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Divisible by Design: Canada's Trade Secrets Paper 1 of 3

Why Canada Needs a Trade Secrets Law, and How to Build One

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THE SERIES

PAPER 1

**Why Canada Needs a
Trade Secrets Law, and
How to Build One**

PAPER 2

**Trade Secrets, the Division of
Powers, and the Limits of
Federal Treaty Performance**

PAPER 3

**The Record: Trade Secrets,
Economic Security, and
Canada's Commitments**

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Table of Contents

Key Findings and Recommendations	ii
Part 1: The Case That Shows the Gap.....	1
Part 2: The Gap Costs Canadian Firms and Canadian Security.....	3
2.1 What firms and investors lose	3
2.2 What the security threat shows	4
2.3 What the owner's remedy adds	5
Part 3: Canada's Partners Have Legislated.....	6
Part 4: Canada Promised a Civil Remedy and Delivered Criminal Offences	8
Part 5: Who Can Build It	11
5.1 The civil remedy belongs to the provinces.....	11
5.2 Why Parliament cannot legislate the civil remedy	12
5.3 A treaty confers no jurisdiction	12
5.4 What Parliament can do: the federal perimeter	13
Part 6: The Plan	14
6.1 Modernize the 1989 Uniform Act	14
6.2 Build Canada's own trade tool, starting with the Tribunal	15
6.3 Co-ordinate on a model the Supreme Court has approved	16
6.4 Who acts first	17
Conclusion.....	17
Annex: CUSMA's Trade Secrets Provisions	18
Article 20.69: Protection of Trade Secrets	18
Article 20.70: Civil Protection and Enforcement.....	18
Article 20.71: Criminal Enforcement.....	18
Article 20.72: Definitions.....	18
Article 20.73: Provisional Measures.....	19
Article 20.74: Confidentiality	19
Article 20.75: Civil Remedies.....	19
Article 20.76: Licensing and Transfer of Trade Secrets.....	20
Article 20.77: Prohibition of Unauthorized Disclosure or Use of a Trade Secret by Government Officials Outside the Scope of Their Official Duties	20
About the Author	21
Acknowledgements.....	21
A Note on Method.....	21

Divisible by Design: Canada's Trade Secrets | Paper 1 of 3

Why Canada Needs a Trade Secrets Law, and How to Build One

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Key Findings and Recommendations

Canada is the only G7 country without statutory civil protection for trade secrets. A trade secret is information that is valuable because it is secret, and it is worth only what the law lets its owner withhold. Canadian law protects it through the judge-made action for breach of confidence, which reaches the employee who breaks a trust but not reliably the stranger who steals.

The gap has a cost. Firms that hold valuable know-how can build where the law is clearer, and investors discount what a founder cannot defend. The firm that holds a secret is Canada's first line of defence against economic espionage, and against the stranger it has no reliable civil remedy.

Canada's partners have acted. Every other G7 country and Mexico has a civil trade-secrets statute, and the United States is still adding to its regime.

Canada promised, and has not delivered. CUSMA requires a civil remedy against misappropriation by any person. Ottawa added a criminal offence in 2020 that no court has interpreted, and the first economic-espionage prosecution, begun in 2022, has no verdict.

The civil remedy belongs to the provinces. The Supreme Court held in 1976 that Parliament cannot create a freestanding statutory action for misappropriating confidential information. A treaty does not change that, and CUSMA itself says the civil procedures need not be federal.

The fix is ready to hand. The Uniform Law Conference of Canada drafted a uniform trade secrets act in 1989 that no province enacted. It needs modernizing, not reinventing. Parliament holds the border and the criminal law, and the Canadian International Trade Tribunal can begin an inquiry now. Ministers have a co-ordination model the Supreme Court has approved.

* The author used artificial intelligence tools in preparing this paper. A Note on Method at the end of the paper names the tools and describes how they were used. The author takes full responsibility for the paper.

Table 1: Recommendations: who acts, and when

Who	Action	When
Uniform Law Conference of Canada	Modernize the 1989 <i>Uniform Trade Secrets Act</i> , with a civil-law version for Quebec	Working group at the next annual meeting; adoption within two years
Provinces	Enact the modernized act	On adoption
Federal Cabinet	Refer trade-secret theft to the Canadian International Trade Tribunal for inquiry, under its existing reference power.	Now; no legislation needed
Parliament	Give the Tribunal power to order the exclusion of goods made with stolen trade secrets; align the criminal offences	In parallel with the uniform act
Federal, provincial, and territorial ministers	Form a standing council to align the laws; Innovation, Science and Economic Development Canada to convene and fund an evidence base.	Within six months; first report before the July 2027 CUSMA review
Canada's trade negotiators	Report progress at each annual review; accept no trade-secret commitment Canadian law cannot perform.	Each review

This is the first of three papers. Paper 2 sets out the constitutional and legislative analysis in full, and Paper 3 the record of Canada's commitments and the security evidence. The Annex to this paper reproduces the treaty text.

