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## Intellectual Property Rights in the Canada-US Relationship:

### Balancing Public and Private Claims to Data

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The ability to legally control giving secrets  
(**privacy**)

and the ability to control a secret, once given,  
in the hands of a confidante,  
so as to preclude the further dissemination of the  
secret (**confidentiality**),  
are demonstrations of both social and economic  
power in an **information** society.



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## Legal protection of a confidence

### By contract

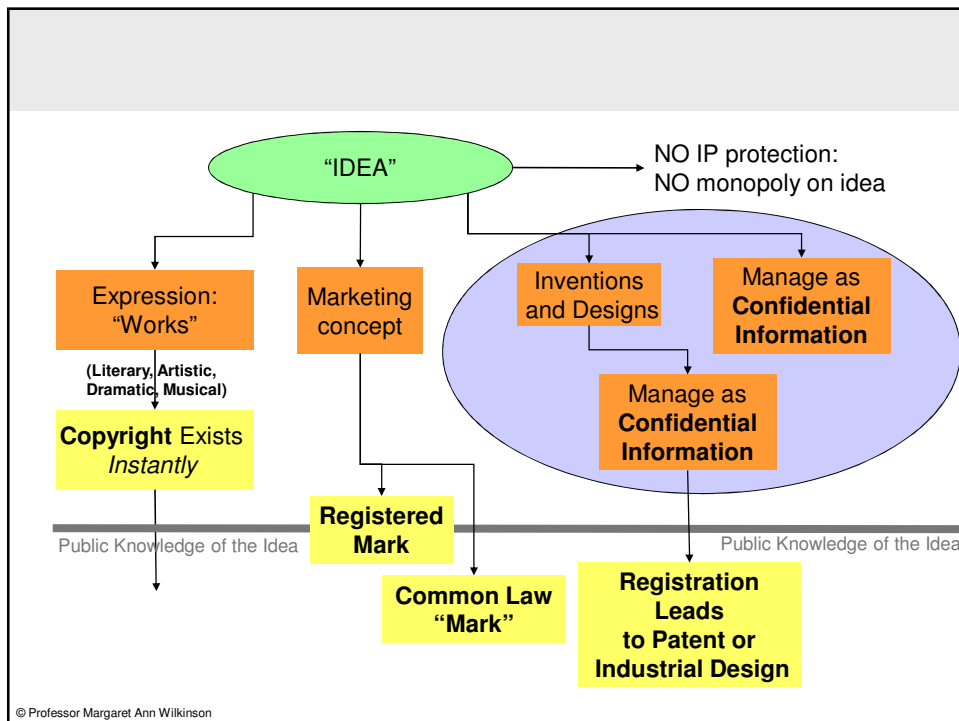
under this branch of the law, a person can be contractually obligated to keep silent about something even if other people have found out and are talking

### Even without contract, at common law in Canada, **only since 1989**

the courts will recompense the confider for a breach

- (1) if the subject matter was secret – and then only –
- (2) if the confider told the confidante in confidence – and then only–
- (3) if the confider suffered as a result of the confidante's breach AND the confidante benefited by the breach...

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## Secrecy and Power

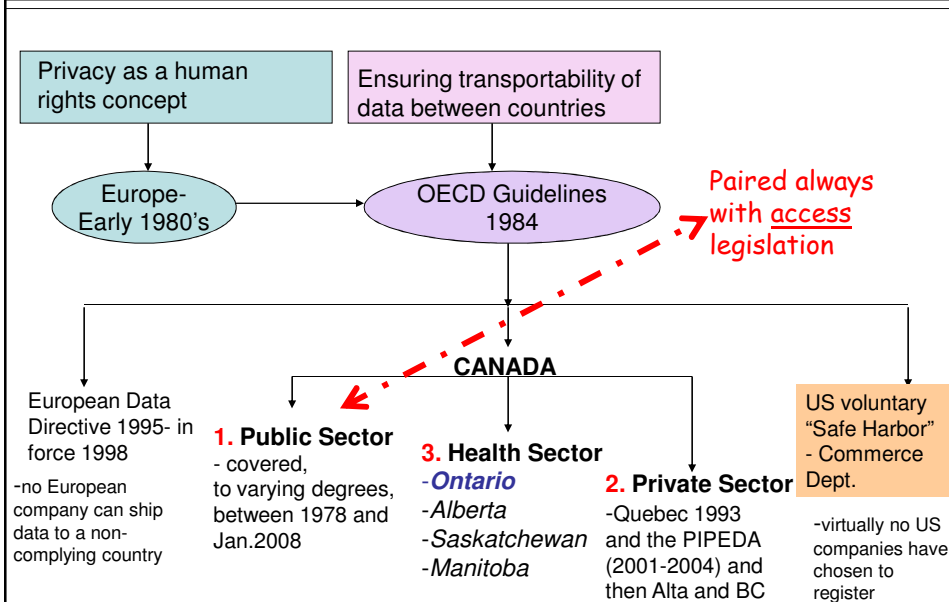
“The secret is the social mechanism through which the interests and intentions of particular social actors, making decisions in their daily lives, became translated into inequalities in knowledge ... the secret is significant precisely because it the means through which the social distribution of knowledge is shaped by the translation of individual, intentional actions into larger social patterns.”

