Is Breach of Confidence Properly Analysed in Fiduciary Terms?

Anglo-American jurisprudence recognises that information obtained by reason of a confidence reposed or in the course of a confidential employment cannot be used to the detriment of the person from whom or at whose expense it was obtained. There is no clear consensus in the common law jurisdictions as to the theoretical basis on which such protection has been granted; adherents of one school of thought seek to analyse the doctrine in proprietary terms, while their opponents regard this head of jurisdiction as a creation of Chancery *sui generis* and thus not requiring a grounding in property, contract or tort.

In the United States the mainstream of authority clearly favours proprietary theory, although this is perhaps due in part to the greater protection presently afforded non- or *quasi*-proprietary interests in that country.[1] For instance, many United States jurisdictions accord some protection to intangible personality interests through an action in tort for intrusion upon privacy. This doctrine has some commercial application, particularly in the class of case which Prosser designated as commercial appropriation of the plaintiff's name or business.[2] Then, there may exist a doctrine against reaping where one has not sown,[3] based on the so-called *I.N.S.* principle,[4] the effect of which may not have been entirely extinguished

[1] See Milgrim, *Trade Secrets* (1978), § 1.01[2] 1-7 for a note of those U.S. jurisdictions adhering to proprietary theory. For a useful general survey of English law, see Cornish, *Protection of Confidential Information in English Law* (1975) 6 International Review of Industrial Property and Copyright Law 43.

[2] Prosser, *Torts* 4th ed. (1971), 804. Perhaps the best known decision of that kind is *Pavesich* v. *New England Life Insurance Co.* 122 Ga 190, 50 S.E. 68 (1905) (use of picture without consent in newspaper advertisement). *Cf. Krouse* v. *Chrysler Canada Ltd* (1973) 40 D.L.R. (3d) 15 (Ont. C.A.). The "newsworthiness" privilege grounded on the First Amendment has considerably restricted the scope of actions in tort for intrusion upon privacy, particularly so far as public figures are concerned. See *Time, Inc.* v. *Hill* 385 U.S. 374 (1967); *Virgil* v. *Time, Inc.* 527 F. 2d 1122 (9th Cir. 1975). For substantive "due process" privacy protection, see DeBoice, *Due Process Privacy and the Path of Progress* [1979] U. Ill. L. Forum 469.

[3] See Callman, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition* (1942) 55 Harv. L. Rev. 595.

[4] *International News Service* v. *Associated Press* 248 U.S. 215 (1918). In this case the defendant was appropriating news items from the plaintiff. Al-

by the *Erie* doctrine.[5] Whatever the reasons, there has been extensive use, in practice, of trade secret protection as a clear commercial alternative to the federal statutory monopolies.[6] These competing modes of protection (which exist alongside the traditional economic torts, such as passing-off) have raised difficult constitutional issues (particularly that of federal pre-emption) which have accordingly compelled American courts to delineate these various concepts more clearly than Commonwealth judges have been called upon to do.[7]

The minority United States position is exemplified by the assertion of Mr Justice Holmes that

> the word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant

though it was recognised that the plaintiff had no property rights vis-à-vis the public in uncopyrighted news after its first publication, the Court held that it had an equitable *quasi*-property right in news collected at its own expense as against the defendant, and therefore equitable relief from unfair competition could be granted.

5 *Erie R.R.* v. *Tompkins* 304 U.S. 64 (1938). The U.S. Supreme Court held that there is no federal common law in diversity cases.

6 See generally Miller, *Legal Aspects of Technology Utilization* (1974). This tendency may have been caused in part, and is certainly exacerbated by, the high attrition rate of patents in actual litigation; in the United States up to 80% of patents fail depending upon the particular circuit in which suit is brought. Then, too, empirical evidence in that country suggests that proprietary rights are far less important in commercial terms than marketing considerations, investment requirements and lead times. The highest demand for protection for innovations appears (predictably) to occur *qua* small firms entering the market for the first time and larger firms entering marginal markets: *ibid.*, 7-10. In Canada, 69% of the patents challenged in the Supreme Court between 1928 and 1969 were held invalid. In all litigation, nearly 40% were held invalid: Duncan, *Canadian Business and Economic Implications of Protecting Computer Programmes* (unpublished Ph.D. thesis, University of Texas at Austin, 1975), 227.