Part 1: The Case That Shows the Gap

In November 2022, the Royal Canadian Mounted Police charged a former Hydro-Québec researcher with obtaining trade secrets for the benefit of the People's Republic of China. It was the first charge of economic espionage under a statute Parliament had enacted twenty-one years earlier. Nearly four years later, there is no verdict. When the utility asked the court to keep information about its partners and projects out of the public record, the court refused. Every step in that story falls under criminal law. No civil statute appears in it, because Canada has none.¹

A trade secret is information that has commercial value because it is secret: a formula, a manufacturing process, the source code of a trading system, the weights of a trained model. It is protected if it is not generally known, derives value from that fact, and its holder takes reasonable steps to keep it confidential.² The wrong is misappropriation, meaning acquisition by improper means such as theft, espionage, or intrusion into a network, or use or disclosure in breach of a duty of confidence. A competitor who discovers the same information honestly, or works it out from a product bought on the open market, commits no wrong.³

Unlike a patent, a trade secret requires no filing or publication, and it lasts as long as it remains secret. It is lost the moment it becomes public, whoever is at fault.⁴ It is withheld knowledge, and nothing else, so its value is exactly what the law lets its owner withhold. Where the law is strong and predictable, the secret can be financed, licensed, and sold. Where it is weak, the same knowledge is worth less, because the owner cannot promise a buyer or lender that it will stay withheld.

Firms know this. In the United States, more firms that perform or fund research rate trade secrets as important as any other form of intellectual property: 76.2 per cent in 2018, against 49.4 per cent for patents.⁵ Canadian firms show the same preference, relying on confidentiality agreements ahead of patents, as Part 2 shows. In the artificial-intelligence economy, the data behind a model and the methods used to refine it are held as secrets, in part because patent protection for computer-implemented inventions remains unsettled in Canada after *Choueifaty*

¹ The prosecution, *R v Wang*, and the trial court's ruling on confidentiality are discussed, with sources, in Part 4 below.

² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, being Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, April 15, 1994, 1869 UNTS 299, art 39(2); *Canada-United States-Mexico Agreement*, November 30, 2018, as amended by the Protocol of Amendment of December 10, 2019 (in force July 1, 2020), art 20.72 (definition of trade secret); *Criminal Code*, RSC 1985, c C-46, s 391(5).

³ CUSMA, *supra* note 2, art 20.72 (misappropriation, and its exclusion of reverse engineering, independent discovery, and legitimate acquisition without notice); *Criminal Code*, *supra* note 2, s 391(4) (no offence where the trade secret was obtained by independent development or reverse engineering).

⁴ *Patent Act*, RSC 1985, c P-4, ss 10 (applications and patents open to public inspection) and 44 (term of twenty years from filing). On the absence of any registration or fixed term for trade secrets, see Christopher T Zirpoli, *An Introduction to Trade Secrets Law in the United States*, Congressional Research Service In Focus IF12315 (January 27, 2023); and Matt Malone, *The Law of Trade Secrets and Confidential Information in Canada* (Toronto: LexisNexis Canada, 2023).

⁵ National Center for Science and Engineering Statistics, *Three-Quarters of U.S. Businesses that Performed or Funded R&D Viewed Trade Secrets as Important in 2018*, InfoBrief NSF 21-339 (September 2, 2021), table 1 (Business Research and Development Survey, 2018; companies with at least ten employees performing or funding \$50,000 or more of research and development); see also NSF 22-305 (Annual Business Survey, 2017, reporting non-disclosure agreements and trade secrets as important to more businesses than patents or copyrights).

and *Benjamin Moore*.⁶ Yet Canada's law inverts the order firms apply. Every form of intellectual property they rank below trade secrets has a federal statute, a national office, and a national court. The form the firms in the market rank highest has no statute at all.⁷

The timing makes the gap urgent. Canada signed a treaty clause it could not keep by federal action alone: this public policy pathology is remedied by what this author prescribes as "code before clause."⁸ On July 1, 2026, the United States declined to confirm CUSMA's extension, which turns the agreement's review into an annual event,⁹ and Washington has shown this year that it will use whatever trade instrument is available.¹⁰ Canada carries its gap into each review, and every firm deciding where to build carries it too.

⁶ *Choueifat v Canada (Attorney General)*, 2020 FC 837 (rejecting the Patent Office's problem-solution approach to claim construction); *Canada (Attorney General) v Benjamin Moore & Co*, 2023 FCA 168 (declining to adopt a comprehensive framework for assessing the subject-matter patentability of computer-implemented inventions).

