THREE

The Confidentiality of Seclusion: Studying Information Flows to Test Intellectual Property Paradigms

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ABSTRACT (EN): In the information age, law is challenged by the nature of information: expandable, diffusive, and shareable. This chapter illustrates the efficacy of an information science-based analysis, focusing on the flow of information and its effect upon the participants (from producers to users), for determining legal disputes involving information, including intellectual property matters. *Jones v Tsige* (Ontario Court of Appeal, 2012), declaring a new tort of intrusion upon seclusion (which the court termed an aspect of privacy protection), is critiqued. From the critique two observations flow: first, the matter at issue in that case, analyzed in terms of the information flow involved, would have been more properly decided under the federal *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) as it involved protection of confidential information and not privacy issues; second, protection of confidential information, now in a business context considered an aspect of intellectual property in the international trade environment (e.g., in the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights* [*TRIPS*]), completely contradicts the effect of traditional intellectual property devices on information flow and therefore should be exclusively considered in the context of legal regimes governing secrecy, personal data protection and access, and not intellectual property.

1 Author wishes to acknowledge the assistance of law student Devin Fulop in preparing this chapter and the comments of her peers in its final editing.

RÉSUMÉ (FR): Dans notre ère informationnelle, le droit est mis au défi par la nature de l'information : extensible, diffuse et partageable. Ce chapitre illustre l'efficacité de l'analyse basée sur les sciences de l'information, qui mettent l'accent sur la circulation des renseignements et leur effet sur les participants (des producteurs aux usagers de l'information), pour régler les différents juridiques portant sur cette information, dont les litiges de propriété intellectuelle. La décision *Jones c Tsige* (de la Cour d'appel de l'Ontario, 2012), créant un nouveau délit d'intrusion dans l'intimité (que la Cour qualifie de protection de la vie privée), est critiquée. Deux points ressortent de cette critique : premièrement, la question en litige dans cette décision, analysée sur la base de la circulation de l'information concernée, aurait dû être réglée en vertu de la Loi fédérale sur la protection des renseignements personnels et les documents électroniques (*LPRPDE*), puisqu'elle portait sur la protection de renseignements confidentiels et non sur la protection de la vie privée; deuxièmement, la protection des renseignements confidentiels, maintenant considérée dans le milieu des affaires comme une partie de la propriété intellectuelle dans le contexte du commerce international (par exemple, dans l'Accord de l'Organisation mondiale du commerce sur les Aspects des droits de propriété intellectuelle qui touchent au commerce [ADPIC]), contredit complètement l'effet des mécanismes de circulation de l'information mis en place par la propriété intellectuelle et devrait être examinée exclusivement dans le cadre des régimes juridiques applicables au secret, à l'accès à l'information et à la protection des données personnelles, et non dans le contexte de la propriété intellectuelle.

A. INTRODUCTION

This chapter demonstrates the central role that information flow model-based analysis should play in intellectual property (IP) and information-related legal analyses. Two landmark copyright judgments from the Supreme Court of Canada (SCC) can be viewed as examples of the information flow model (a model most prevalent in library and information science [LIS] theory):[2]

2 By contrast, in a number of recent decisions, courts, including the SCC, have failed to adopt analytic strategies parallelling communications or LIS approaches. The decisions appear to be the weaker for that failure: for example, the SCC was split in both *Théberge v Galerie d'Art du Petit Champlain*, 2002 SCC 34 [*Théberge*] and *Robertson v Thomson*, 2006 SCC 43. In *Robertson v Thomson*, the majority (LeBel J and Fish J for themselves and Rothstein J, Bastarache J, and Deschamps J) said "process" was not important — just the "context" of the presentation of the works at issue, distinguishing the Court's approach

LSUC[3] and *Tariff 22*.[4] In the original decision of the Copyright Board in the latter case, the analysis closely followed an LIS model, using language such as:

> Generally speaking, information transmitted over the Internet is delivered in a unicast pull mode: pull, because the user requests or "pulls" the information when desired, and unicast, because packets go to only one recipient. Alternative delivery modes associated with audio files involve multicasting and the use of streaming software.[5]

In its turn, the SCC approved much of the Board's decision and entirely approved its analytic approach, at one point quoting directly from the Board:

> [T]he Copyright Board provided a succinct description of an Internet transmission:
>
> > First, the file is incorporated to an Internet-accessible server. Second, upon request and at a time chosen by the recipient, the file is broken down into packets and transmitted from the host server to the recipient's server, via one or more routers. Third, the recipient, usually using a computer, can reconstitute and open the file upon reception or save it to open it later . . . .[6]

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in *SOCAN v Canadian Association of Internet Providers*, 2004 SCC 45 [*Tariff 22*]. The minority (Abella J for herself and Charron J, McLachlin CJ, the latter author of the unanimous judgment in *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339 [*LSUC*], and Binnie J (author of the majority judgments in *Théberge* (a 4:3 split) and *Tariff 22*)) endorsed the "process" approach.

3 *Ibid*.

4 *Ibid*. Justice Binnie for himself and Iacobucci J, Major J, Bastarache J, Arbour J, Deschamps J, Fish J, and McLachlin CJ in the majority. Justice LeBel wrote a judgment concurring for the most part but dissenting on other grounds. The case is referred to as the "Tariff 22" case because it arose from consideration by the Copyright Board of "Tariff 22," filed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN) to target Internet Service Providers (ISPs).

5 *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, (1999) 1 CPR (4th) 417 at para 54 (Copyright Board of Canada) [*Copyright Board*].

6 *Tariff 22*, above note 2 at para 10, citing *Copyright Board* above note 5 at para 82.