7 The U.S. intellectual and industrial property bar underwent sharp trauma consequent on the decision in *Kewanee Oil Co.* v. *Bicron Corp.* 478 F. 2d 1074 (6th Cir. 1973), *rev'd* 416 U.S. 470 (1974), in which the Sixth Circuit Court of Appeals held that state trade secret protection laws were pre-empted by operation of the federal patent laws and were therefore unconstitutional. Given that trade secret law is utilised at least as much as patents to protect private research and development in the United States (see generally Harris & Siegel, "Trade Secrets in the Context of Positive Competition" in Harris (ed.), *Nurturing New Ideas: Legal Rights and Economic Roles* (1969), 82), the implications of the decision were enormous. The U.S. Supreme Court, in reversing the decision, held at page 481 that "the maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law".

> knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them.[8]

Mr Justice Holmes' perception comes very close to the philosophy prevailing amongst the judiciary in the British Commonwealth, particularly since the landmark case of *Saltman Engineering Co.* v. *Campbell Engineering Co.*[9] Despite some endeavours to advance proprietary theory, the Commonwealth judiciary has not yet been prepared to depart from the basic premise that there is a "broad principle of equity that he who has received information in confidence shall not take unfair advantage of it".[10] The attraction in this approach is not difficult to discern; a principle thus conceived will functionally reach many situations that proprietary theory will not.[11] Then, too, Commonwealth judges today may favour broad discretionary principles, rather than a strict proprietary approach with the attendant formalistic difficulties.[12]

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[8] *E.I. DuPont de Nemours Powder Co.* v. *Masland* 244 U.S. 100, 102-3 (1917). The American Law Institute also rejected the property concept of trade secrets: *Restatement of Torts* vol. 4, § 757, Comment (a) (1939).

[9] (1948) 65 R.P.C. 203 (C.A.). The equitable obligation was largely overlooked in the numerous nineteenth century master and servant cases, in which protection was granted on the basis of an implied term of secrecy in the contract of employment. See Hammond, *Developments in the Equitable Doctrine of Breach of Confidence* [1976] N.Z.L.J. 278, 279.

[10] *Seager* v. *Copydex, Ltd* [1967] 2 All E.R. 415, 417 (C.A.) *per* Lord Denning M.R. See also *Conveyor Co. of Australia Pty Ltd* v. *Cameron Bros. Engineering* [1973] 2 N.Z.L.R. 38 (S.C.); *New Zealand Needle Mfrs Ltd* v. *Taylor* [1975] 2 N.Z.L.R. 33 (S.C.); *Interfirm Comparison (Australia) Pty Ltd* v. *Law Soc'y of New South Wales* (1975) 5 A.L.R. 527 (S.C. N.S.W.); *Professional Maintenance Systems of Canada Ltd* v. *Smits* (1978) 40 C.P.R. (2d) 160 (B.C. S.C.); *Unicure, Inc.* v. *Thurman* (1978) 41 C.P.R. (2d) 97 (Ont. H.C.); *Stephenson* v. *Babity Motors Ltd* (1978) 40 C.P.R. (2d) 187 (B.C.S.C.); *Canadian Javelin Ltd* v. *Sparling* (1979) 4 B.L.R. 153 (F.C.T.D.). For recent arguments in favour of proprietary theory, see North, *Breach of Confidence: Is There a New Tort?* (1972) 12 J.S.P.T.L. 149; Ricketson, *Confidential Information — A New Proprietary Interest?* (1977) 11 Melbourne U. L. Rev. 223; Libling, *The Concept of Property: Property in Intangibles* (1978) 94 L.Q.R. 103; U.K. Law Commission, *Breach of Confidence* (Working Paper No. 58) (1974).

[11] *Quaere* whether proprietary theory would have reached *Duchess of Argyll* v. *Duke of Argyll* [1967] Ch. 302 (marital confidences); *Attorney General* v. *Jonathon Cape Ltd* [1975] 3 All E.R. 484 (Q.B.) (Cabinet confidences); *Foster* v. *Mountford & Rigby Ltd* (1977) 14 A.L.R. 71 (S.C. N.T.) (aboriginal tribal secrets).

