in the health sector.

The majority of the Supreme Court in *Heinz* appears to have intended a triumph for privacy interests.<sup>76</sup> Instead, the key result of the case appears to be that an individual's right under legislation involving personal-data protection can be exercised by a corporation without the individual's knowledge. This result seems to run counter to the very structure of personal-data protection and access legislation as they have developed across the country: personal-data protections are drafted into the statutes as rights of "individuals" – carefully distinguished from legal "persons" in order to exclude corporate "persons." Corporations and companies, such as Heinz in this case ("artificial persons"), are classed as "third parties" in these statutes (with their own exemptions and protections related to protection of confidential information), not as "individuals" directly entitled to personal-data protection. In the *Heinz* case, there were no individuals involved in the proceedings, even though much of the dialogue in the judgments was about the rights of individuals. Heinz sought to require the Canadian Food Inspection Agency, the government agency subject to the *Access to Information Act* that was holding the information subject to an access request, to withhold documents under the "privacy" exemption normally reserved for individuals.

Heinz had been notified of the request for access by the agency because of its possible interest in parts of the same information as a "third party." As a potential "third party" under the legislation, it was appropriate that Heinz be notified, in order that it could decide whether or not to make representations about why certain of the information, in which it could claim a "third-party exemption," should not be released by the agency to the requestor. The majority of the Supreme Court noted that legislators in personal-data protection statutes have contemplated and provided for situations in which the *individuals* involved consent to release of information about themselves – since the individuals who were the subjects of the information in question were unaware of the proceedings, they did not have that opportunity. The majority worried that under the federal legislation, absent involvement in the ongoing proceedings by the individuals who were the subjects of the information, the federal information and privacy commissioners lacked power to take direct action to stop the release of the personal information. The Court's decision did stop the release of personal data – but neither directly through objection of the individuals nor through the actions of the information commissioner but rather indirectly through the objection of the third-party corporation, Heinz.

It does not seem appropriate for the Court to have so empowered third-party organizations, albeit on behalf of individuals, when the Court itself identified the administration of the act, as legislated, as inadequate. The majority convinced itself that the “*Access Act* and the *Privacy Act* must be read together, with special emphasis given to the *protection* of personal information.” A better interpretation of the legislative intent in these statutes is that they were intended to balance access to government information with *control* over personal information, *by the individuals affected*, in both public and private sector settings: protection and control are different concepts. The minority<sup>77</sup> noted the power imbalance that has occurred with this decision: companies have control over personal-data disclosure that even the individuals involved lack. The majority, in the name of protection, wrested some control of personal information away from individuals, back into the hands of corporations.

While the result in the *Heinz* case, which gives control over the disposition of personal data held by one organization to another, outside organization, is inconsistent with the intent of the OECD Guidelines and might eventually create problems with European data exporters because of the European Data Directive, it appears completely consistent with Canada’s trade obligations with respect to confidential information. If Parliament steps in to “fix” this interpretation of the Supreme Court and reasserts the control of the individual over personal data, such a legislative intervention is bound to highlight the tension in the area of government-held information between the access and personal-data protection regimes and the protection of confidential information that is represented by the “third-party” provisions in this legislation – legislation that probably is not entirely consistent with Canada’s obligations under the TRIPS Agreement.

### *Medical Innovation*

A second looming problem area for Canada in terms of reconciling personal-data protection and confidential-information protection is in the health arena. Although personal-data protection in the public sector in many jurisdictions across Canada has gradually affected more and more Canadian health-related organizations over the past quarter century, the coming into force in January 2004 of all of the federal *Personal Information Protection and Electronic Documents*

*Act (PIPEDA)*, intended to encompass, among other sectors, virtually all commercial activities in the health environment, has brought the challenges in the health sector into stark relief. Taken together, the various pieces of personal-data protection legislation now in place affecting health are intended to give patients full access and control over any data held about them in any medical environment. This is consistent with the OECD Guidelines.

On the other hand, the medical establishments in four provinces have succeeded in persuading their legislatures to pass separate, sectoral legislation for health (combining private and public sector personal-data protection into one single act for the health sector).<sup>78</sup> In order to have the federal Cabinet suspend the operation of *PIPEDA* in respect of health organizations involved in commercial activities now to be encompassed in the provincial sectoral health enactments, these provinces would like to have their legislation deemed equivalent to *PIPEDA*.<sup>79</sup> However, this has occurred in only one province – Ontario.<sup>80</sup> The fact that the legislation in the others has not been deemed equivalent is strong evidence that these enactments are inconsistent with the federal government initiative in *PIPEDA*, as well as with the OECD Guidelines. Indeed, even in the case of Ontario, the provincial health enactments privilege, to a great extent, the traditional power of physicians and medical experts over the patient's judgment about his or her own data.<sup>81</sup> But even if all this personal health data protection legislation met the OECD Guidelines, there would still appear to be an unavoidable conflict between the patient's right to control information in this environment, as demanded by personal-data protection, and the right of entities to control confidential information in this environment.

Canada's Food and Drug Administration, through the Notice of Compliance (NOC) process,<sup>82</sup> is responsible for "approving the marketing of pharmaceutical ... products which utilize new chemical entities," to use the language of TRIPS article 39(3), quoted above, and requires "submission of undisclosed test or other data, the origination of which involves a considerable effort" (i.e., clinical trials)<sup>83</sup> – and so Canada is obliged to "protect such data against unfair commercial use ... [and] against disclosure." The only permitted exceptions to these obligations are "where necessary to protect the public" or where "steps are taken to ensure that the data are protected against unfair commercial use." There is no permitted exception under TRIPS for meeting the personal-data control rights of individual patients in such trials.

The regulation of clinical trials in Canada is currently controlled in large measure through the administrative processes of ethics boards, many of which are situated in universities.<sup>84</sup> These boards currently operate through panels (none of which are required to be composed, in part or in full, by lawyers providing legal advice) making decisions under institutional ethics policies whose drafting has been guided by the Tri-Council Policy Statement: Ethical Conduct in Research Involving Humans,<sup>85</sup> created by Canada's three large federal funding bodies (the Canadian Institutes of Health Research (CIHR), the National Science and Engineering Research Council (NSERC), and the Social Sciences and Humanities Research Council (SSHRC)).<sup>86</sup> It should be noted that the enabling legislation for the CIHR actually includes commercialization in its mandate: "encouraging innovation, facilitating the commercialization of health research in Canada and promoting economic development through health research in Canada."<sup>87</sup> The Tri-Council Policy has been heavily influenced by guidelines prevalent in the medical research environment of the United States, a feature considered very important by the Canadian agencies because of the number of cross-border drug trials that occur.<sup>88</sup> The authority of this policy flows from the fact that funding from the three lead federal agencies will not be made available for research if the mandated ethics processes are not met.<sup>89</sup>

The current content of these ethics guidelines does not reflect the new realities of the ubiquity of personal-data protection legislation in Canada today and the range of institutions that can be involved in any particular health study<sup>90</sup> – although it would appear that they must inevitably come to reflect this new legal reality.<sup>91</sup> It seems difficult to envisage how, if patient subjects have the access and control to which they are entitled under personal-data protection regimes,<sup>92</sup> these trials will be able to be conducted in a way that maintains the confidentiality demanded in TRIPS article 29(3).