More recently, the Copyright Board initiated an analysis of information use in schools[7] later accepted by the Federal Court of Appeal (FCA)[8] and, ultimately, by the SCC.[9]

In this chapter, the utility of an information science-based analysis in the wider context of all intellectual property and information law cases[10] will be demonstrated through a re-examination of the scenario with which the Ontario Court of Appeal (ONCA) dealt in the recent case of *Jones v Tsige*.[11] Based on this analysis of *Tsige*, it will be demonstrated that the decision of the ONCA in the *Tsige* case is flawed. Moreover, the analysis will lead, in turn, to the chapter's conclusion casting doubt on the appropriateness of including the law of confidential information (or privacy or personal data protection [PDP]) within the rubric of IP.

B. THE LIS PERSPECTIVE

Historically, the relationship in written communication was one of a single sender to a serial set of receivers as a single manuscript was passed around amongst readers. Only oral communication was able to achieve the relationship of one sender to many simultaneous receivers (with the exception of public monuments which, where the population was literate, could reach a mass audience through writing). Of course, a choir would be an oral/aural instance of many senders to many simultaneous receivers and, in written communication, a manuscript authored by a number of writers would be an early example of "many to many (serial)" communication.

Librarianship, based in these information distribution realities over the millennia, has understood concepts of communication, including those recently modelled by communications theorists focusing on the relationship between the sender of a communication and the receiver of that

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7 "Reprographic Reproductions (2005–2009): Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire" *Copyright Board of Canada* (26 June 2009), online: Copyright Board of Canada www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf; see also Margaret Ann Wilkinson, "Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 503.

8 *Alberta (Minister of Education) et al v Canadian Copyright Licensing Agency*, 2010 FCA 198.

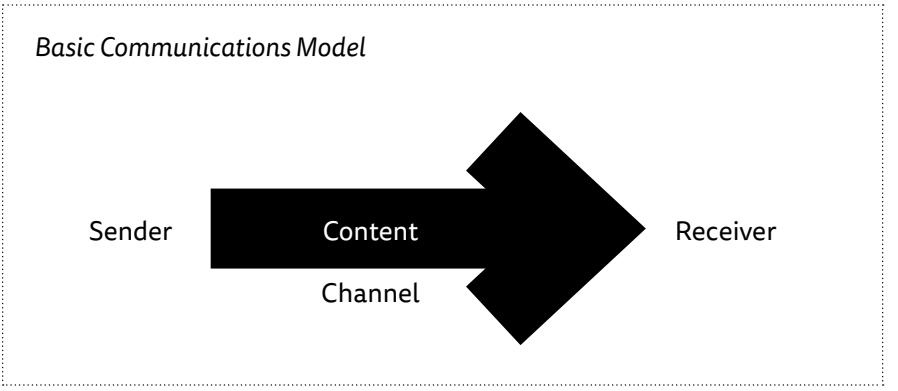
9 *Alberta (Minister of Education) et al v Canadian Copyright Licensing Agency*, 2012 SCC 37.

10 See *Crookes v Newton*, 2011 SCC 47, where the SCC draws a direct analogy between hyperlinks and footnotes, the latter information resources long embraced by LIS.

11 2012 ONCA 32 [*Tsige* CA], allowing the appeal from Whitaker J, 2011 ONSC 1475 [*Tsige* SC].

communication and on the mediation between sender and receiver of both the content and the channel for that content[12] (see Figure 3.1). There are many variations on this basic model — recently transmission of information from many to many has become common — but the analytic focus of this model is on the flow of information *from* the sender(s) *to* the receiver(s).

Figure 3.1



While LIS can embrace communications analyses, with its roots in librarianship,[13] LIS is always firmly focused on the user perspective and the insight that information will be neither sought nor received unless the user wishes it. Users seek information and evaluate it to fit their needs based both on availability (access) *and* on the perceived authority of the source of the information.[14] Information is absorbed by users hierarchically, involving both objective and subjective experience specific to each user: a user must source data useful to meeting an information need and combine it with her or his own cognitive framework to acquire knowledge and, ultim-

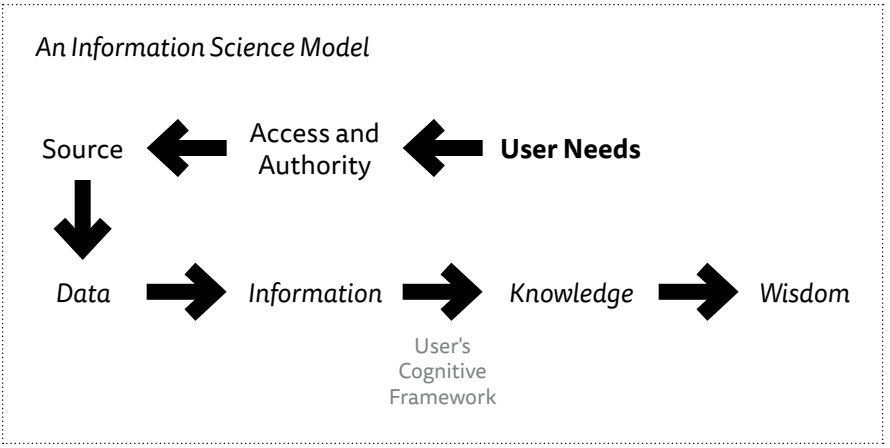
12 The seminal work is Claude E Shannon & Warren Weaver, *The Mathematical Theory of Communication* (Illinois: University of Illinois Press, 1949); later, but key, is Marshall McLuhan, *Understanding Media: The Extensions of Man* (Toronto: McGraw-Hill, 1964).

13 Boyd P Holmes, *An Enquiry into the Domain of Information Science, with an Emphasis on Contributing Disciplines: 1973–1998* (PhD dissertation, Western University, 2002).