[12] See, *e.g.*, the judgment of Lord Wilberforce in *Johnson* v. *Agnew* [1979] 2 W.L.R. 487, 490 (H.L.), wherein he addresses "the mystification which has been allowed to characterise contracts for the sale of land, as contrasted

Those objections apart, at least two logical difficulties in categorising confidential information or know-how as property are encountered at a purely abstract level. First, circularity in reasoning is surely involved in the assertion that the term "property right" (whether in tangible or so-called "intangible" property) may be attached to what is no more than a result of the courts' consideration of the total issues at stake in the proceedings.[13] Second, it seems highly unorthodox to describe as property that which "evaporates" when it reaches the public domain,[14] or when third parties, whether independently or by reverse engineering, make the same discovery.[15]

Many critics of the proprietary approach, however, are equally unwilling to embrace an overly-broad equitable doctrine, and re-

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with other contracts, ... [and the] accumulated debris of decisions and text book pronouncements which has brought semantic confusion and misunderstandings into an area capable of being governed by principle".

[13] *Cf. Colbeam Palmer Ltd* v. *Stock Affiliates Pty Ltd* (1968) 122 C.L.R. 25, 34 (Austr. H.C.) *per* Windeyer J., wherein his Lordship draws attention to the circularity involved in the argument that because injunctions were granted in equity to restrain interference with particular subject matter (*e.g.*, passing off by use of the plaintiff's common law trade mark), that subject matter became a form of property and was therefore entitled to the equitable protection granted to established property interests. However, if that were so, then there would have been no need for the "equitable" intervention in the first place. Equity attacks the improper user; it makes no judgments as to the property.

[14] See, *e.g.*, *Smith* v. *Dravo Corp.* 203 F. 2d 369, 373 (7th Cir. 1953) *per* Lindly Cir. J.: "That which has become public property cannot be recalled to privacy"; *Mustad* v. *Allcock* (H.L. 1928) reported late in [1963] 3 All E.R. 416 when the importance of the decision was recognised. See also Stedman, *Trade Secrets* (1963) 23 Ohio St. L.J. 4 where the "evaporation" argument is made. The reply which is usually made to the "evaporating property" argument is that there are many situations where, by operation of law, property rights are extinguished (*e.g.*, loss of common law copyright, adverse possession, loss of monopoly patent rights by effluxion of time). See Milgrim, *supra*, note 1, § 1.01[2] 1-6 and *National Starch Prods. Inc.* v. *Polymer Indus., Inc.* 273 App. Div. 732, 79 N.Y.S. 2d 357 (1st Dept 1948), *leave to appeal denied*, 274 App. Div. 822, 81 N.Y.S. 2d 278 (1948).

[15] The propriety of reverse engineering received the *imprimatur* of the U. S. Supreme Court in *Kewanee Oil Co.* v. *Bicron Corp., supra*, note 7. See also *E.I. du Pont de Nemours & Co.* v. *Christopher* 431 F. 2d 1012 (5th Cir. 1970), *cert. denied* 400 U.S. 1024 (1971), where it is suggested that there *may* be an active duty to guard against ordinary discovery. In that case an aeroplane hired by competitors circled an uncompleted methanol plant and took photographs. The Court noted at page 1016: "Perhaps ordinary fences and roofs must be built to shut out incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available".

cently the notion that the equitable obligation of confidence is doctrinally dependent upon the spectrum of fiduciary obligations seems to have gained some acceptance. Gowans J. in *Ansell Rubber Co.* v. *Allied Rubber Industries*[16] seemingly sought to categorise it thus, and in *Whimp* v. *Kawakawa Engineering Ltd*, Chilwell J. claimed: "From my reading [of] the authorities, it matters not whether a proprietary right as such exists. Equity steps in to prevent a breach of confidence in circumstances where something akin to a fiduciary duty exists".[17] Finn included breach of confidence in his recent treatise on fiduciary obligations,[18] and Dessemontet has asserted that "no obligation to secrecy *ever* arises from the disclosure itself, but only pre-existing or simultaneous fiduciary relationships give rise to it".[19] Conversely, Goff and Jones, in their work on restitution, maintain a formal (and apparently deliberate) distinction between "breach of fiduciary relationships" and "benefits obtained in breach of confidence".[20] In addition, the learned authors of an Australian treatise assert that "obligations of confidence arise other than between fiduciaries as traditionally understood and there seems little served by burdening that already difficult area of equity with an additional and disparate category".[21]

Given the divergent academic viewpoints and the paucity of judicial pronouncements on the issue, the recently reported decision of the New Zealand Court of Appeal in *A.B. Consolidated Ltd* v. *Europe Strength Food Co.*[22] is of some interest. The facts of the case would make a suitable textbook illustration of the typical breach of confidence case. Both parties were manufacturers of confectionary. The plaintiff (Europe) was an Australian based company;

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[16] [1967] V.R. 37 (S.C.).