## CONCLUSION

Canada has a number of international obligations that arise from two different impulses in information law: control of secrets by commercial entities and control of any information about individuals by those individuals themselves. Inevitably there are conflicts between the two. The international instruments involving each have arisen from different sectors entirely within the international community:



one, within the past quarter century, from the consensual but small OECD; the other, despite its rhetoric of a long and inevitable history, only just over a decade ago in the huge, coercive environment of the WTO. Currently, Canada has entered into specific international obligations in respect of each – and relatively recently has put law in place in respect of each.

Canada's short experience in each of these areas of law is revealing practical challenges in respect of the other area. In personal-data protection, the Supreme Court of Canada has given the right to exercise the censoring of information about identifiable individuals to corporations whose primary objective is the protection of third-party confidential information – and not to the individuals who are the subject of the information, as required by the OECD Guidelines to which Canada is signatory. At the same time, an attempt to legislate in order to overcome the Supreme Court's decision in the *Heinz* case may highlight the potential conflict between confidential-information protection, which Canada must protect pursuant to both TRIPS and NAFTA, and personal-data protection, particularly in the context of government-held information.<sup>93</sup> In health, any personal-data protection regime that is actually going to be in compliance with Canada's international obligations under the OECD Guidelines has not only to overcome the power of the medical establishment but also, it seems, to ignore Canada's obligations in TRIPS article 39(3). In an environment where health issues are a major source of international discontent with TRIPS, where costs associated with health care are an increasing and major burden for Canada, and where health information is increasingly important at the level of the individual, both as a subject and as a user, it would seem unwise for Canada to develop information policy in this sector merely as a reaction to international commitments made a few years ago and increasingly being demonstrated to be in conflict with one another.

Thus, in these and other respects,<sup>94</sup> both the Canadian legal environment for protection of confidential information and that for personal-data protection probably fall short of Canada's international obligations. Indeed, it appears impossible for Canada to simultaneously fulfill both sets of obligations fully. Given this impossibility and given the multiplicity of complex information relationships involved in these areas (including perspectives, such as access, that are not part of either system but are protected in Canada's Constitution), it would seem very wise for Canada to develop policy



in the light of its own understanding of its own information environment and needs, quite apart from reference to any obligations currently in place, and, eventually, to implement only law that has been fully and dispassionately analyzed from Canada's own perspective. Once Canada has developed its own internally consistent and domestically effective policy, it can then use that experience in the appropriate international forums to try to assist in the elimination of conflicts between international information-related (including intellectual-property) instruments.

## NOTES

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- 1 See G.B. Doern & M. Sharaput, *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests* (Toronto: University of Toronto Press 2000) at 99, observing: "The Canadian Intellectual Property Office and the Commissioner of Patents and Registrar of Trademarks have emerged in the 1990s from almost total obscurity as a technical operating agency [within government] to an agency now recognized as being very important to Canada's capacity to be both innovative and internationally competitive."
- 2 The *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3, 28 I.L.M. 1448 (entered into force 2 September 1990), for example, contains far-reaching and comprehensive provisions for rights to information for children. See M.A. Wilkinson & L.E.F. McKechnie, "Implementing the Information Rights of Canadian Children" (2002) 20 Can. Family L.Q. 429.
- 3 I have introduced this theme in an earlier paper where I challenge the notion of the "public domain" as a useful concept in the current environment. Long associated with copyright, in particular, I argue that its close semantic association with notions of property and its implied binary approach ("public/private") is perhaps a rhetoric that actually detracts from the kinds of multi-dimensional approaches needed to situate intellectual-property policy at both the national and the international levels within the whole arena of global information policy analysis. See M.A. Wilkinson, "National Treatment, National Interest and the Public Domain" (2003-4) 1(1&2) Univ. Ottawa L. & Tech. J. 23.

- 4 Particularly when many of these obligations were undertaken during a period when, as Bruce Doern and Markus Sharaput ultimately conclude *supra* note 1 at xii, that “[i]n an overall sense, Canada has become more of a policy-taker than a policy-maker on matters of IP.”
- 5 And it should be noted that the concept as defined in the *Convention Establishing the World Intellectual Property Organization*, s. 2 (viii), does not include confidential information per se. Instead, the term “intellectual property” is defined as including the rights relating to “literary, artistic and scientific works,” “performances of performing artists, phonograms, and broadcasts,” “inventions in all fields of human endeavour,” “scientific discoveries,” “industrial designs,” “trademarks, service marks, and commercial names and designations,” “protection against unfair competition,” and “all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”
- 6 Ronald Bettig traces the roots of copyright back to the Roman publishing system but points to the advent of the printing press in 1450 CE as the genesis of the role of copyright in the European context. See R.V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press 1996) at 11 and 16. The earliest-known patent legislation, the *Venetian Patent Act of 1474*, also dates from the fifteenth century – also very early in the industrial revolution in Europe.
- 7 Between 1484 and 1533 in England, a statute (1 Rich. III, c. 9) that otherwise regulated and restricted foreign businesses in England, contained an exemption for printing and bookselling. This was replaced in 1538 by the first of a number of attempts to protect and encourage the indigenous English trade by licensing (Steele, Procl. No. 176 (Henry VIII, November 16, 1538)). See further L.R. Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press 1968).
- 8 *Statute of Monopolies*, 1624. This law replaced the earlier prerogative of the monarch to grant exclusive privileges under “letters patent [or open, rather than sealed]” and, for most fields of coverage, prohibited the creation of monopolies. In the area of patent, however, it continued the possibility of monopoly, but under the statute rather than through the Crown.
- 9 *Statute of Anne*, (1709) 8 Anne c. 19.
- 10 In *United Artists Pictures Inc. v. Pink Panther Beauty Corp.*, [1998] 3 F.C. 534, 225 N.R. 82, leave to appeal allowed (1998), 235 N.R. 399 (note), but appeal discontinued, the Federal Court of Appeal described the history of trademark as follows: “Historically, the marketplace has been very concerned with guaranteeing consumers the quality of goods that they had come to rely upon in the course of trade ... While the

rationale for the tort [of passing off] was to protect the public, it was not the consumer who sued, but the owner of the trade-mark who brought the action, thereby protecting the public, as well as its own interest.