⁷ Malone, *The Law of Trade Secrets*, *supra* note 4. On the centrality of trade secrets to the data and artificial-intelligence economy, where training data and model weights are deliberately held as undisclosed know-how rather than patented, see also Cassels Brock & Blackwell LLP, *Canadian Trade Secrets: Year in Review 2025* (February 2026), online: <<https://cassels.com/insights/canadian-trade-secrets-year-in-review-2025>>. The argument is developed for a general audience in Barry Appleton, "The Clause Canada Could Not Keep," *Appleton's Clause and Effect* (Substack), June 2026, online: <<https://barryappleton.substack.com/p/the-clause-canada-could-not-keep>>; the present paper supplies the constitutional analysis the essay states in summary form.

⁸ The formulation inverts the title of an earlier paper in this series, which applied the same sequencing argument to Canada-European Union digital trade negotiations: Barry Appleton, "Code Before Clause: Building Canada's Digital Defences Before Negotiating Trade," *Balsillie Papers* vol 7, issue 05 (August 23, 2025), doi:10.51644/BAP75. The present paper applies the argument to trade secrets and supplies the constitutional analysis.

⁹ CUSMA, *supra* note 2, art 34.7 (review and term extension). At the joint review held July 1, 2026, the United States declined to confirm its intention to extend the agreement for a further sixteen-year period, triggering the annual review process under art 34.7.4; the agreement remains in force until July 1, 2036 absent extension. See Office of the United States Trade Representative, statement of Ambassador Greer on the USMCA joint review (July 1, 2026); statement by Minister LeBlanc following the trilateral CUSMA joint review meeting (July 1, 2026).

¹⁰ Donald J Trump, Truth Social post, June 26, 2026 (threatening a 100 per cent tariff on any country that imposes a digital services tax on United States technology companies, and stating that the measure would "supersede Trade Deals made with the Country, whether implemented, signed, or not"). The threat followed by one day the European Union's ratification of a trade agreement with the United States capping most tariffs on the bloc's exports at 15 per cent. Which statute would authorize the measure was unclear when the threat was made. The Supreme Court of the United States had struck down the reciprocal IEEPA tariffs in *Learning Resources, Inc v Trump* (February 20, 2026), holding six to three that IEEPA does not authorize the President to impose tariffs, and the section 122 surcharge adopted in its place was capped at 15 per cent and expired on July 24, 2026. On July 23, 2026, the United States announced tariffs on sixty economies, including Canada, under section 301 of the *Trade Act of 1974*. See Josh Boak and Paul Wiseman, "Trump Threatens 100% Tax on European Imports if Countries Impose Tax on Digital Services," Associated Press (June 26, 2026); "Trump Vows 100% Tariff on Countries Over Digital Services Taxes," Bloomberg (June 26, 2026). On section 338: three proclamations of July 20, 2026, issued under section 338 of the *Tariff Act of 1930*, 19 USC § 1338, imposed additional duties of fifty per cent on Canadian motor vehicles, alcoholic beverages, and dairy, with annexes extending well beyond those sectors. The duties were scheduled for August 19, 2026, and took effect on August 22, 2026, after a short delay for negotiations, the first use of the provision to impose duties. On September 8, 2026, further proclamations prohibited imports of certain Canadian goods and raised section 338 duties on others. Section 338 permits duties of up to fifty per cent on a presidential determination of discrimination against United States commerce, requires a minimum of thirty days' notice, carries no expiry, and is available without investigation, hearing, or agency report. The proclamations contain no exemption for goods

Part 2: The Gap Costs Canadian Firms and Canadian Security

2.1 What firms and investors lose

Canadian firms invest heavily in knowledge and capture less of its return. Between 2000 and 2019, business investment in intangible assets grew faster than investment in machinery and structures, yet intangibles contributed less to productivity growth in Canada than in the United States or Europe.¹¹ Among Canadian businesses that developed product innovations between 2020 and 2022, non-disclosure agreements were the most common means of protecting them, used by 45 per cent, ahead of trademarks and patents.¹² Each agreement is only as strong as the uncoded law behind it.

Statutes change behaviour. When American states adopted the Uniform Trade Secrets Act, research spending rose among larger firms and in high-technology industries, by about 3 per cent in pharmaceuticals and computers.¹³ The gains come from defining the wrong and giving owners a reliable remedy. The losses come from restricting the people who carry skills between firms: where courts let employers block departing staff on the theory that a new job would inevitably reveal old secrets, innovation declined.¹⁴ A Canadian act should take the first and refuse the second. The U.S. Justice Department put the business point plainly to Congress: uncertain legal protection for trade secrets discourages companies from entering partnerships or expanding in a country.¹⁵

The point is immediate. Whatever view one takes of Canada's 2026 arrangement with China, the joint ventures it is expected to bring run on shared know-how. Partners on both sides need confidence that what they share stays protected, and Canadian firms will enter those ventures with no statutory civil remedy behind their confidentiality terms.¹⁶

qualifying under CUSMA rules of origin. The integrated reading is developed in Barry Appleton, "The Paused Continental Defence Bargain: Architecture, Asymmetry and the 2026 CUSMA Joint Review," *Balsillie Papers* vol 10, issue 02 (June 25, 2026), doi:10.51644/BAP102.