[17] S.C.N.Z., Nov. 29, 1977, A. No. 105/75, Whangarei Registry (unreported), 16.

[18] *Fiduciary Obligations* (1977), 159-68.

[19] *The legal protection of know-how in the United States of America* 2d ed. (1976), Clarke (trans.), 337 [emphasis added].

[20] *The Law of Restitution* 2d ed. (1978), chs. 34 and 35.

[21] Meagher, Gummow & Lehane, *Equity, Doctrines and Remedies* (1975), 722. Breach of confidence and fiduciary obligation can be easily confused because in some cases the duty of confidence *may* arise out of the fiduciary relationship itself and be one dimension of that duty (see, *e.g.*, *Westminster Chemicals NZ Ltd* v. *McKinley* [1973] 1 N.Z.L.R. 659 (S.C.) and *Dunford & Elliott Ltd* v. *Johnson & Firth Brown Ltd* [1977] 1 Lloyds L.R. 505 (C.A.)) but it is a long step, and, it is submitted, an incorrect one, to assert that breach of confidence is either doctrinally based upon or somehow parasitic upon fiduciary concepts. Gibson J. in *Canadian Javelin Ltd* v. *Sparling*, *supra*, note 10, 167, recognised the suggested distinction.

[22] [1978] 2 N.Z.L.R. 515 (C.A.).

the defendant (A.B.C.) was domiciled in New Zealand. Europe, after successful experimentation, marketed health food bars containing fruit or nuts in transparent packages which attractively exposed the ingredients to visual inspection. A.B.C. had attempted the same process itself without much success. Negotiations ensued between Europe and A.B.C. for a licensing agreement whereunder A.B.C. would produce Europe's bar in New Zealand. When it seemed likely that agreement would be reached, A.B.C. was permitted to inspect Europe's plant while the bars were being produced. The process itself was revealed as a novel combination of several well-known and relatively simple procedures. Subsequent to the inspection, A.B.C. commenced production of similar bars. No formal agreement with Europe was ever concluded. The New Zealand Supreme Court granted the plaintiff's request for a permanent injunction and ordered the defendant to account for its profits.[23]

Before the Court of Appeal, counsel for the appellant urged that "there must be some sort of contractual nexus or at least a recognised relationship of a fiduciary kind before a remedy would be given for the misuse of confidential information".[24] Woodhouse J. would have none of it. On the first issue he asserted that "the obligations of confidence relied upon ... are founded in equity and arise quite independently of contract — or of tort".[25] In that respect Woodhouse J. was squarely in line with previous Australasian authority.[26] In enlarging on the submission of the need for a relationship of a "fiduciary kind",[27] counsel further urged that "in the absence of any stipulation as to confidence, the Court should be reluctant to accept the existence of such a relationship in the case of commercial organisations dealing with one another from relatively equal positions of strength".[28] The Court again rejected the bait. "The issue is not whether some special kind of relationship can be recognised and given a label but whether the circumstances give rise to a situation where the obligation of confidence fairly rests upon the party receiving the information."[29]

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[23] Unreported, March 6, 1978, *per* Somers J.
[24] *Supra*, note 22, 520.
[25] *Ibid.*
[26] See *supra*, note 10.
[27] Counsel may have been attempting to mirror the language of Chilwell J. in the *Whimp* case, *supra*, note 17.
[28] *Supra*, note 22, 522.
[29] *Ibid.*, 523.