- 11 R.J. Roberts, “Canadian Copyright: Natural Property or Mere Monopoly?” (1979) 40 C.P.R. (2d) 33; A. Drassinower, “A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law” (2003) 16 Can. J. L. & Juris. 3. See also W. Adams, “Personal Property Law and Information Assets” (2002) 36 Can. Bus. L.J. 267; W. Adams, “Secondary Markets for Copyrighted Works” (2002) 37 Can. Bus. L.J. 321. The statutes in copyright and patent clearly establish that the two devices are purely statutory: see Copyright Act, R.S.C. 1985, c. C-42, s. 89 and Patent Act, R.S.C. 1985, c. P-4, s. 42. In *Galerie d’Art du Petit Champlain Inc. v. Théberge*, [2002] S.C.R. 336 Binnie J. wrote “Copyright in this country is a creature of statute and the rights and remedies it provides are exhaustive” (at 338), and further described the statute as creating a balance “between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)” (at para. 30). Despite this history and the clarity of the Supreme Court of Canada on the matter, it has become fashionable both in Canadian and in American scholarly circles to identify intellectual property with property. See, for example, A.A. Keynes & C. Brunet, “A Rejoinder to ‘Canadian Copyright: Natural Property or Mere Monopoly?’” (1979) 40 C.P.R. (2d) 54; W.M. Landes & R.A. Posner, “Trademark Law: An Economic Perspective” (1987) 30 J. L. & Econ. 265; F. Easterbrook, “Intellectual Property Is Still Property” (1990) 13 Harv. J. Law & Pub. Pol. 108; S. Carter, “Does it Matter That Intellectual Property Is Property?” (1993) 68 Chicago-Kent L. Rev. 715; L. Becker, “Deserving to Own Intellectual Property” (1998) 68 Chicago-Kent L. Rev. 609; A. Moore, *Intellectual Property and Information Control* (New Brunswick: Transaction Publishers 2001); E. Hettinger, “Justifying Intellectual Property” in A. Moore, ed., *Intellectual Property: Moral, Legal and International Dilemmas* (New York: Rowan and Littlefield 1997) 17; J. Child, “Moral Foundations of Intangible Property” in A. Moore, ed., *Intellectual Property: Moral, Legal and International Dilemmas* (New York: Rowan and Littlefield 1997) 57; A. Moore, “Toward a Lockean Theory of Intellectual Property” in A. Moore, ed., *Intellectual Property: Moral, Legal and International Dilemmas* (New York: Rowan and Littlefield 1997) 81; J. Hughes, “Philosophy of Intellectual Property,” in A. Moore, ed.,

*Intellectual Property: Moral, Legal and International Dilemmas* (New York: Rowan and Littlefield, 1997) 135; N. Siebrasse, "A Property Rights Theory of the Limits of Copyright" (2001) 51 U.T.L.J. 1.

- 12 *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, 219 D.L.R. (4th) 577, Bastarache J., for the majority, at 185, citing *Free World Trust v. Electro Sante Inc.*, [2000] 2 S.C.R. 1024, at para. 24.
- 13 *Ibid.*, Binnie J., for the minority, at para. 4. Justice Ginsburg of the United States Supreme Court demonstrated a slightly different view of patent, noting that, while patent requires disclosure to the public of the invention, and in copyright "disclosure [to the public] is the desired objective, not something exacted from the author in exchange for the copyright," nevertheless, "[f]urther distinguishing the two kinds of intellectual property, copyright gives the holder no monopoly on any knowledge ... [while] the grant of a patent, on the other hand, does prevent full use by others of the inventor's knowledge." See *Eldred v. Aschcroft*, 537 U.S. 186, 123 S. Ct. 769 (2003), *rehearing den'd* 538 U.S. 916, 123 S. Ct. 1505 (2003) at para. 787. However, while acknowledging the learned authority W. Copinger, *Law of Copyright*, 7th ed. (1936), cited by Justice Ginsburg, it seems the better view that patent gives no more monopoly on knowledge than does copyright and, indeed, provides a statutory requirement that knowledge of the invention be made public.
- 14 T. Drier, "Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?" in R.C. Dreyfuss et al., eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press 2001) 295 at 305.
- 15 Note that Canada's depository system, in the sense of making government information available to the public, has not been legislated: see E. Dolan & L. Vaughan, *Electronic Access to Canadian Federal Government Information: How Prepared are the Depository Libraries? Report to Depository Services Program, Canadian Government Publishing* (Ottawa: Public Works and Government Services Canada 1997). On the other hand, there has long been a legislated requirement for publishers to deposit monographs with the National Library of Canada, now the National Library and Archives of Canada. See *Library and Archives of Canada Act*, 2004, S.C. 2004, c.11, s. 10.
- 16 In *R. v. Stewart*, [1988] 1 S.C.R. 963, 50 D.L.R. (4th) 1 the Supreme Court of Canada refused to consider confidential information to be property, at least in the context of criminal law.
- 17 *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577.

- 18 By contrast, since even before Canada became independent, it had experience with patent and copyright – enough experience that the two were explicitly included amongst the named heads of power in the division of power between provinces and federal government in 1867. The *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. 11, No.5, gives both powers explicitly to the federal government: s. 91(22) concerning “Patents of Discovery and Invention” and s. 91(23) concerning “Copyright”.
- 19 *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14. The cause of action cannot be maintained per se in the province of Quebec, where, as a civil law jurisdiction, the cause of action must be codified. An exact codification of the cause of action for breach of confidence does not exist, but there are related provisions: C.C.Q., 1991, c. 64, Art. 1457; 2002, c. 19, s. 15. See further R. Howell, “Database Protection and Canadian Law,” 2d ed., prepared for the Department of Canadian Heritage, online: <[http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/database/database\\_e.pdf](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/database/database_e.pdf)> and M. Goudreau, trans. David Vaver, “Protecting Ideas and Information in Common Law Canada and Quebec” (1994) 8 I.P.J. 189 at 205.
- 20 Fiduciary obligations law was emerging slowly at about the same time, but when faced with a case that would have permitted Supreme Court sanction on either one of the emerging causes of action, in *Canadian Aero Service Ltd. v. O’Malley* (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371, the Supreme Court chose to sanction the emerging doctrine of fiduciary obligation rather than the notion of an independent action for breach of confidence. See R.J. Roberts, “Corporate Opportunity and Confidential Information: Birds of a Feather That Flock Together or Canaeros of a Different Colour?” (1977) 28 C.P.R. (2d) 68.
- 21 Paraphrased from the language of the Supreme Court in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14.
- 22 And it is an open constitutional question who has the power to legislate in this area. For a restrictive view see *MacDonald v. Vapor Canada Ltd.* (1976), [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1. There has been a similar challenge in determining jurisdiction over trademark: the federal government claims jurisdiction pursuant to its trade and commerce power (s. 91(2)), but the provinces also claim jurisdiction pursuant to their powers over “property and civil rights” (s. 92(13)) and “matters of a merely local or private interest” (s. 92(16)). Under its authority the federal government has legislated under the *Trade-Marks Act*, R.S.C. 1985, c.T-13, as