14 Margaret Ann Wilkinson, "The Public Interest in Moral Rights Protection" (2006) 1 Mich St L Rev 193 [Wilkinson, "The Public Interest"]; see also Margaret Ann Wilkinson & Natasha Gerolami, "The Author as Agent of Information Policy: the Relationship between Economic and Moral Rights in Copyright" (2009) 26:2 Government Information Quarterly 321.

ately, gain wisdom[15] (see Figure 3.2). In LIS theory, both information producers (or senders) *and* information users (or receivers) control information during its lifecycle, not just "senders."[16]

Figure 3.2



Sources of LIS-inspired insight on IP and information law-related questions are slowly accumulating in the scholarly literature.[17] Margaret Stieg has documented the reaction of law to the information changes emerging from industrialization in her canvas of nineteenth-century British law.[18] Catherine Maskell has drawn attention to the unequal treatment of information producers and users under the Canadian *Copyright Act*[19] in that cartels of information producers have been encouraged since 1988 in Part VII of the *Act* (which exempts them, as collectives under the purview of the

15 (1) Data, (2) Information — into which data is converted once someone is looking for it, (3) Knowledge — information absorbed by the user, and (4) Wisdom — knowledge combined into the user's already extant cognitive framework.

16 The author does not claim LIS offers the only lens through which emerging legal problems in IP and information law should be analyzed; from the humanities, see, for example, Marilyn Randal, *Pragmatic Plagiarism: Authorship, Profit and Power* (Toronto: University of Toronto Press, 2001). The author does assert that LIS offers a unique and important framework for decision makers and policy makers that will prove extremely valuable to law reform.

17 See, for example, Margaret Ann Wilkinson & Lynne EF McKechnie, "Implementing the Information Rights of Canadian Children" (2002) 20:1 CFLQ 429.

18 Margaret F Stieg, "The Nineteenth-Century Information Revolution" (1980) 15:1 Journal of Library History 22.

19 RSC 1985, c C-42.

Copyright Board, from the *Competition Act*[20]) while cartels of information users or their agents are not so exempted.[21] Charles Maina asks whether the voice of indigenous peoples as represented in international negotiations over indigenous knowledge is authentic, not only surveying the formal international and regional instruments, but also interviewing elders from First Nations, establishing that they believe theirs is the authentic voice and that it has been missing.[22] Maina has also commented on patents as knowledge-bearing artifacts.[23] As ownership of research data becomes an increasingly contested area of IP law development, Carole Perry offers an empirical study of attempts by the Social Science and Humanities Research Council of Canada to require the researchers it funds to deposit data in open repositories.[24]

C. REGULATING THE FLOW OF INFORMATION

Laws related to ordering the flow of information in society, such as censorship, defamation, and criminal prohibitions on blackmail, have arisen at many times in many places. Emerging separately in law, the publication of expressions (copyright), the spread of innovation (patent), and protection of consumers from confusion about products (trademark) developed to protect and encourage certain aspects of information flow. By the second half of the twentieth century, the three had become more commonly viewed together as part and parcel of the same theoretical construct: *intellectual property*. At the same time, societies and economies began to undergo changes which observers identified as so profound as to require a new moniker: *the information age*. Now, when information, rather than industry, is the lynchpin, it is not surprising that law designed to meet the information needs of a society based on industry is being severely tried by the needs of a society

20 RSC 1985, c C-34.

21 Catherine Maskell, *Consortia Activity in Public Libraries: Anti-Competitive or in the Public Good?* (PhD dissertation, Western University, 2006); Catherine A Maskell, "Consortia: Anti-Competitive or in the Public Good?" (2008) 26:2 Library Hi-Tech 164.

22 Charles K Maina, *Traditional Knowledge Protection Debate: Protecting Traditional Knowledge Against Versus Through Intellectual Property Mechanisms* (PhD dissertation, Western University, 2009).

23 Charles K Maina, "What Patents Tell: Limitations of Patent-Based Indicators of Innovation" (2007) 1:1 Journal of Law, Ethics, and Intellectual Property, online: Scientific Journals International www.scientificjournals.org/journals2007/articles/1254.pdf.

24 Carole Marie Perry, "Archiving of Publicly Funded Research Data: A Survey of Canadian Researchers" (2008) 25:1 Government Information Quarterly 133.

whose information needs are its raison d'être. By the final quarter of the twentieth century, the emerging changes had spawned a new global concern about the effect of telecommunications and computerization of data on the handling of data about individuals.[25] Inevitably, such new law-making and the pressures of technological change on the old laws become challenges that will reverberate particularly in IP laws: laws that were specifically designed to order the flow of information as it was transformed by the previous industrial age.

D. BACKGROUND TO *JONES v TSIGE*

In approaching the analysis of *Tsige*, it is useful to note that the FCA, in the reasons for decision in the earlier *BMG v John Doe*,[26] had already considered relationships between the areas of law to be explored in this chapter. In *BMG v John Doe*, music publishers[27] had launched a lawsuit against a group of individuals who, it claimed, were infringing copyrights in music by each downloading large numbers of songs from the Internet. However, since the plaintiffs only had evidence of the *behaviour* of these Internet users and did not have any knowledge of the "real world" individuals behind these Internet identities, the plaintiffs had to launch the lawsuit against unknowns (hence "John Doe"). [28] The plaintiffs then brought a motion against certain Internet Service Providers (ISPs)[29] seeking to have the Federal Court force the ISPs to reveal actual identities for these certain subscribers so they could become the named targets of the lawsuit. On appeal when the motion

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25 Organisation for Economic Cooperation and Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (adopted 23 September 1980), online: OECD www.oecd.org/internet/interneteconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm [OECD, *Guidelines*]

26 2005 FCA 19 [*BMG* FCA], aff'g 2004 FC 488 [*BMG* FC].

27 *Ibid*. The style of cause included: BMG Canada Inc, EMI Music Canada, Sony Music Entertainment [Canada], Universal Music Canada, Warner Music Canada, BMG Music, Arista Records Inc, Zomba Recording Corporation, EMI Music Sweden AB, Capitol Records Inc, Chrysalis Records Limited, Virgin Records Limited, Sony Music Entertainment Inc, Sony Music Entertainment [UK] Inc, UMG Recordings Inc, Mercury Records Limited, and WEA International Inc.