From Kim Scheppele,  
Legal Secrets: Equality and Efficiency in the Common Law (1988), p.23



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## Evolution of Personal Data Protection



## The operation of personal data protection law:

- this legislation neither confers on an organization the ability or duty to collect information from individuals nor prohibits organizations from gathering such information
- it is not privacy legislation: it is not about secrets held by individuals
- it may be more closely related to confidentiality: individuals who give organizations personal information are given legal controls over the ways in which the confidante organization can deal with that information – but, the control applies whether or not the information was secret or non-public in the first place
- these laws apply to all personally identifiable information held by subject organizations, no matter whence the information was collected
- the protection of personal data is time limited by each statute...



## Confidentiality for businesses and other organizations is always lost when information is submitted to government bodies subject to access legislation:

Once in the hands of government, a company's confidential information will only be held within government walls, if requested by an outsider, if the information falls within a statutory exemption from release:

**FEDERAL:**  
trade secrets  
AND certain classes of  
confidential information  
AND competitive information  
AND sensitive information in  
negotiations

**ONTARIO:**  
trade secret  
AND certain information  
IF  
supplied in confidence  
AND disclosure could have certain  
implications (a) to (d)

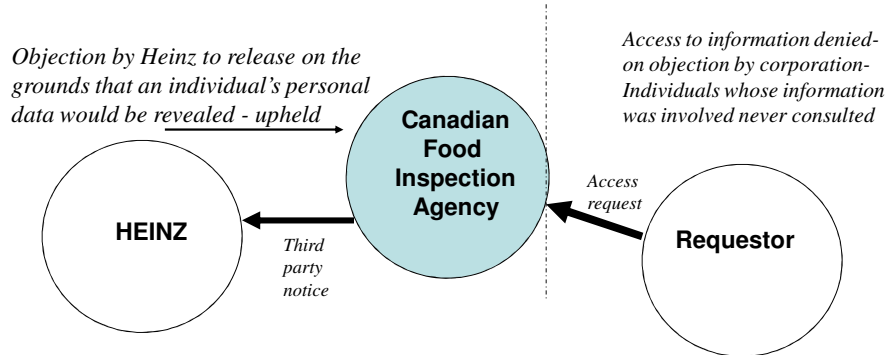
**Federal wider:**

Ontario does not necessarily even protect trade secrets from an access request... and not all confidential information is protected in either case...



**Twinning of personal data protection and access administrative regimes in the public sector has led to some confusion --**

The Supreme Court of Canada issued *AG Canada v. Heinz* in April 2006



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**PUBLIC SECTOR**

**Confidentiality** is meaningless – access is legislated

**Personal data protection** is legislated but for a limited period, usually life plus some years

- The Supreme Court says a corporation can successfully block release of information about an individual from a government organization to a requestor without the individual's knowledge or participation

**Privacy** is not legislated

**PRIVATE SECTOR**

**Confidentiality** is legally protected through contract and the common action for breach of confidence – potentially in perpetuity

- These protections are more or less in line with Canada's international trade obligations
- These protections are not the result of government action and therefore cannot be tested against the principles, including access, in the *Canadian Charter of Rights and Freedoms*

If information gets into the hands of government, confidentiality cannot be continued – the information becomes subject to the access legislation (where there are limited exceptions for corporate information)

**Personal data protection** is legislated – but not for the press – and at a different level for medical information in some provinces – and for lifetimes plus, mostly, 20 years

**Privacy** is legislated in some provinces, but not for the press, except in Quebec – and for only lifetime

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Does the common law action for breach of confidentiality satisfy Canada's obligations under NAFTA and TRIPS?

Could or should Canada legislate over the courts' initiative in confidential information protection?

**TRIPS**

Article 39(2) adds requirements to 10bis of the older Paris Convention:

Information shall be protected IF

- secret
- commercial value due to secrecy
- reasonable steps taken to keep secret

PART 1 ?

PART 3 ?

PART 2 ?

**NAFTA**

Article 1711 (1), (2) & (3)

**trade secrets**

shall be protected IF

- secret
- actual OR *potential* commercial value
- reasonable steps taken to keep secret

country **may** require documentation  
country **may** not limit general duration of protection



What is the appropriate balance – in the information age?  
Shouldn't we experiment domestically before trying to create (or enforce!) any international position?

**Secrecy:**

- **Should personal data protection be**
  - controlled by organizations? (Heinz) -- controlled by doctors (the Health pdp regimes)?
    - ◊ See my student's paper: Wil Peekhaus, "Personal Medical Information: Privacy or Personal Data Protection?" (2006) 5 Canadian Journal of Law and Technology 87-106.
  - inapplicable to the press?
  - lasting longer, in many cases, than rights to privacy, defamation actions – appropriate?
  - balanced against a public right of access in private sector as in copyright and patent? How?
- **Is the value of privacy**
  - different from personal data protection?
  - constitutional value? Canada's Supreme Court calls it "quasi-constitutional"...
- **Can confidential information**
  - be constructed in Canadian law to definitively meet Canada's obligations under trade agreements? Given that any statutory activity would invite scrutiny under the Charter's s.2(b)?
  - be constructed in such a way that it can truly become consistent with the historic intellectual property rights which balance private rights with the public interest?

**Who should be balancing?**

The courts... ?

The legislatures... (subject in Canada to the Charter, as interpreted by the Courts) ?

Individuals, corporations... ?



# THANK YOU

## Balancing Public and Private Claims to Data

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A version of this research is *in press* as a chapter entitled  
“Confidential Information and Privacy-Related Law in  
Canada and in International Instruments”  
in  
Chi Carmody (editor),  
Is Our House in Order? Canada’s Implementation of  
International Law (McGill-Queen’s University Press)