amended, but has always left “room” for the provinces by recognizing other marks through s. 10. Recently, however, in connection with interpretation of s. 7 of the *Trade-Marks Act* the Supreme Court of Canada has declared that both statutory and “common law” marks (through s. 10 of the *Trade-Marks Act*) are creatures of the federal statutory enactment; see *Kirkbi AG and Lego Canada, Inc., v. Ritvik Holdings Inc./Gestions Ritvik Inc. (Lego v. Mega Bloks)*, [2005] 3 S.C.R. 302, 2005 SCC 65. As will be noted below, the federal government, for reasons similar to those that have challenged it in the trademark area and will challenge it in the area of confidential information, legislated boldly in the area of personal-data protection for the private sector but attempted to avoid constitutional challenge by leaving “room” for “equivalent” legislation to be passed by the provinces, as described further below.

- 23 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11. The s. 2(b) right to freedom of expression includes a right to access information (confirmed in *Luscher v. Deputy Minister of Revenue (Customs and Excise)*, [1985] 1 F.C. 85 (F.C.A.)) and is therefore likely the *Charter* protection that would be raised in a challenge to legislation involving confidential information protection. Even though Canada's common law action for breach of confidence may not completely satisfy the requirements of NAFTA or TRIPS, the vulnerability of any attempted legislative enhancement of the action to a *Charter* challenge might in itself discourage Canadian jurisdictions from legislating in the area.
- 24 The principle of national treatment was carried through into the Berne Convention, concluded in 1886, concerning copyright.
- 25 The Berne Convention similarly created a platform for minimum copyright protection, and again, member states were free to adhere to revisions or not. (There were six revisions, the last being at Paris in 1971). However, the Berne Convention, even in its earliest versions, reflected a greater degree of consensus around the basic elements of copyright than was ever achieved in the Paris Convention around patent and trademark – and thus nation states enjoyed relatively less freedom to create national differences in their copyright laws. Its members form the Berne Union.
- 26 Basic elements of patent law, such as the term of protection and defined criteria for patent, were never specified in the Paris Convention. In the realm of trademark, the Paris Convention does not specify exactly what a trademark is. Moreover, member states never agreed whether trademark protection should extend to services as well as goods.
- 27 Canada's participation in the Berne Union parallels its experience in the Paris Union. Britain was a founding player and agreed to the Berne

Convention immediately (see *International Copyright Act of 1886* (49–50 Vic., c. 33, which applied to Canada as a dominion) and ratified effective 5 December 1887. Canada's first independent participation in the Berne Union was through the Rome Convention 1928. Canada's adherence to the Berne Convention remained at the 1928 level until international intellectual property moved into the arena of international trade negotiations in 1986.

- 28 On 7 July 1970 Canada adhered to Arts. 13–30 of the Stockholm version, but decided not to adhere to the substantive provisions of Arts. 1–12.
- 29 Throughout their histories, the Berne and Paris Unions have been closely entwined. Indeed the Berne Union has always relied on the larger and wealthier Paris Union for administrative support. The comments made here about the Paris Union, therefore, are also applicable to the Berne Union. One long-standing difference between the two, however, has been that the United States joined the Paris Union early on but remained outside the Berne Union, although attending to observe its conferences, during the Union's first century.
- 30 Sam Rickertson points out that “[d]espite relatively limited membership, the geographical sweep of the new [Berne] Union was considerable when account is taken of the colonial possessions of France, Germany, Italy, Belgium, Spain and the U.K.” See S. Rickertson, *The Berne Convention for the Protection of Literary and Artistic Works, 1886–1986* (London: Centre for Commercial Studies, Queen Mary University, 1987) at 79–80.
- 31 There were four pivotal multilateral agreements affecting the information environment that came into being at the end of the nineteenth century: in addition to the Paris and Berne Conventions, there was the International Telegraph Union (1865), since renamed the International Telecommunications Union, and Universal Postal Union (1874).
- 32 The closest provision is Article 10bis: Unfair Competition
  - (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
  - (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
  - (3) The following in particular shall be prohibited:
    - i. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
    - ii. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;



- iii. indications or allegations, the use of which in the course of trade, is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

This provision was used as a “hook” to bring confidential information into TRIPS, a provision in the Paris Convention that was argued to already encompass confidential information and thus to lead naturally to inclusion of confidential information provisions in TRIPS. TRIPS Art. 39 begins: “(1) In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments and governmental agencies in accordance with paragraph 3.” See also the drafting history provided in D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2d ed. (London: Sweet & Maxwell 2003) at 271. It can be seen, however, that the provisions of Article 10bis of the Paris Convention are actually far more directly related to legal concepts involved in passing off and trademark.

33 ICESCR Art. 15 provides

- 1 ... the right of everyone:
  - a. To take part in cultural life;
  - b. To enjoy the benefits of scientific progress and its applications;
  - c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

34 *Universal Declaration of Human Rights*, 10 December 1948, G.A. Res. 217(III), U.N. G.A.O.R., 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948) at 71, Art. 27.

35 WIPO was created at the Stockholm Conference of 1967 by the *Convention Establishing the World Intellectual Property Organization*. Canada ratified on 26 June 1970.

36 Given the strict economic, trade, and commercial origins of the unions, this marriage between the intellectual-property unions, which now exist within the framework of WIPO, and the United Nations must be philosophically uneasy. This is despite the current economic interests of the majority of the UN membership and the language of intellectual property in other UN instruments such as the *Universal Declaration of Human Rights*. After all, these unions were formed



to support and extend national legal monopolies to various international markets.