¹¹ Statistics Canada, "Data, intangible capital and economic growth in Canada," *The Daily* (March 13, 2025) (intangible investment growing 2.58 per cent a year against 2.02 per cent for tangible investment, 2000 to 2019).

¹² Statistics Canada, "Survey of Innovation and Business Strategy, 2020 to 2022," *The Daily* (February 20, 2024).

¹³ I P L Png, "Law and Innovation: Evidence from State Trade Secrets Laws" (2017) 99:1 *Rev Econ & Stat* 167 (state enactments of the Uniform Trade Secrets Act between 1979 and 1998).

¹⁴ Andrea Contigiani, David H Hsu & Iwan Barankay, "Trade Secrets and Innovation: Evidence from the 'Inevitable Disclosure' Doctrine" (2018) 39:11 *Strategic Mgmt J* 2921.

¹⁵ United States, Department of Justice, *Report to Congress Pursuant to the Defend Trade Secrets Act* (2018), online: <<https://www.justice.gov/criminal/ipft/page/file/1101901/dl>> at 23.

¹⁶ Global Affairs Canada, "Backgrounder: Preliminary Joint Arrangement on Addressing Bilateral Economic and Trade Issues between Canada and the People's Republic of China" (January 16, 2026), online: <<https://www.international.gc.ca/news-nouvelles/2026/2026-01-16-china-chine.aspx?lang=eng>> (the government's expectation that the arrangement "will catalyse considerable new Chinese joint-venture investment in Canada with trusted partners"); Global Affairs Canada, "Canada secures renewed market access with China to boost exports and strengthen economic collaboration" (March 2026). On joint-venture requirements as a channel of technology transfer, see Office of the United States Trade Representative, *Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974* (March 22, 2018), s I.

The founder's choice shows the cost. Consider a Canadian AI company whose value lies in its training methods and model weights. Its founders learn that those assets are protected by a provincial breach-of-confidence action with no statutory definition and no clear remedy against a stranger. They can incorporate and build where a statute exists instead. The talent follows the company, and the tax base follows the talent. Canadian firms that can afford it already litigate abroad: when Bombardier alleged in 2018 that its aircraft-certification know-how had been carried to a rival program, it sued in Seattle under the American federal statute, a claim with no Canadian equivalent.¹⁷

Canada's innovation community has asked for a single standard it can rely on. The Canadian SHIELD Institute told the Commons Finance Committee in 2025 that firms must piece protection together from contract and tort law, and the Intellectual Property Institute of Canada called in 2017 for statutory civil remedies.¹⁸ Both framed the answer as federal. Part 5 of this paper explains why a uniform provincial act, with a federal perimeter, is the form that can deliver it.

2.2 What the security threat shows

Trade secrets are where economic security meets ordinary commerce. The know-how a hostile state most wants is usually unpatented, because a patent would publish it. In December 2018, the Director of the Canadian Security Intelligence Service called foreign interference and espionage the greatest threat to Canada's prosperity, and economic espionage a long-term threat to the economy.¹⁹ The same month, Canada joined its allies in attributing to China's Ministry of State Security a campaign that compromised service providers and their clients, including clients in Canada. Washington charged two of the hackers. The federal public safety minister said no charges were pending in Canada.²⁰

¹⁷ "Bombardier sues Mitsubishi jet program over trade secrets," *Reuters* (October 22, 2018) (action filed in the United States District Court for the Western District of Washington against Mitsubishi Aircraft Corporation, Aerospace Testing Engineering & Certification Inc, and former Bombardier employees). In April 2019 the court dismissed the claims against Mitsubishi's United States subsidiary and left others standing: "US Judge rejects claim that Mitsubishi stole Bombardier's trade secrets," *Aerospace Testing International* (April 26, 2019). The action ended on June 2, 2020, when the court dismissed all claims and counterclaims with prejudice on the parties' stipulated motion, each party bearing its own costs: *Bombardier Inc v Mitsubishi Aircraft Corp*, No 2:18-cv-01543 (WD Wash June 2, 2020) (order, Dkt 243).

¹⁸ Canadian SHIELD Institute, *Written Submission for the Pre-Budget Consultations in Advance of the Upcoming Federal Budget*, House of Commons, Standing Committee on Finance (August 1, 2025), recommendation 1.4 and part 1; Intellectual Property Institute of Canada, "Ideas for Inclusion in National IP Strategy" (July 17, 2017), as described in Malone, *The Law of Trade Secrets*, *supra* note 4 at 165; the submission is listed at <<https://ipic.ca/advocacy/submissions/ideas-for-inclusion-in-national-ip-strategy-2017-07-17.htm>>, with the full text available to members.