28 *Ibid*. The style of cause cited "John Doe, Jane Doe and All Those Persons Who are Infringing Copyright in the Plaintiffs' Sound Recordings."

29 Identified as Shaw Communications Inc, Roger Cable Communications Inc, Bell Canada, Telus Inc, and Videotron Ltée.

was dismissed, Sexton J, for the FCA, framed the problem as a contrast between privacy rights and IP:

> [I]n my view, in cases where plaintiffs show that they have a *bona fide* claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action.[30]

An LIS-inspired analysis, however, establishes that the real question before the courts in *BMG* was the appropriate application of PDP legislation.[31]

Unfortunately, in part due to an overlap between the vocabulary of PDP and that of privacy, the role of PDP has been much misunderstood, both by the public, but also, more unfortunately, in the courts.[32] In the FCA in *BMG*, for example, Sexton J's analysis concerning the federal *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) became completely circular. After stating that if there is a court order, *PIPEDA* permits disclosure of information otherwise not to be disseminated, he used *PIPEDA* to determine whether there ought to *be* an order — which inevitably led him to the conclusion that, indeed, there ought to be one.[33] His key question should have been whether there was a public interest in favour of disclosure to the plaintiffs in the copyright infringement action before him that outweighed the legitimate privacy concerns of the potential defendants. If there was not, then PDP would prevail because the court had no jurisdiction to compel production of the identities of ISP customers in the face of *PIPEDA* (which dictated the terms of the confidential relationship between the ISPs and their customers and required the ISPs to keep the information confidential).

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30 *BMG* FCA, above note 26 at para 42.

31 In that case, the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*]; see Margaret Ann Wilkinson, "Battleground between New and Old Orders: Control Conflicts between Copyright and Personal Data Protection" in Ysolde Gendreau, ed, *Emerging Intellectual Property Paradigm — Perspectives from Canada* (Cheltenham, UK: Edward Elgar, 2008) at 227 [Wilkinson, "Battleground"].

32 Confusingly, Canada's PDP legislation governing federal private sector institutions was re-enacted in 1982 as the *Privacy Act*, SC 1982, c 111 (now RSC 1985, c P-21). It is entirely distinct from the four provincial statutes entitled "Privacy Act" in Saskatchewan (RSS 1978, c P-24), Manitoba (RSM 1987, c P-125), Newfoundland and Labrador (RSNL 1990, c P-22), and British Columbia (RSBC 1996, c 373). The latter are directed primarily at prohibiting surveillance.

33 *BMG* FCA, above note 26 at para 42. Ultimately, the court dismissed the appeal because time had passed and the holders of these ISP accounts might have changed — but without prejudice to a right to commence a fresh application.

The only possible public interest in disclosure in *BMG* would have been an interest which would make *all* litigants able to compel defendants' identities from third parties — a position clearly not taken by the legislators and not consistent with any prior law.[34] If, as this author believes, *PIPEDA* should have governed the outcome in *BMG*, the FCA would have left it to plaintiffs to find some way, other than court orders compelling third party businesses to identify their customers, to identify those they allege infringed.

PIPEDA is one of a web of PDP statutes created by legislatures across Canada, stemming from an international initiative to protect the privacy of individuals while enabling the flow of information in a digital society.[35] While privacy concerns the "state of being let alone," PDP comes into play only once an individual has not been "left alone" and has had information about herself or himself come into the hands of an organization governed by PDP legislation.[36] PDP legislation is *not* designed to regulate the flow of information between individuals in society — relationships that *would* be regulated as part of law protecting privacy — but rather is designed to regulate organizations that obtain information about individuals from various sources.

Over the same period during which many legislatures in Canada and other countries have been developing the balance between data transfer and the right of individuals to protection of data about themselves into comprehensive schemes of PDP, there has also been an accretion of the concept of legal protection for confidential information into the domain of IP.

Concepts of confidentiality historically played no part in the development of the classic IP devices: no part in copyright *per se*;[37] no part in trade-

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34 Wilkinson, "Battleground," above note 31 at 259.

35 See OECD, *Guidelines*, above note 25; see also Colin J Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Ithaca: Cornell University Press, 1992) at 136–40.

36 There are two important distinctions in this characterization. First, the definition of privacy has recently become virtually crystallized as "the *right* to be let alone" (the emphasis is added here by this author), a formulation which presupposes a legal consequence — whereas it is best characterized analytically as "the state of being let alone": see Wilkinson, "Battleground," above note 31 at 244–45. Second, privacy concerns an individual and PDP concerns organizations: see Wilkinson, "Battleground," above note 31 at 252–58; see also Margaret Ann Wilkinson, "Confidential Information and Privacy-Related Law in Canada and in International Instruments" in Chios Carmody, ed, *Is Our House in Order? Canada's Implementation of International Law* (Montreal: McGill-Queen's University Press, 2010) at 275 [Wilkinson, "Confidential"].

37 Anonymity has become linked with the framing of moral rights in copyright but it should be considered as privacy and not moral rights: see Wilkinson, "The Public Interest," above note 14.

mark (because confidentiality is the antithesis of trademark, which is based on consumer identification of information signals about products); and no part in the theory of patent protection, with its bargain of publication of the invention in return for a limited term monopoly on manufacture, use, distribution, and sale. Nonetheless, in the landmark *Agreement on Trade-Related Aspects of Intellectual Property Rights*,[38] Article 39, paragraph 2 provides that

> 2. Natural . . . persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices* so long as such information:
> (a) is secret in the sense that it is not . . . generally known among or readily accessible to persons within the circles that normally deal with the 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.[39]

The note to the text of *TRIPS* denoted by the asterisk reproduced above is to the effect that "contrary to honest commercial practices"

> mean[s] at least . . . breach of contract, breach of confidence . . . 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.[40]

Although it declares confidential information to be part of IP, *TRIPS* is a product of trade negotiations and not necessarily theoretically sound. While it is true, as a practical matter, that confidentiality has long played a practical role in patent practice because preserving the secret, non-public status of an invention so that its novelty can be established when application is made for a patent is important, at a theoretical level, despite the inclusion of confidentiality in *TRIPS*, it nonetheless remains an open question whether the legal protection of confidentiality belongs as a part of IP law or is more appropriate to another area of law.