- 37 The United States joined the Berne Union in 1989.
- 38 Under article 28 of the Paris Convention, recourse to the International Court of Justice is provided – but this dispute settlement mechanism has remained entirely theoretical and has never been used.
- 39 R.V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press 1996) at 5. Indeed, as mentioned above, the United States and Japan put forward the first proposal to fully include intellectual property in the international trade regime. It was drafts by the European Union and the United States that Daniel Gervais identifies as dramatically accelerating the process of negotiating TRIPS. See D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2d ed. (London: Sweet & Maxwell 2003) at 16.
- 40 Pat Choate identifies specifically “two US corporate CEOs, John R. Opel of IBM and Edmund T. Pratt Jr. of Pfizer pharmaceuticals” as the progenitors of TRIPS: P. Choate, *Hot Property: The Stealing of Ideas in an Age of Globalization* (New York: Knopf 2005) at 18.
- 41 The *General Agreement on Trade and Tariffs*, concluded 30 October 1947, 61 Stat. A-11, 4 GATT B.I.S.D. 1 (1969), was provisionally applied between its “contracting parties” as of 1 January 1948. It contained no direct provision for intellectual property. GATT was later reformulated and incorporated into the WTO Agreement along with the TRIPS Agreement. See the *Marrakesh Agreement Establishing the World Trade Organization*, (1994) 33 I.L.M. 1125.
- 42 See the Punta del Este Declaration, WTO Doc. MIN/DEC (20 September 1986) at 7–8, quoted by D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2d ed. (London: Sweet & Maxwell 2003) at 11.
- 43 I say “initially” because there was a backlash after the adoption of TRIPS. The Doha Declaration of 2001, to the extent that it addresses intellectual property at all, reflects mostly the concerns of the developing nations. See Ministerial Declaration (14 November 2001), WT/MIN(01)/DEC/1, especially paras. 3, 19.
- 44 D. Gervais & E.F. Judge, *Intellectual Property: The Law in Canada* (Toronto: Thomson Carswell 2005) at 541.
- 45 The United States and Japan put forward the first notions of covering all intellectual property in the international trade environment in the late 1980s: see D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2d ed. (London: Sweet & Maxwell 2003) at 10.
- 46 In *Canadian Intellectual Property*, *supra* note 1 at 182–3, Bruce Doern and Markus Sharaput observe that in the copyright environment,

"copyright enjoyed an ascendancy in the 1990s because it was possible to Canadian policy-makers to cast it as a cultural policy which, unlike many other subsidy-based cultural policies which were seen as antithetical to market liberalism, could be presented as being entirely in keeping with ... pro-market framework rules." Further evidence of the American domination of Canadian copyright policy is supplied through Ronald Bettig's study by a scholar examining the American experience. See R. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press 1996). Many of the examples and case studies in his book involve the co-opting of Canadian intellectual property policy to the interests of the American entertainment industry elites. Canada is identified as the American entertainment industry's "largest 'foreign' market in the Western Hemisphere." *Ibid.* at 201.

- 47 *Canadian Intellectual Property*, *supra* note 1 at 183. Dan Dorner's empirical analysis of the federal government during this period of information policy development demonstrates also that the federal Department of Industry, more than any other agency, dominated policy formation at this time. See D.G. Dorner, "The Essential Services Policy Network: Organizational Influence in Canada's Information Highway Policy Development Process" (2002) 72(1) Lib. Quart. 27–84. It was only on 26 May 1996, however, pursuant to new trade obligations under NAFTA and TRIPS, that Canada adhered fully to the 1967 Stockholm version of the Paris Convention. For the same reasons, Canada adhered even a little later (26 June 1998) to the most recent version of the Berne Convention; see *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221, Can. T.S. 1998 No. 18 (last revised 24 July 1971 and amended on 28 September 1979).
- 48 The signing of NAFTA, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) preceded the conclusion of TRIPS but was based on the same international drafting experience. See D. Gervais & E.F. Judge, *Intellectual Property: The Law in Canada* (Toronto: Thomson Carswell 2005) at 556.
- 49 This probably makes the environment for patent and copyright much less risky for many of the players – even though they are now facing an environment of coercion, where non-compliance with obligations brings with it a dispute resolution mechanism and the possibility of trade sanctions as penalty. In the area of confidential information they have no prior experience of international harmonization.
- 50 The language of NAFTA with respect to confidential information protection differs somewhat from the language that entered the text of TRIPS, as

will be elaborated on below. However, it will be sufficient at this point in the discussion to focus on the language in TRIPS.

- 51 Initially in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, and later in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 the Court canvassed a number of possible characterizations for the cause of action for breach of confidence and declined to classify it specifically.
- 52 The phrase “a manner contrary to honest commercial practices” is defined in a footnote in TRIPS as follows: “For the purpose of this provision, ‘a manner contrary to honest commercial practices’ shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.”
- 53 Perhaps because the social conditions that it was developed to meet were so new and on a global scale, the vocabulary in this area became value-laden and confusing almost before any law was formulated – and the term “privacy” became identified as synonymous with this new area. That identification is not apt, as is described herein, nor is it serving well the development of either the area of privacy law or the area of personal-data protection law. I have made this point directly in connection with a critique of the recent decision of the Federal Court of Appeal in *BMG Canada Inc. v. John Doe*, [2005] 4 F.C.R. 81, 2005 FCA 193. See M.A. Wilkinson, “Battleground between New and Old Orders: Control Conflicts between Copyright and Personal Data Protection,” in Ysolde Gendreau, ed., *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Edward Elgar 2008), 305–52. In Canada, only five provinces have legislated privacy. Quebec, Canada’s civil law jurisdiction, gives privacy its strongest and clearest legal expression in the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. The original *Privacy Act* in British Columbia was the first privacy legislation in common law Canada, S.B.C. 1968, c. 39, now R.S.B.C. 1996, c. 373, s. 1. Saskatchewan, Manitoba and Newfoundland are the other three common law provinces ( *Privacy Act*, R.S.S. 1978, c. P-24, s. 2; *Privacy Act*, R.S.M. 1987, c. P125, s. 2(1); and *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3, respectively), and in these three privacy is protected only in surveillance, eavesdropping, and certain itemized commercial situations.

In the other common law provinces, neither the legislatures nor the courts have recognized such a tort. As the Manitoba Court of Appeal observed in *Bingo Enterprises Ltd. v. Plaxton* (1986), 26 D.L.R. (4th) 604,

41 Man. R. (2d) 19, at para. 17: "It would appear that at common law the tort of violation of privacy in regard to disclosure of personal information has not been recognized in Canada. Neither counsel has supplied us with a case ... Counsel for defendants states simply that the tort has not be recognized although recognized in the United States of America."

The ambivalence of the common law in general towards privacy has been highlighted recently in Great Britain: Buxton L.J., speaking for the English Court of Appeal at paragraph 8 of *Ash v. McKennitt*, [2006] E.W.C.A. Civ. 1714., stated: "There is no English domestic tort of invasion of privacy." Actions in Britain based upon English *Human Rights Act*, Art. 8, which legislates respect for private and family life (and incorporates Arts. 8 and 10 of the European Convention on Human Rights into English law), have been successful but have been founded in breach of confidence.