The Court cited no authority for what appears to be a clear rejection of the argument that the equitable doctrine of breach of confidence is somehow doctrinally dependent upon the concept of fiduciary obligations. However, the Court could have referred to the persuasive authority of the Supreme Court of Canada decision in *Canadian Aero Service Ltd* v. *O'Malley*.[30] In that case, Laskin J. (as he then was) noted:

> I do not see that either the question of the confidentiality of the information acquired by O'Malley and Zarzycki in the course of their work for Canaero on the Guyana project or the question of copyright is relevant to the enforcement against them of a fiduciary duty. The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.[31]

Canaero has been trenchantly criticised by Roberts on the basis that the Court got itself hopelessly muddled over the relationship between "the law of confidential information and the law of fiduciary relationships and as a result perpetuated the erroneous notion of their mutual exclusivity".[32] He further argues that "because the same information or knowledge is susceptible of a number of different characterizations it is irrational to wed to the characterization selected the body of law applied".[33] The *Europe* case involved no possibility of the application of fiduciary theory (at least as conventionally understood), and the process was not in the public domain, thereby making breach of confidence a suitable vehicle for a claim. In *Canaero,* however, the case could arguably have been treated under the rubric of corporate opportunity as well as breach of confidence. To that extent *Canaero* was a more difficult case, although even Roberts — the most determined critic of that case — approves of the result the Court reached.

Thus, two senior Commonwealth appellate courts (and at least one Canadian Federal Court judge) have clearly rejected the necessity to link the equitable duty of confidence with the spectrum of fiduciary duties.[34] It is submitted that they were right to do so.

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[30] [1974] S.C.R. 592.

[31] *Ibid.,* 616. See also *Canadian Javelin Ltd* v. *Sparling, supra,* note 10.

[32] 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, 69.

[33] *Ibid.,* 110.

[34] The reasoning of the New Zealand Court of Appeal in the *Europe* case on the issue of the duration of the injunction is not pursued here. (That issue has been a difficult one: see Braithwaite, *Trade Secrets: The Springboard Unsprung* (1979) 42 M.L.R. 94, 96.) The Court took the position that "it

To circumscribe the equitable duty, which has heretofore been regarded by Commonwealth judges as a head of equity jurisdiction *sui generis,* by restricting its application to those situations governed by the law relating to fiduciary obligations would be to seriously stunt (if not terminate) the growth of the doctrine of breach of confidence. Anglo-Commonwealth jurisprudence is not so healthily endowed with judicially created concepts which can usefully be employed in an information conscious age that it can afford to have the scope of the present duty thus curtailed.[35]

There are two clear alternatives open to Commonwealth jurisdictions in respect of this important (and developing) area of the law and a conscious election must be made between them. The first is to continue to allow the doctrine of breach of confidence to develop as a matter of judge-made law.[36] The second is to attempt a complete re-evaluation of the rationale for the doctrine and its relationship to other concepts and policies. In this respect the spectrum is much wider than that which was considered by the English Law Commission in its working paper on breach of confidence;[37] it runs all the way from the statutory monopolies (patent,

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is not sufficient for a defendant to answer a request for an injunction on the basis, by itself, that the information could be discovered independently or that it was likely to become a matter of public knowledge. The real answer (and not merely as a matter of commercial morality) is to avoid a situation of confidence that could result in subsequent embarrassment. It may be that in certain cases where such a situation has developed almost fortuitously the Court will prefer the remedy of damages to that of injunction. However, those who seek and accept information which they know has been given in confidence for a limited purpose ought not to be able to misuse it feeling that a money payment will sufficiently balance the present and future injury thereby caused to their informant": *supra,* note 22, 525.

35 *Cf.* the common law remedies available in the U.S., *supra,* text between notes 1 & 6.

36 This alternative was favoured in Torts and General Law Reform Committee of New Zealand, *Protection of Trade Secrets* (1973). Its conclusions were as follows: "Our survey of the law on this matter and of such other materials as were available to us has led to the conclusion that there is no need for major change in the existing law. In our view, the existing actions available at common law and equity provide a satisfactory remedy in those cases outside the patent system where protection is desirable. The Courts have shown a willingness to develop the equitable principles relating to breach of confidence in order to cover new types of situation. At the same time the rules developed by the Courts have proved sufficiently flexible to take account of other interests, mainly the interests of employees and society in the mobility of labour and utilisation of special skills, and the public interest in receiving disclosure": *ibid.,* 17.