¹⁹ Canadian Security Intelligence Service, "Remarks by Director David Vigneault at the Economic Club of Canada" (Toronto, December 4, 2018), online: Government of Canada <<https://www.canada.ca/en/security-intelligence-service/news/2018/12/remarks-by-director-david-vigneault-at-the-economic-club-of-canada.html>>.

²⁰ "Canada among targets of alleged Chinese hacking campaign," *CBC News* (December 20, 2018) (reporting the statement of the Communications Security Establishment that it was almost certain that actors likely associated with the Ministry of State Security were responsible for compromising several managed service providers beginning as early as 2016, and Minister Goodale's statement that no charges were pending in Canada); United States, Department of Justice, "Two Chinese Hackers Associated With the Ministry of State Security Charged with Global Computer Intrusion Campaigns Targeting Intellectual Property and Confidential Business Information" (December 20, 2018).

The intelligence service's 2025 report calls foreign espionage "a long-term threat to Canada's economy and our collective prosperity."²¹ China is the leading example on the public record, but not the only one: a former United States defence secretary has estimated that a dozen or fifteen countries steal American technology, allies among them.²² Paper 3 in this series sets out the fuller record.

The state's own tools depend on the state. Screening investments, restricting research partnerships, and prosecuting spies all require the government to detect the threat and choose to act, and the criminal law reaches poorly beyond the border.²³ The American experience also shows the limits of a strategy built on prosecution. The U.S. Justice Department ended its initiative against Chinese economic espionage in 2022, acknowledging that it had helped give rise to a harmful perception that the department applied a lower standard to cases involving China, after an independent analysis found that only about a quarter of those charged had been convicted.²⁴

2.3 What the owner's remedy adds

The civil action is the one defence the owner controls. An owner that learns its process has been taken can ask a court within days for an injunction and an order preserving the evidence.²⁵ It will not reach an immune intelligence officer or an unidentified hacker. It does reach the commercial end of the chain: the recruited insider, the competitor using the secret, the state-owned enterprise acting as a business, and, through a border measure, the goods. That is where stolen know-how becomes a product and a profit.

Micron shows the difference. It sued the companies it accused of taking its memory-chip technology in December 2017, under the American federal and California statutes. Its civil claims ended in settlements with both defendants. The prosecution of the state-owned Chinese manufacturer ended in acquittal in 2024.²⁶ A Canadian owner in Micron's position would have

²¹ Canadian Security Intelligence Service, *CSIS Public Report 2025* (published March 2026; released May 1, 2026), "Foreign interference and espionage."

²² Peter E Harrell, Center for a New American Security, testimony before the Senate Committee on the Judiciary, "China's Non-Traditional Espionage Against the United States" (December 12, 2018) (quoting former Defense Secretary Robert Gates's estimate that "probably a dozen or 15 countries" steal American technology, and citing examples from France and from a South Korean company).

²³ Department of Justice, *Report to Congress*, *supra* note 15 at 3, citing 18 USC § 1837, and at 6 (FBI jurisdiction does not extend to wholly foreign theft).

²⁴ "The US crackdown on Chinese economic espionage is a mess," *MIT Technology Review* (December 2, 2021) (analysis of 77 cases and 148 defendants: about 27 per cent convicted, with 64 per cent of cases pending); United States, Department of Justice, remarks of Assistant Attorney General Matthew G Olsen announcing the Strategy for Countering Nation-State Threats (February 23, 2022) (grouping the cases "helped give rise to a harmful perception" that the department applied a lower standard; concerns from the civil rights community that the initiative fuelled a narrative of intolerance and bias). For the opposing view, see Senator Chuck Grassley, letter to Assistant Attorney General Olsen (February 28, 2022).

²⁵ *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (interlocutory injunctions); *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36, [2006] 2 SCR 189 (Anton Piller orders to preserve evidence).

²⁶ *Micron Technology, Inc v United Microelectronics Corp*, No 3:17-cv-06932 (ND Cal, filed December 5, 2017) (claims under the *Defend Trade Secrets Act*, civil RICO, and California's Uniform Trade Secrets Act); Micron Technology, Inc, Form 10-Q (quarter ended December 2, 2021) (claims against UMC dismissed January 3, 2022, pursuant to settlement) and Form 10-Q (quarter ended February 29, 2024) (settlement with Jinhua, December 4, 2023); *United States v United Microelectronics Corp*, No 3:18-cr-00465 (ND Cal, indictment filed September 27, 2018; announced November 1, 2018: United States, Department of Justice, "PRC State-Owned Company, Taiwan Company, and Three Individuals Charged With Economic Espionage"). UMC pleaded guilty in 2020 to a single count and paid a US\$60 million fine:

no statute to sue under. A Canadian statute could reach a defendant like that: CUSMA requires protection against misappropriation by "state-owned enterprises,"²⁷ and the federal *State Immunity Act* already denies immunity for a foreign state's commercial activity.²⁸ Since 2024, the intelligence service has been able to warn a private firm that its secrets are being targeted; the firm has no statute under which to act on the warning.²⁹

None of this makes the civil law of trade secrets a federal subject. The security threat justifies the federal tools the Constitution provides: the criminal law, investment screening, and control of what crosses the border. It does not turn a dispute between an owner and a competitor using its secret into a matter the provinces cannot handle.