- 54 The *Universal Declaration of Human Rights* Art. 12 states that "No one shall be subjected to arbitrary interference with his privacy ... Everyone has the right to the protection of the law against such interference or attacks."
- 55 Including the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. No. 47, 6 I.L.M. 368 (entered into force 23 March 1976). Art. 17 of the ICCPR provides: "(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation; (2) Everyone has the right to the protection of the law against such interference or attacks."
- 56 C. Bennet, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Ithaca: Cornell University Press 1992).
- 57 The OECD Guidelines were created as a Recommendation of the Council of the OECD, becoming applicable 23 September 1980, and are available at <<http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM>>.
- 58 Although paragraph 2 of the OECD Guidelines, concerning their scope, of the refers to "personal data ... which ... pose a danger to privacy and individual liberties," the operative sections providing for the treatment of personal data, paragraphs 7–14, do not mention the concept of privacy, but rather refer throughout to the treatment of "personal data."
- 59 Part 3 of the OECD Guidelines, paragraphs 15–18, is entitled "Basic Principles of International Application: Free Flow and Legitimate Restrictions," and paragraph 16 provides specifically that "Member countries should take all reasonable and appropriate steps to ensure that transborder data flows of personal data, including transit through a Member country, are uninterrupted and secure." Paragraph 17 provides that "A member country should refrain from restricting transborder data flows of

personal data between itself and another Member country [in cases where the Guidelines are met].”

- 60 For example, Mary Marshall and Barbara von Tigerstrom, in their chapter entitled “Health Information,” in J. Downie et al., *Canadian Health Law and Policy*, 2d ed. (Markham, ON: Butterworths 2002) provide brief histories of the right to privacy in international law (at 159) and the right to privacy under the *Canadian Charter of Rights and Freedoms* (at 160–4). They then move on to a discussion of the OECD Guidelines, but without mentioning the second goal of the OECD Guidelines at all and putting the whole discussion in the context of privacy. They state that “[w]hile [the 8 principles of the OECD Guidelines] are not all directly related to the protection of privacy, they provide indirect protection (for example, by limiting collection of personal data), and, more generally, serve to safeguard the basic values of autonomy that underlie the right to privacy” (at 165). Halyna Perun, Michael Orr & Fannie Dimitriadis, in *Guide to the Ontario Personal Health Information Protection Act* (Toronto: Irwin Law 2005), completely omit any reference to the OECD Guidelines in their introductory chapter, focussing entirely on privacy. See *ibid.*, 1–18.
- 61 I have previously argued that personal-data protection is philosophically more closely akin to legislated confidentiality law than to privacy law: see M.A. Wilkinson, “Privacy and Personal Data Protection: Albatross for Access?” in K. Adams & W.F. Birdsall, eds., *Access to Information in a Digital World* (Ottawa: Canadian Library Association 2004), 109–32, where I point out that viewing personal-data protection from this perspective may help to explain certain decisions of governments to make public information that would otherwise fall under personal-data protection, such as Ontario’s decisions in the *Adoption Information Disclosure Act*, S.O. 2005, c. 25 and the *Public Sector Salary Disclosure Act*, 1996, S.O. 1996, c. 1, Sch. A, or Nova Scotia’s decision in the *Ministerial Education Act Regulation* 80/97, as up to N.S. Reg. 120/2006, concerning annual reporting of school board salaries, made under s. 145 of the *Education Act*, S.N.S. 1995–96, c.1.
- 62 Paragraph 7 of the OECD Guidelines referring to the collection limitation principle states: “There should be limits to the collection of personal data and all such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.”
- 63 Paragraph 2 of the OECD Guidelines begins: “These Guidelines apply to personal data, whether in the public or private sectors.”
- 64 The definition in paragraph 1(b) of the OECD Guidelines is “‘personal data’ means any information relating to an identified or identifiable individual (data subject).”

- 65 Federal rules under PIPEDA protect an individual's information until twenty years after death or one hundred years after the document was created: see R.S.C. 2000, c. 5, ss. 7(3)(h)(i)-(ii). British Columbia has legislation with the same time frames: see *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 36. Nova Scotia has provincial legislation that protects personal information of deceased persons until twenty years after death only: see *Freedom of Information and Protection of Privacy Act*, R.S.N.S. 1993, c. 5, s. 30(c). Newfoundland's legislation protects information for twenty years after a person's death or for fifty years after the document was created: see *Access to Information and Protection of Privacy Act*, R.S.N.L. 2002, c. A-1.1, s. 42(c)(d). Alberta and Saskatchewan have statutes protecting personal information until twenty-five years after the individual's death: see *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 17(2)(i); *The Local Authority Freedom of Information and Protection of Privacy Act*, R.S.S. 1990-91, c. L-27, s. 29(1)(2); and *The Freedom of Information and Protection of Privacy Act*, R.S.S. 1990-1991, c. F-22.01, s. 30(2)). Prince Edward Island's legislation protects personal information for twenty-five years after death, or seventy-five years after the creation of the record: see *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. F-15.01, ss. 15(2)(i) and 40(c)(ii). Ontario and Quebec legislation protects personal information until thirty years after death: see *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 2(2) and *An Act respecting the Protection of Personal Information in the Private Sector*, R.S.Q. 1994, c. P-39.1, s. 18.2. Manitoba's provincial legislation protects information only until ten years after an individual's death: see *The Freedom of Information and Protection of Privacy Act*, C.C.S.M. 1997, c. F175, s. 17(4).
- 66 Set out in part 2 of the OECD Guidelines, entitled "Basic Principles of National Application," at paras 7-14.
- 67 Paragraph 11 of the OECD Guidelines, the "Security Safeguard Principle," provides that "Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data."
- 68 Specifically, paragraph 10 of the OECD Guidelines, the "Use Limitation Principle," states: "Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except: (a) with the consent of the data subject; or (b) by the authority of law." Paragraph 9 is the "Purpose Specification Principle," which provides: "The purposes for which personal data are

collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.”

- 69 The best illustration of this relationship is the extraordinary passage of the federal *Access to Information Act* together with the separate *Privacy Act* as one enactment: see *Access to Information Act and Privacy Act*, S.C. 1982, c. 111. The federal personal-data protection legislation, which actually had its antecedent as part 4 of the *Human Rights Act* in 1977 (S.C. 1977, c. 33), before being re-enacted with the access legislation in 1982, is now the *Privacy Act*, R.S.C. 1985, c. P-21 (Canada). The other personal-data protection legislation for the public sector in Canada is the following: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (Alberta); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (British Columbia); *The Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50 (Manitoba); *Right to Information Act*, S.N.B. 1978, c. R-10.3 (New Brunswick); *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1 (Newfoundland & Labrador); *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 (Nova Scotia); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (Ontario); *Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2001, c. 37 (Prince Edward Island); *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q., c. A-2.1 (Quebec); *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 (Saskatchewan); *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20 (Nunavut & Northwest Territories); and *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1 (Yukon). Several jurisdictions also have privacy legislation for the municipal sector: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M56 (Ontario) and *Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1 (Saskatchewan). As will be further discussed below, in four provinces health information, including health information held in the public sector, has been protected by separate legislation: *Health Information Act*, R.S.A. 2000, c. H-5 (Alberta); *Personal Health Information Act*, C.C.S.M. c. P33.5 (Manitoba); *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3, Sch. A (Ontario); and *Health Information Protection Act*, S.S. 1999, c. H-0.021 (Saskatchewan).