37 *Supra,* note 10.

copyright and trade mark) to privacy concepts.[38] If this alternative were selected, it would be necessary to ascertain the points at which contractual protection, breach of confidence, fiduciary obligations, economic torts, and notions of unfair competition should appear along the aforementioned continuum. Limiting the re-evaluation of breach of confidence to its categorisation as part of the fiduciary spectrum or as a tort would leave unanswered as many problems as it might solve and put the issues right back where they began — in the courts. Moreover, critical issues may remain unarticulated or be avoided. For instance, what was the real result in *Europe?* Is it that at the end of the day the plaintiff received more extensive protection (at least as against the particular defendant) than it could have gained through the patent system? It is not clear on the facts of the case as recorded in the judgment of Woodhouse J. whether the "process" was clearly patentable, not patentable, or even arguably patentable. If the process had been patented there would have been a time limit to the statutory protection against the world in all the various common law jurisdictions. The patent laws proceed on the rationale that the monopoly is granted for a limited term in exchange for the inventiveness of the originator being placed in the public domain at the end of the statutory period. Was this a case where the plaintiff had deliberately chosen to go outside the statutory possibilities and rely on the "weaker"[39] system of trade secret protection? If so, what does the actual result in that case — even though Woodhouse J. was astute enough to

[38] "Privacy" as a concept compared with "confidence" as a concept merits much closer examination. It is surely remarkable (yet unremarked upon in any published work to date) that the English cases on which Warren & Brandeis relied to suggest a right of privacy, in their seminal article *The Right to Privacy* (1890) 4 Harv. L. Rev. 193, are the identical cases which are usually claimed in the older authorities as giving rise to an equitable duty of confidence in English law: see, *e.g., Prince Albert* v. *Strange* (1849) 1 Mac. & G. 25, 41 E.R. 1171 (Ch.). Does that suggest that the underlying policies for the two causes of action share at least some essential features (particularly in the appropriation cases)? See *Woodward* v. *Hutchins* [1977] 1 W.L.R. 760 (C.A.), and Hammond, *Superstuds and Confidence* [1977] N.Z.L.J. 464. Does it also suggest that English judges have found the concept of confidence wide enough to gather in at least some situations which in the United States would have clearly been fought as "privacy" issues? See, *e.g., Foster* v. *Mountford & Rigby, supra*, note 11.

[39] See the U.S. Supreme Court's decision in the *Kewanee* case, *supra*, note 7, 489. The system is "weaker" because it gives no protection against reverse engineering, it does not operate against the world, and there appears to be greater risk of interception.

emphasize that it applied only against "this defendant"[40] — do to the conventional wisdom that the patent system is itself an exception to anti-monopoly and free enterprise theory as supposedly demarcated and enforced through restrictive trade practices or anti-monopoly legislation? Does this kind of result mean that there are not one, but two islands of monopoly (patents *and* trade secrets) in a sea of free competition?

These kinds of issues suggest a need, not so much to find the most appropriate peg on which to hang the concept of breach of confidence, but rather to shift the inquiry from a predominantly doctrinal debate to a resolution of the actual and potential conflicts between several useful working vehicles along the wide spectrum previously suggested. To state the matter thus is not to decry the necessity for a sound doctrinal base but rather to suggest that some closer debate on functional purpose, economic efficiency, and empirical result of the concept of breach of confidence might lend greater perspective to an admittedly difficult area of the law.[41] Given the increasing use being made of the cause of action as a vehicle for resolution of information-related disputes in a technological age, it seems inevitable that Canada, too, will soon be confronted with the need to make the suggested election.

R. G. Hammond*

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[40] *Supra*, note 22, 525. See also *Coco* v. *A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41 (Ch.).

[41] It is surprising that such relatively intensive studies as have been done in the industrial and intellectual property area in Canada to date appear to have overlooked the critical importance of "black box" technology. "Black box" protection includes such practices as putting new and sophisticated electronic devices into a small unit and sealing it in such a way that it will self-destruct or be incapable of having reverse engineering applied to it on close examination. To ignore or overlook the issue of this sort of trade secret protection versus patent (or other statutory monopoly) protection is to miss the single most critical issue. This fundamental flaw is apparent in Economic Council of Canada, *Report on Intellectual and Industrial Property* (1971); Hindley, *The Economic Theory of Patents, Copyrights, and Registered Industrial Designs* (1971); Firestone, *Economic Implications of Patents* (1971). Some greater perception was demonstrated by Duncan, *supra*, note 6, 234-73.

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