Part 3: Canada's Partners Have Legislated

Every other G7 country has enacted statutory civil protection for trade secrets, and so has Mexico.³⁰ Canada relies on judge-made law and, in Quebec, on the general law of civil liability.

Table 2: Statutory civil protection for trade secrets in the G7 and Mexico

Country	Principal civil trade-secrets instrument	In force
United States	<i>Defend Trade Secrets Act</i> , 18 USC § 1836, with state enactments of the Uniform Trade Secrets Act	2016 (federal)
Germany	<i>Gesetz zum Schutz von Geschäftsgeheimnissen</i>	2019
France	<i>Code de commerce</i> , arts L151-1 ff	2018
Italy	<i>Codice della proprietà industriale</i> , arts 98 and 99	2005, amended 2018

United States Attorney's Office, Northern District of California, "Taiwan Company Pleads Guilty to Trade Secret Theft in Criminal Case Involving PRC State-Owned Company" (October 2020). Fujian Jinhua was found not guilty after a non-jury trial: "Chinese Chipmaker Cleared in US Criminal Trade Secrets Case," *Bloomberg* (February 27, 2024); Kanishka Singh, "Chinese firm Fujian Jinhua cleared of US allegations that it stole trade secrets," *Reuters* (February 27, 2024).

²⁷ CUSMA, *supra* note 2, art 20.69.

²⁸ *State Immunity Act*, RSC 1985, c S-18, s 5.

²⁹ *Countering Foreign Interference Act*, SC 2024, c 16, s 34(2), amending *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 19(2)(d) (disclosure, where in the Minister's opinion it is essential in the public interest, to "any person or entity"), and adding s 19(2.1) (disclosure to "any person or entity" for the purpose of building resiliency against threats to the security of Canada); Department of Justice, Charter Statement, Bill C-70 (the amendment responds to threats that increasingly affect sectors including private enterprises).

³⁰ *Defend Trade Secrets Act of 2016*, Pub L No 114-153, 130 Stat 376, codified at 18 USC § 1836; *Gesetz zum Schutz von Geschäftsgeheimnissen* of April 18, 2019, BGBl I 466 (in force April 26, 2019); *Code de commerce*, arts L151-1 and following, inserted by Loi no 2018-670 du 30 juillet 2018 relative à la protection du secret des affaires; *Codice della proprietà industriale*, Decreto legislativo 10 febbraio 2005, n 30, arts 98 and 99, as amended by Decreto legislativo 11 maggio 2018, n 63; *Trade Secrets (Enforcement, etc.) Regulations 2018*, SI 2018/597; *Unfair Competition Prevention Act* (Japan), Act No 47 of 1993 (in force May 1, 1994); *Ley Federal de Protección a la Propiedad Industrial* (Mexico), Diario Oficial de la Federación, July 1, 2020 (in force November 5, 2020; as amended to April 3, 2026), Title III (arts 163 and following).

Country	Principal civil trade-secrets instrument	In force
United Kingdom	<i>Trade Secrets (Enforcement, etc.) Regulations 2018</i>	2018
Japan	<i>Unfair Competition Prevention Act</i>	1993, as amended
Mexico	<i>Ley Federal de Protección a la Propiedad Industrial</i> , arts 163 ff	2020
Canada	None ; common-law breach of confidence	None

The United States keeps building. Its states supply a uniform act adopted in 52 jurisdictions; Congress added a federal civil action in 2016; and its trade commission excludes goods made with stolen secrets, even where the theft occurred abroad.³¹ In 2023, Congress authorized sanctions against foreign persons who steal American trade secrets, first used in February 2026,³² and in 2025 its uniform-law commission began updating the uniform act, unchanged for forty years.³³ Canada has no counterpart to the American border remedy: its border program stops counterfeit trademarks and pirated copyright, not goods made with stolen secrets.³⁴ Paper 3 compares the two countries' trade tools in full.

Europe harmonized without centralizing. A 2016 directive required each member state to legislate to a common standard and left the civil law with the states.³⁵ This paper proposes that

³¹ Uniform Law Commission, "New ULC Study and Drafting Committees" (July 25, 2025) and "ULC 2025 Annual Meeting Highlights" (August 13, 2025), online: <<https://www.uniformlaws.org>> (the Uniform Trade Secrets Act "widely adopted in 52 jurisdictions"); *Defend Trade Secrets Act*, *supra* note 30, 18 USC § 1836(b)(1) (civil action), and 18 USC § 1838 (no preemption or displacement of other civil or criminal remedies); *Tariff Act of 1930*, s 337, 19 USC § 1337(a)(1)(A); *TianRui Group Co v International Trade Commission*, 661 F 3d 1322 (Fed Cir 2011) (section 337 reaches imports of goods produced using trade secrets misappropriated abroad).