- 70 European Union, *Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, EU Council Directive 95/56/EC, [1995] O.J. No. L 281, p. 31.
- 71 In Quebec personal-data protection legislation for the private sector pre-dates the EU Directive: see *Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q., c. P-39.1 (1993). However, all other personal-data protection legislation in Canada is a direct response to the federal government's initiative, with the *Personal Information Protection and Electronic Documents Act*, R.S.C. 2000, c. 5 [PIPEDA], which responded to the EU Directive. The federal government, for constitutional reasons, left room for, and indeed encouraged, provincial regulation of private sector activities, and some provinces have taken up this invitation. The federal legislation anticipates the passage of "equivalent" provincial legislation, by providing that, once recognized as equivalent by the federal Cabinet, such provincial legislation will replace PIPEDA for provincial matters within that province: see PIPEDA at s. 26(2)(b). Quebec's pre-existing act has already been recognized by the federal government as equivalent to PIPEDA. Several other provinces have passed legislation for the private sector but have not succeeded in persuading the federal government that the legislation is equivalent to PIPEDA: see, for example, Alberta, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, and British Columbia, *Personal Information Protection Act*, S.B.C. 2003, c. 63. Consequently, organizations in those provinces must satisfy both regimes. As noted, several other provinces have passed specific personal-data protection legislation for the health sector. In Ontario's case, this legislation has been deemed equivalent to PIPEDA by the federal government.
- 72 See the International Safe Harbor Privacy Principles issued by the U.S. Department of Commerce (July 21, 2000), online: <<http://www.ita.doc.gov/td/ecom/Principles1199.html>>. The principles were developed in consultation with industry and the general public to facilitate trade and commerce between the United States and EU. The EU was persuaded to accept this voluntary system as compatible with its directive. Few of the targeted private organizations have applied to be certified. This record is to be contrasted with the fully legislated administrative schemes created in Canada. Personal-data protection law is not an issue for organizations in the American health sector. In this connection see further W.W. Lowrance, "Privacy and Secondary Use of Data in Health Research" (2003) 8 Suppl 1 J. Health Services Research & Pol. 13-28 at 17-18.



- 73 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, H.R. 3162 (2001).
- 74 *Freedom of Information and Protection of Privacy Act Amendment Act 2004*, S.B.C. 2004, c. 64 (“Bill 73”).
- 75 [2006] S.C.R. 441, 266 D.L.R. (4th) 675.
- 76 Justice Deschamps, writing for himself and Binnie, Fish and Abella JJ. in the majority, clearly holds that privacy trumps access to government-held information and is “quasi-constitutional.” Promptly thereafter, the Federal Court of Appeal referred to *Heinz in Canada (Information Commissioner) v. Canadian Transportation Accident Safety Investigation & Safety Board*, [2007] 1 F.C.R. 203, 267 D.L.R. (4th) 451, acknowledging the paramountcy of privacy.
- 77 The minority (McLachlin C.J.C., Bastarache, LeBel JJ.) maintained that corporate parties should be limited under these statutes to claiming the exemptions specifically targeted for them by the legislators.
- 78 As noted, these are *Health Information Act*, R.S.A. 2000, c. H-5, (Alberta); *Personal Health Information Act*, C.C.S.M. c. P33.5 (Manitoba); *Health Information Protection Act*, S.S. 1999, c. H-0.021 (Saskatchewan); and *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3, Sch. A (Ontario).
- 79 As noted, the provision for this process is contained in *PIPEDA* s. 26(2)(b).
- 80 See *Personal Information and Protection of Electronic Documents Act: Health Information Custodians in the Province of Ontario Exemption Order*, C. Gaz. 2005.1.331.
- 81 In this connection see the study by W. Peekhaus, “Personal Medical Information: Privacy or Personal Data Protection?” (July 2006) 5:2 Can. J. Law & Tech. 87.
- 82 The *Food and Drugs Act*, R.S.C. 1985, c. F-27, as am., is the mechanism used by the federal government to protect public health and safety by ensuring that only approved products are distributed in Canada. A food or drug product may not be marketed in Canada until a Notice of Compliance (“NOC”) has been issued under the *Food and Drug Regulations*, C.R.C., c. 870, ss. C.08.002(1) and C.08.004. The *Patented Medicines (Notice of Compliance) Regulations*, S.O.R./93-133, were actually enacted under s. 55.2(4) of the *Patent Act*, R.S.C. 1985, c. P-4, as am., and came into force on 13 March 1993. They were substantially amended in 1998 (C. Gaz. Part II, Col. 132, No. 7 at 1051 (1998)) and again in 2006 (*Regulations Amending the Patented Medicines (Notice of Compliance) Regulations Registration*, S.O.R./2006-242 (5 October 2006)).

They are intended to link the *Patent Act* to the *Food and Drugs Act* by prohibiting the minister of health from allowing drugs that are the subject of a valid patent to be distributed in Canada by anyone not claiming through the patent.

- 83 A generic drug manufacturer who can show that the drug for which the NOC is being sought is equivalent to a drug already approved is able to file an abbreviated submission for the NOC without having to do extensive clinical studies: see *Food and Drug Regulations*, s. C.08.002.1(2)(a) and (g)–(i).
- 84 Many commentators considering the ethics process in health research fail to discuss the relationship of law to the process at all: see for example E. Whittaker, “Adjudicating Entitlements: The Emerging Discourses of Research Ethics Boards” (2005) 9 *Health: An Interdisciplinary Journal for the Social Study of Health, Illness and Medicine* 513, and M. Aita & M.-C. Richer, “Essentials of Research Ethics for Healthcare Professionals” (2005) 7 *Nursing and Health Sciences* 119. Even when legal parameters are acknowledged, personal-data protection is often overlooked: see B.M. noppers, “Consent Revisited: Points to Consider” (2005) 13 *Health L. Rev.* 33.
- 85 Curiously, the composition of the boards, at least for biomedical research, is meant to include someone knowledgeable in law, but even in that area that person is not to provide legal advice. Membership of the REB shall consist of at least five members, including both men and women, of whom “ a) at least two have broad expertise in the methods or in the areas of research that are covered by the RED; b) at least one member is knowledgeable in ethics; c) for biomedical research, at least one member is knowledgeable in the relevant law; this is advisable but not mandatory for other areas of research; d) at least one member had no affiliation with the institution, but is recruited from the community served by the institution.”