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38 15 April 1994, 1869 UNTS 299, 33 ILM 1197 [*TRIPS*].
39 *Ibid* at Article 39(2).
40 *Ibid* at Part II, note 10.

While an international consensus on providing legal protection for confidences may be appropriate, it is equally important to be analytically clear about what the information flow consequences of such a development will be. It is premature to identify such a development with IP not least because there is no public aspect to the protection of confidentiality like there is in patent, trademark, and copyright.[41]

E. *JONES v TSIGE*

Within the past year, the ONCA self-consciously saw itself as creating a watershed moment not in IP law but in the law of privacy:

> [I]t is appropriate for this court to confirm the existence of a right of action for intrusion upon seclusion. Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.[42]

In developing the argument for the new tort, certain facts in *Tsige* were identified by the ONCA as key:

1) Tsige was an employee of the Bank of Montreal [BMO].
2) Tsige used her employee access at BMO to access the customer accounts held by Jones multiple times: "As a bank employee, Tsige had full access to Jones' banking information and, contrary to the bank's policy, looked into Jones' banking records at least 174 times over a period of four years."[43]
3) Jones was a customer of BMO: "Jones maintains her primary bank account there."[44]

These three facts alone can be used to construct an information flow diagram of the circumstances relevant to determination of this dispute (see Figure 3.3).

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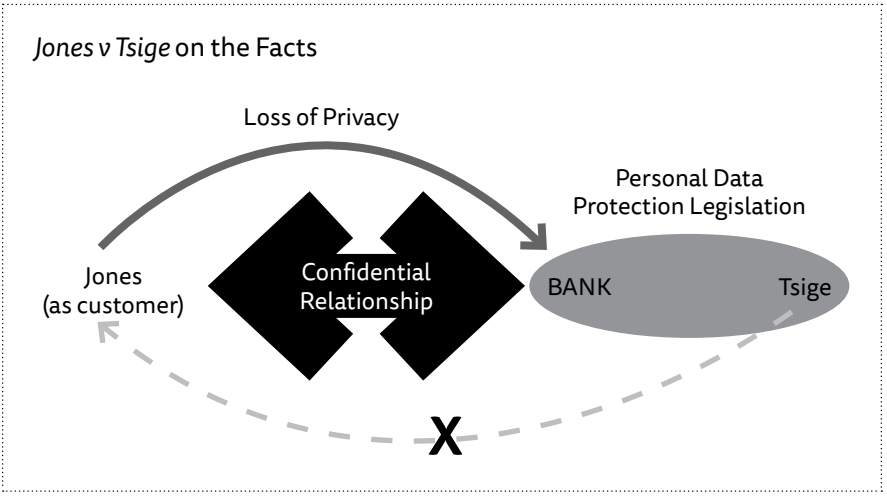
41 See Wilkinson, "Confidential" above note 36.

42 *Tsige* CA, above note 11 at para 65, Sharpe J, also speaking for Winkler CJO, and Cunningham ACJ.

43 *Ibid* at para 2.

44 *Ibid* at para 4. Justice Whitaker on the original motion stated: "Ms. Jones is a Project Manager employed by BMO. She is also a customer of BMO and maintains her primary banking accounts there. Ms. Jones' pay is deposited to these accounts and all of her personal financial transactions are managed in these accounts" *Tsige* SC, above note 11 at para 12.

Figure 3.3



Certain additional implications, which the ONCA did not identify, become clear from the relationships evident in the representation of the known facts diagrammed in Figure 3.3:

1) The bank must comply with *PIPEDA* with respect to its treatment of customer data.
2) Jones would have a customer account agreement with the bank.[45]

Notably, Whitaker J, the judge of first instance in *Tsige*, was absolutely clear that

> there is no doubt that *PIPEDA* applies to the banking sector and Ms. Jones had the right to initiate a complaint to the Commissioner under that statute with eventual recourse to the Federal Court. For this reason I do not accept the suggestion that Ms. Jones would be without any remedy for a wrong, if I were to determine that there is no tort for the invasion of privacy.[46]

The role of *PIPEDA* in *Tsige* led Whitaker J to hold that "[i]n Ontario, it cannot be said that there is a legal vacuum that permits wrongs to go unrighted — requiring judicial intervention"[47] and was a principal reason behind his judgment denying Jones' claim to a common law right of privacy

45 Tsige and Jones would both be in an employment contract with BMO or covered by a collective agreement.
46 *Tsige* SC, above note 11 at para 54.
47 *Ibid* at para 53.

in the situation. However, when the matter was appealed to the ONCA, although acknowledging briefly that all the action involved in the dispute took place within BMO,[48] Sharpe J did not characterize the bank as a participant in the information flow involved in the case — treating BMO rather as the setting of the action, not a participating actor.[49]

The analysis Sharpe J used to arrive at the declaration of a new privacy-related tort of "intrusion upon seclusion" focused upon the person of "Ms. Jones" — not on the flow of information. Information flow inevitably involves more than one player — the information must flow from a source to a user. Seeing the bank as a player, at least in the role of repository for the information about Jones, which Tsige accessed, might have changed the way the ONCA perceived the issue.

If the flow of information in the situation had been traced, the ONCA would have realized that Jones had given up her privacy in the information held by the bank.[50] As a consequence of doing her banking, Jones had no privacy since the bank was privy to all transactions. In order to bank, Jones had chosen to rely on a relationship of confidence with this bank. This, in turn, leads to the analytic consequence that, when Tsige accessed Jones' information, it was the bank that held it, and not Jones herself. By focusing in on Jones as the one player important to the situation, Sharpe J mischaracterized her, ignored the other participants and obscured the analysis.[51] Justice Sharpe highlighted facts that should have been considered completely irrelevant to the resolution of the matter:

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48 *Tsige* CA, above note 11. BMO is identified as the workplace of both parties at para 4; also again in connection with the women's roles at paras 5 and 6; BMO is only mentioned in the "Analysis" where Sharpe J disposes of the arguments concerning *PIPEDA* at para 50.