³² *Protecting American Intellectual Property Act of 2022*, Pub L No 117-336, 136 Stat 6147 (January 5, 2023), codified at 50 USC § 1709 (annual report identifying foreign persons that knowingly engaged in, or benefited from, significant theft of trade secrets of United States persons reasonably likely to result in, or materially contributing to, a significant threat to national security, foreign policy, or economic health or financial stability, and mandatory sanctions). United States, Department of State, "Designation of Russia-Based Zero-Day Exploits Broker and Affiliates for Theft of U.S. Trade Secrets" (February 24, 2026), designating Sergey Zelenyuk, Matrix LLC (Operation Zero), and Special Technology Services LLC FZ under the *Protecting American Intellectual Property Act*; see King & Spalding LLP, "U.S. Sanctions Foreign Companies and Executive for Brokering Trade Secrets Stolen from U.S. Company in First-Ever Action Under the Protecting American Intellectual Property Act" (March 3, 2026).

³³ Uniform Law Commission, "New ULC Study and Drafting Committees," *supra* note 31 (Drafting Committee on Updates to the Uniform Trade Secrets Act, to update the text of and comments to an act "widely adopted in 52 jurisdictions" that "has not been updated for 40 years"). The Uniform Trade Secrets Act was promulgated in 1979 and amended in 1985.

³⁴ Canadian Intellectual Property Office, "IP border enforcement: Customs action" (the program applies only to copyright, geographical indications, and registered trademarks, and does not cover patents or industrial designs); Canada Border Services Agency, Memorandum D19-4-3, *Copyright, Trademarks and Geographical Indications; Combating Counterfeit Products Act*, SC 2014, c 32.

³⁵ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, [2016] OJ L 157/1, recitals 6 and 10 and art 1(1).

model for Canada. Britain, which legislated in 2018, has since added an offence of obtaining or disclosing a trade secret for a foreign power.³⁶

Mexico legislated at once. It published a new federal industrial-property law on July 1, 2020, the day CUSMA entered into force, defining misappropriation in the treaty's terms and protecting confidentiality in proceedings.³⁷ It did so although CUSMA gave it five years to implement the civil provisions. Canada had no transition period and did not legislate.³⁸

Why can Canada not simply do what the United States, Germany, and Mexico did? Each could legislate nationally because its national legislature holds power over commerce or the civil law.³⁹ Canada's Constitution assigns property and civil rights to the provinces. Canada's answer to the patchwork is therefore the one the American states adopted before Congress acted: a uniform act enacted jurisdiction by jurisdiction, with federal law reserved for what crosses the border.⁴⁰

Part 4: Canada Promised a Civil Remedy and Delivered Criminal Offences

CUSMA speaks in obligations. Each party must provide civil procedures through which the lawful holder of a trade secret can prevent, and obtain redress for, its misappropriation by "any other person," including those who never received the information in confidence. It must provide provisional measures, injunctions, damages, confidentiality in litigation, and criminal penalties.⁴¹ Canada agreed to all of it. The Annex reproduces the text. The chapter was the top

³⁶ *National Security Act 2023* (UK), c 32, s 2 (in force December 20, 2023, by SI 2023/1272, reg 2(a)), as amended by the *National Security (State Threats) Act 2026* (UK), c 24, s 7(1) and Sch, para 16 (adding a designated body condition, from July 8, 2026). The United Kingdom first publicly named elements of the Chinese government as responsible for a cyber campaign in December 2018: National Cyber Security Centre, "APT10 continuing to target UK organisations" (December 20, 2018). See also Intelligence and Security Committee of Parliament, *China* (July 13, 2023).

³⁷ *Ley Federal de Protección a la Propiedad Industrial*, *supra* note 30, arts 1 (federal law of general application throughout the republic), 163(I) (industrial secret) and 163(II) (misappropriation, including acquisition, use, or disclosure by a third party that knew, or had reasonable grounds to know, that the secret was acquired contrary to good commercial practice), and 169 (protection of industrial secrets in judicial and administrative proceedings); World Intellectual Property Organization, WIPO Lex, "Mexico: Federal Law for the Protection of Industrial Property" (November 5, 2020) (entry into force; new concepts of misappropriation and new offences for trade secrets).

³⁸ CUSMA, *supra* note 2, art 20.89.3(e) (five-year transition for Mexico for arts 20.70, 20.73, and 20.75). No transition period applied to Canada.