The role of the member knowledgeable in the applicable law is to alert REBS to legal issues and their implications, not to provide formal legal opinions nor to serve as legal counsel for the REB. An understanding of relevant legal issues and contexts is advisable for all REBS, although for non-biomedical research such insights may be sought from someone who sits on the REB only for specific research projects. The institution's legal counsel should not be a member of the REB. *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (Canadian Institute of Health Research, Natural Sciences and Engineering Research Council of Canada, Social Sciences and Humanities Research Council of Canada, 1998) at 1.3.

- 86 In M. Hirtle, “The Governance of Research Involving Human Participants in Canada” (2003) 11 Health L. J. 137 at 148, Marie Hirtle asks, “[i]s an administrative model appropriate for what is closest to becoming the national standard for research in Canada or should other types of standards (ethical, legal, professional or scientific) be considered?”
- 87 *Canadian Institutes of Health Research Act*, s.c. 2000, c. 6, s. 4(i).
- 88 For example, in the Ethics Review Board Application Form for Research Involving Human Subjects in a medical context at the University of Western Ontario, question 1.2 is “Is this a U.S. Food and Drug Administration (FDA) monitored study?” The first question involving Canada occurs later, at question 1.11, namely, “Does this project require Health Canada approval?” Question 12.2 accepts that the FDA may require access to identifiable or confidential data for monitoring or auditing purposes: see <<http://www.uwo.ca/research/ethics/med/hsreb-forms.htm>>
- 89 It is interesting that CIHR’s Commercialization and Innovation Strategy document of November 2005 includes a heading “Ethical Perspective,” which states “Conscious of the issues that arise from the academic/industry interface and the potential for ethical conflict between profit and the public good, CIHR will lead an industry/university effort that will review and propose standards for ethical conduct of projects in the commercialization and innovation areas.” Nowhere in the document is there a discussion of the legal aspects of these relationships – or, indeed, any mention at all of the interests of patients involved in these processes. Patients are mentioned only as one of several designated recipients of one of the sought-after outcomes of the strategy: “accelerated drug and device development, which would ensure prompt delivery of discoveries to community, caregivers and patients.” The description of clinical research notes that research is “a key ‘bench to bedside’ link. Unless the training and careers of clinical researchers are better supported, and the specialized facilities for clinical research are available to clinical researchers in Canada, this will limit CIHR’s and Canada’s capacity for commercialization and innovation.” See online: <[www.cihr-irsc.gc.ca/cgi-bin/print-imprimer.pl](http://www.cihr-irsc.gc.ca/cgi-bin/print-imprimer.pl)>
- 90 The Tripartite Panel on Research Ethics has just released seventeen reports from working committees considering revisions to the policy statement: see <[www.pre.ethics.gc.ca](http://www.pre.ethics.gc.ca)>, under “Publications and Reports.” Among these, reports such as the sswc [Social Sciences and Humanities Research Ethics Special Working Group] Recommendations Regarding Privacy and Confidentiality (February 2008) and the Ethics Review of Research in Multiple Settings and/or Involving Multiple REBs (previously multi-centred ethics review): A Discussion Paper and Recommendations

(April 2008) briefly comment on the need to reconcile the policy with applicable legislation. The conclusion that this need exists is also supported by empirical research, sponsored by the Social Sciences and Humanities Research Council of Canada, just completed by M.A. Wilkinson and M. Perry: for preliminary indications, see M.A. Wilkinson, "Social Sciences and Humanities Research and the Protection of Privacy in Universities," a paper presented in the *Privacy and Access Issues across the Professions: Ethics at Ryerson* series (April 2007); online: <<http://www.ryercast.ryerson.ca/dmpstreams/ethics2007april/index.asp>>

- 91 The possible impact of personal-data protection legislation on health research has been contemplated in K. Weisbaum et al., "A Voluntary Privacy Standard for Health Services and Policy Research: Legal, Ethical and Social Policy Issues in the Canadian Context" (2005) 14 *Health L. Rev.* 42 at 44; D. Willison, "Privacy and the Secondary Use of Data for Health Research: Experience in Canada and Suggested Directions Forward" (2003) 8 *Suppl.1 Journal of Health Services Research Policy* 51-17-23; and D. Willison, "Trends in Collection, Use and Disclosure of Personal Information in Contemporary Health Research: Challenges for Governance" (2005) 13 *Health L. Rev.* 107.
- 92 Given the primary focus of the CIHR on commercialization and the barriers to that process that differing provincial regimes and personal-data protection can pose in general, it is perhaps not surprising that the CIHR has taken a lead role in trying to standardize this area. The CIHR commissioned the *CIHR Best Practices for Protecting Privacy in Health Research* (Ottawa: Canadian Institutes for Health Research 2005). Although the document acknowledges that the law in this area differs across Canada and that various statutes govern practice in each jurisdiction and although it states that its guidelines are not to be relied on (at 26), the document nevertheless purports to be able to give health care practitioners a uniform code of practice for anywhere and everywhere within Canada. As such, it is misleading. In the health legislation of the four provinces that have passed it, including Ontario, patients' control over personal information has been muted to reflect and preserve the professional judgments of medical personnel by adding a notion of *implied* patient consent to the traditional personal-data protection legislative standard of express consent in information situations (for example, see Ontario's *Personal Health Information Protection Act*, S.O. 2004, c. 3, Sch. A, s. 18(2)). Under *PIPEDA*, express consent is the norm. It has already been noted that in the three provinces, apart from Ontario, with specific health legislation in this area, patients may still have rights under *PIPEDA* and patients in

the remaining provinces and territories will have rights under *PIPEDA* in applicable situations.

- 93 Canada would probably prefer to avoid close scrutiny of its confidential-information protection provisions in the access and personal-data protection arena altogether. For example, under Ontario's access legislation in the public sector, if an organization holds a trade secret or certain other information from a third party, that information will be released to a requestor unless it has been supplied in confidence *and* disclosure would have one of a series of legislated consequences. This may be too narrow to comply with TRIPS, let alone NAFTA; see *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 17.
- 94 NAFTA requires protection of information of potential commercial value, which Canada's common law test, set out above, does not cover, although NAFTA requires only protection of trade secrets and thus would appear to be narrower in that respect than the protection that Canada offers. However, under either the NAFTA or the TRIPS standard, Canada's requirement that the confider show detriment *and* benefit to the confidante is probably a higher standard than the demonstration of "commercial value" in international standards.