49 Justice Sharpe never mentions the regulatory environment within which banks in Canada operate: for example, the *Bank Act*, SC 1991, c 46 and the *Office of the Superintendent of Financial Institutions Act*, RSC 1985, c 18 (3rd Supp).

50 Note that Sharpe J accepts the concept of privacy as involving "the right to be let alone" not the "state . . ." (see *Tsige* CA, above note 11 at para 17).

51 In *Tsige* SC, above note 11, Justice Whitaker saw the matter as governed by *PIPEDA* — which applied to the bank — and his findings about the two individual litigants did not dominate although he provided details: "Ms. Jones is a Project Manager employed by BMO" at para 12; "[Ms. Tsige] was involved in a financial dispute with Mr. Moodie (at the time Ms. Tsige's common-law spouse and former husband of Ms. Jones) and wished to confirm whether he was paying child support to Ms. Jones" at para 21; "Ms. Tsige has been employed by BMO for twenty years. She has worked as a licensed Financial Planner for the last ten years. Prior to that she was a financial services manager for eight years and before that a customer service representative for two years" at para 13; "Ms. Tsige has completed the Canadian Securities Course and has received extensive training in privacy and ethical issues as they arise in the financial services sector" at para 14.

1) Jones was an employee of the bank.[52]
2) Although they had never met each other or communicated, Jones and Tsige had a connection in their personal lives: "Tsige and Jones did not know each other despite the fact that they both worked for the same bank and Tsige had formed a common-law relationship with Jones' former husband."[53]

Figure 3.3 is analytically correct in identifying only Tsige as a BMO employee. While Sharpe J was factually correct when he identified both Tsige and Jones as employees of the bank,[54] the accounts held by Jones and accessed by Tsige were personal accounts held by Jones as a *customer* of BMO, not as an employee of the bank. In analyzing the legal implications of the information flow that occurred in this situation, Jones' identity as a BMO employee is irrelevant. In contradistinction to Jones' situation in the dispute, it *is* Tsige's identity as an employee of BMO that is the aspect of her identity relevant to this situation. While Jones' work identity as a bank employee is irrelevant and her private identity as a customer of the bank is paramount, Tsige's identity as a bank employee is key and her private identity as a participant in a domestic contretemps also involving Jones is irrelevant. These analytic distinctions become clear under the information flow analysis presented in Figure 3.3 but were obscured and lost in the FCA's analysis.

Identifying Tsige's employee role as the material one then points to the bank as *the* key player in the information transaction at issue in *Tsige*: it is only by virtue of her employment that Tsige had access to the accounts of Jones, a customer of BMO. *PIPEDA* is therefore clearly the applicable law and a legal solution should not have been sought by the ONCA in the common law of privacy.

In the *BMG* case, discussed above, the FCA, like the ONCA in *Tsige*, turned to privacy law when appeal to *PIPEDA* alone should have resolved the matter — but, in *BMG*, *PIPEDA* was brand new.[55] The *Tsige* case was heard re-

52 *Tsige* CA, above note 11 at para 2.

53 *Ibid*.

54 *Ibid* at paras 2 and 4.

55 *BMG* FC, above note 26. Justice von Finckenstein's judgment was released 31 March 2004, just after *PIPEDA* came into force on 1 January 2004, in respect of businesses including ISPs. All parties agreed on two points, recited at para 9: "[1] ISP account holders have an expectation that their identity will be kept private and confidential. This expectation of privacy is based on both the terms of their account agreements with the ISPs and sections 3 and 5 of . . . [PIPEDA] [2] The exceptions contained in PIPEDA apply in

cently and *PIPEDA* is now over a decade old in its application to the banking sector. Indeed, in *Tsige*, Sharpe J acknowledged that "[t]he federal and Ontario governments have enacted a complex legislative framework addressing the issue of privacy. These include: [*PIPEDA*]; *Personal Health Information Protection Act*; *Freedom of Information and Protection of Privacy Act*; *Municipal Freedom of Information and Protection of Privacy Act*; *Consumer Reporting Act*."[56] Unfortunately, much of what Sharpe J then said about *PIPEDA* is incorrect.

Justice Sharpe stated categorically that "the remedies available under *PIPEDA* do not include damages and it is difficult to see what Jones would gain from such a complaint."[57] In fact, this is one of the key differences between the private sector *PIPEDA* and the public sector PDP regimes passed by the various Canadian jurisdictions, including the federal government's *Privacy Act*.[58] Section 16 of *PIPEDA* provides the possibility of a court-ordered remedy in damages for Jones:

> The Court may, in addition to any other remedies . . .
>
> (c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.[59]

Indeed, in the recent case *Landry v Royal Bank*,[60] involving another Canadian bank, the Federal Court awarded damages (from the bank) to a customer in the amount of $4,500 (with interest and costs).

Further, Sharpe J introduced a complete red herring when, after holding "Tsige acted as a rogue employee contrary to BMO's policy,"[61] he thought

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this case and an ISP by virtue of s. 7(3)(c) of PIPEDA may disclose personal information without consent pursuant to a court order."

56 *Tsige* CA, above note 11 at para 47.

57 *Ibid* at para 50.

58 *Privacy Act*, RSC 1985, c P-21.

59 *PIPEDA*, above note 31 at s 16.

60 2011 FC 687 [*Landry*].

61 See *Tsige* CA, above note 11 at para 50. Characterizing Tsige as a "rogue employee" originated in the ONCA, not with Whitaker J, who found "[o]ver the course of four years and on 174 occasions, Ms. Tsige accessed and reviewed on her computer screen at work, Ms. Jones' private banking records" (*Tsige* SC, above note 11 at para 4); second, "[a]fter being caught doing this by BMO, Ms. Tsige acknowledged that she had no legitimate purpose in reviewing Ms. Jones' records. Ms. Tsige claims to have done it for personal reasons" (*Tsige* SC, above note 11 at para 5); and, finally, "[w]hen confronted by BMO, Ms. Tsige acknowledged that she had no legitimate need or interest to explain her conduct. She also confirmed that she understood that this was contrary to her professional training and contrary to BMO policies" (*Tsige* SC, above note 11 at para 20).

"that may provide BMO with a complete answer to the complaint."[62] Canadian PDP legislation specifically places the onus for protecting data about identifiable individuals on institutions: there is no suggestion in the drafting that institutions may escape responsibility if their employees behave in a "rogue" manner. In *PIPEDA*, specifically, Schedule 1 provides the following:

> **4.1 Principle 1 — Accountability**
>
> An organization is responsible for personal information under its control . . . [and for]compliance with the following principles.
>
> . . . .
>
> **4.7 Principle 7 — Safeguards**
>
> Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.
>
> **4.7.1**
>
> The security safeguards shall protect personal information against . . . unauthorized access . . . .

The Royal Bank clerk in *Landry* appears to have behaved in at least as "roguish" a manner as Tsige and yet in *Landry* the bank was held to account: "[T]he fax cover page . . . clearly establishes that the [bank's] clerk, Ms. Bouchard, had sent the information to Ms. Arsenault [the husband's lawyer], thereby directly breaching Bank policy and procedures."[63] The personal account information was sent, without the customer's consent, to counsel for the customer's husband in divorce proceedings and the Royal Bank was ordered to pay the customer, Landry, $4,500 plus interest and costs. The bank was ordered to do so even though Scott J acknowledged that

> the respondent [bank] did not benefit commercially from the error made by one of its clerks and . . . there is no evidence that the respondent acted in bad faith, except for Ms. Bouchard denying any knowledge of the file even though she herself was responsible for the wrongful disclosure. The disclosure of personal information in the present case is not trivial; it is a major error, especially as the Bank's employee tried to cover up her wrongful conduct.[64]

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62 See *Tsige CA*, above note 11 at para 50.

63 *Landry*, above note 60 at para 5.

64 *Ibid* at para 28.

The third instance of Sharpe J's confusion about *PIPEDA* in *Tsige* not only reveals his misunderstanding but also highlights the analytic fallacy of Sharpe J's focus on Jones. Justice Sharpe wrote "[f]irst, Jones would be forced to lodge a complaint against her own employer rather than against Tsige, the wrongdoer."[65] Justice Sharpe's concern is surprising since he himself recites that Jones did not hesitate to complain to the bank about her suspicions of Tsige initially:[66] "Jones became suspicious that Tsige was accessing her account and complained to BMO."[67] Analytically, Sharpe J's concern is misplaced in that Jones would not be lodging this complaint against her *employer* but against her *banker* (who also happens to be her employer).[68] It is not uncommon for individuals to have multiple relationships with organizations or institutions. Where a given relationship is governed by statute, the common law cannot be invoked to create new causes of action because one individual in that statute-governed relationship also happens to have a different relationship with the institution or organization which the individual would rather not jeopardize in seeking legal redress connected to the statute-governed relationship.

Clearly Jones had a remedy in this situation under *PIPEDA*, albeit directed against the bank, BMO, rather than its employee, Jones. While it is axiomatic at common law that "the categories of tort are never closed,"[69] they are closed where a legislature has spoken. Justice Sharpe acknowledges this in *Tsige*:

> Tsige argues that it is not open to this court to adapt the common law to deal with the invasion of privacy on the ground that privacy is already the subject of legislation in Ontario and Canada that reflects carefully considered economic and policy choices. It is submitted that expanding the reach of the common law in this area would interfere with these carefully

65 *Tsige* CA, above note 11 at para 50.

66 *Tsige* SC, above note 11. Justice Whitaker states that "Ms. Tsige was only stopped from continuing this behaviour [accessing Ms. Jones' accounts] when BMO detected her activity" at para 19.

67 *Tsige* CA, above note 11 at paras 5 & 6.

68 Presumably Sharpe J would not create a new cause of action at common law for daycare employees of a municipal government who also lived in the municipality if that municipality failed to provide garbage pick up services: he would not create a new cause of action for the daycare workers against the garbage workers.

69 Lord MacMillan in *Donaghue v Stevenson*, [1932] UKHL 100.

> crafted regimes and that any expansion of the law relating to the protection of privacy should be left to Parliament and the legislature.[70]

Nevertheless, Sharpe J wrote:

> I am not persuaded that the existing legislation provides a sound basis for this court to refuse to recognize the emerging tort of intrusion upon seclusion and deny Jones a remedy. In my view, it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area . . . . [71]

This is because, unfortunately, he misapprehended the scope of *PIPEDA*, saying "*PIPEDA* is federal legislation dealing with 'organizations' subject to federal jurisdiction and does not speak to the existence of a civil cause of action in the province."[72] This understates *PIPEDA*'s ambit in two ways. First, while it is true that *PIPEDA* is federal legislation and speaks to "organizations" subject to federal jurisdiction, the application of *PIPEDA* is much wider than that: it is directed to all organizations which carry on commercial activities in Canada, except organizations carrying on activities exclusively within provinces or territories which have passed legislation which the federal cabinet deems to be "substantially similar" to *PIPEDA*. Second, as *PIPEDA does* provide for a civil cause of action, it indeed "speak[s] to the existence of a civil cause of action in the province."[73]

On this information flow-based analysis, the federal government in *PIPEDA*, when combined with the equivalent legislation passed by provincial or territorial governments, has occupied this arena. *PIPEDA* gives Jones lawful control over her information while in the hands of the bank — and the *Tsige* case was solely about Jones' control over her customer information held at the bank.

This aspect of *Tsige* mirrors the question that came years earlier before the same court in *Seneca College v Bhadauria*.[74] When that ONCA decision was appealed to the SCC, Laskin, then CJ, reversed the ONCA, concluding Ms Bhadauria had no cause of action at common law:

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70 *Tsige* CA, above note 11 at para 48.
71 *Ibid* at para 49 [citation omitted].
72 *Ibid* at para 50.
73 *Ibid*.
74 (1979), 27 OR (2d) 142, rev'd [1981] 2 SCR 181 [*Bhadauria*].

> The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code . . . . I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.[75]

The legislation at issue in *Bhadauria* was the then newly minted Ontario *Human Rights Code*.[76] The SCC found that Code contained some gaps in enforcement:

> The comprehensiveness of the Code is obvious from this recital of its substantive and enforcement provisions. There is a possibility of a breakdown in full enforcement if the Minister refuses to appoint a board of inquiry where a complaint cannot be settled . . . . I do not, however, regard this as supporting . . . the contention that the Code itself gives or envisages a civil cause of action . . . .[77]

Given the relatively stronger enforcement provisions in *PIPEDA*, it would appear that the same decision, excluding other civil causes of action except as provided in *PIPEDA*, should have been made by the ONCA in *Tsige*.[78]

F. CONCLUSION

Tsige did not present a factual situation supporting the introduction of a new tort of "intrusion upon seclusion." Not taking an information flow analytic approach to the facts, Sharpe J persuaded the ONCA that

> [f]inally, and most importantly, we are presented in this case with facts that cry out for a remedy. While Tsige is apologetic and contrite, her actions were deliberate, prolonged and shocking. Any person in Jones' position

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75 *Ibid* at 195.
76 Now RSO 1990, c H-19.
77 *Bhadauria*, above note 74 at 188.
78 No further appeal of *Tsige* was taken.

> would be profoundly disturbed by the significant intrusion into her highly personal information. The discipline administered by Tsige's employer was governed by the principles of employment law and the interests of the employer and did not respond directly to the wrong that had been done to Jones. In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.[79]

But, under existing legislation, *PIPEDA*, Jones *was* entitled to a remedy — a remedy created by Parliament exactly for the wrong that Jones experienced. Analytically, the question is not one of Jones' privacy but rather of Jones' entitlement to a confidential relationship with her bank. An LIS-inspired analysis of the facts in *Tsige*, based on the flow of information, would have led the ONCA to a focus on Jones, her confidential relationship with her bank as a *customer* of that bank, and her entitlement to protection under *PIPEDA*. In turn, this analysis should have led to a recognition that Parliament has already created law to assist Jones in this situation, crafting a careful balance between individual's privacy interests and encouraging the flow of information in society, and there was neither need nor room for a new judicially-created common law remedy based on a purported cause of action for intrusion upon seclusion.

The consequence of finding that Jones was entitled to confidentiality (as enacted under *PIPEDA*, in this case), rather than a direct remedy to protect her privacy interests (including the purported right of seclusion), brings this discussion full circle to a consideration of the theoretical underpinnings of confidential information as a facet of IP.

Protection of commercial confidences has been brought within *TRIPS*, which purports to focus on IP, and from this development, it might be argued, it is axiomatic that protection of confidentiality has become part of IP. But, while it is true that, in the service industry of banking, the confidence between customers and the bank is essential to the commerce of the institution, it is demonstrable from this analysis of the *Tsige* situation that, where PDP is legislated, such provisions override any other law concerning such confidences. And, while PDP has been shown here to be quite different from privacy law, it *is* related to confidential information protection. Privacy

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79 *Tsige* CA, above note 11 at para 69. The ONCA allowed the appeal, set aside the summary judgment below dismissing the action, and substituted an order granting summary judgment of $10,000 damages, leaving the parties to bear their own costs throughout, at paras 92 & 93.

is only one of the impulses behind PDP, regimes which themselves legislate certain relationships of confidence. Further, nothing in the analysis of privacy interests, confidentiality, or PDP suggests any of the three share characteristics normally associated with IP devices.

None of privacy, confidentiality, or PDP speaks to the public aspect that has been a hallmark of the development of IP. The recent case of *Girao v Zarek Taylor Grossman Hanrahan LLP*[80] illustrates the non-public and censoring nature of PDP. A law firm posted to the web the decision it had received from the federal Privacy Commissioner's Office holding a complaint against its client unfounded. Girao, the complainant, then launched a further complaint about the posting, this time against the law firm, which was, in turn, found to be "well-founded" but "resolved" by the Commissioner's Office.[81] Girao applied to the Federal Court for review and for remedies against the law firm (not the insurance company which had been the target of the original complaint), including $5 million for public humiliation and emotional damage.[82] The original Commissioner's decision was held to have been placed in the public domain by the law firm contrary to *PIPEDA* and the law firm was ordered to pay $1,500 damages and $500 costs to Girao.

Nothing in the legal protection of personal data or privacy or confidentiality encourages the spread of ideas in ways consistent with the basic tenets of IP; analytically, the essence of all three (privacy, PDP, and confidentiality) is to exclude others completely from access. Intellectual property, on the other hand, encourages public dissemination of ideas. The tensions between exploitation of confidential information in a business context, providing appropriate PDP for individuals in the context of those same businesses, and balancing privacy with demands for access are becoming real social, economic, and political issues.[83] Recognizing that these concepts — and the IP devices — are all facets of information flow and focusing analysis of situations on that perspective, as has been demonstrated here, will help the law respond to the emerging demands of a changing society, one increasingly challenged by new claims asserted in respect of informa-

80 2011 FC 1070.

81 *Ibid* at para 13.

82 *Ibid* at para 1.

83 See Mark Perry & Margaret Ann Wilkinson, "The Creation of University Intellectual Property: Confidential Information, Data Protection, and Research Ethics" (2010) 26 CIPR 93.

tion and flows of information and yet increasingly universally dependent upon information and information flow.