³⁹ *Defend Trade Secrets Act*, *supra* note 30, 18 USC § 1836(b)(1) (civil action for the owner of a trade secret related to a product or service used in, or intended for use in, interstate or foreign commerce); *Grundgesetz für die Bundesrepublik Deutschland*, art 74(1), no 1 (concurrent federal legislative power over civil law); *Ley Federal de Protección a la Propiedad Industrial*, *supra* note 30, art 1 (federal law of general application).

⁴⁰ Christopher B Seaman, "The Case Against Federalizing Trade Secrecy" (2015) 101:2 Va L Rev 317.

⁴¹ CUSMA, *supra* note 2, c 20, s I (Trade Secrets), arts 20.69 (protection of trade secrets), 20.70 (civil protection and enforcement, requiring civil judicial procedures for any person lawfully in control of a trade secret to prevent, and obtain redress for, its misappropriation by any other person), 20.71 (criminal enforcement), 20.72 (definitions, including misappropriation), 20.73 (provisional measures), 20.74 (confidentiality), 20.75 (civil remedies, including injunctive relief conforming to art 44 of the TRIPS Agreement and damages adequate to compensate for the injury), 20.76 (licensing and transfer) and 20.77 (unauthorized disclosure or use by government officials). See also TRIPS, *supra* note 2, art 39.

rung of a ladder of commitments Canada had climbed for a century, and it was the template Washington was pressing on other countries at the same time; Paper 3 traces both.

Ottawa did what it could do alone, which was the criminal law. Section 19 of the *Foreign Interference and Security of Information Act* has made economic espionage for a foreign entity a crime since 2001; its first prosecution, against the former Hydro-Québec researcher, has run nearly four years without a verdict.⁴² The CUSMA implementing legislation added section 391 to the *Criminal Code* in 2020, a general trade-secret offence; no court has interpreted it, and the only reported charge under it was withdrawn before trial.⁴³ The criminal law can punish a thief. It cannot give the victim an injunction against a competitor already using the stolen process, or damages for the market lost.⁴⁴

⁴² *Foreign Interference and Security of Information Act*, RSC 1985, c O-5, s 19(1) (offence to communicate, obtain, retain, alter or destroy a trade secret at the direction of, for the benefit of, or in association with a foreign economic entity, fraudulently and without colour of right, to the detriment of Canada's economic interests, international relations, national defence or national security). The statute was enacted as the *Security of Information Act* and retitled by the *Countering Foreign Interference Act*, SC 2024, c 16 (Bill C-70; royal assent June 20, 2024). The first prosecution under s 19 was brought in November 2022 against Yuesheng Wang, a former Hydro-Québec researcher: "RCMP lays historic first charge of economic espionage against former Hydro-Québec researcher," *The Globe and Mail* (November 16, 2022). The four counts laid in November 2022 were obtaining a trade secret for the benefit of the People's Republic of China (s 19), unauthorized use of a computer (*Criminal Code*, s 342.1(1)(a)), obtaining trade secrets by deceit (s 391), and breach of trust by a public officer (s 122): *R c Wang*, 2022 QCCQ 8889 at paras 1 to 5. Two counts of preparatory acts under s 22 were laid in a second file: *Wang c R*, 2024 QCCQ 1926 at para 35. The trial opened in the Court of Québec at Longueuil in October 2025 before Judge Jean-Philippe Marcoux: Sidhartha Banerjee, The Canadian Press, "Trial begins for former Hydro-Québec researcher charged with economic espionage for China," *The Globe and Mail* (October 9, 2025). The accused testified in November 2025, after which the evidence closed and the parties were to file their final arguments in writing: "L'ex-employé d'Hydro dit avoir menti à un interlocuteur chinois," *La Presse* (November 7, 2025). The verdict scheduled for June 5, 2026, was postponed because the presiding judge was not able to deliver his decision as scheduled, with the matter returning on September 8, 2026, to set a new date: The Canadian Press, "Verdict postponed in case of ex-Hydro-Québec employee accused of economic espionage" (June 5, 2026). No report of a new verdict date or of a verdict had been located in English or French news sources as of October 10, 2026. For the earlier absence of any prosecution, see Matt Malone, "Why We Need a Canada Trade Secrets Act," *Slaw* (November 26, 2021), citing a federal access-to-information response; and Matt Malone, "Consequences of the Criminalization of Trade Secret Theft in Canada" (2021) 54:3 UBC L Rev 889 at 912 to 913.

⁴³ *Canada-United States-Mexico Agreement Implementation Act*, SC 2020, c 1 (assented to March 13, 2020), adding s 391 to the *Criminal Code*, *supra* note 2 (offence of fraudulently obtaining or communicating a trade secret). The *Criminal Code* does not define a trade secret as property. No reported decision has interpreted s 391 of the *Criminal Code* as of October 2026. Practitioner commentary noted the same absence three years after entry into force: Gowling WLG, "Trade Secret Enforcement in Canada versus the United States: What's Changed Since Pre-Pandemic?" (2023). Published charging statistics are not disaggregated by offence, so reported decisions are the only available measure of the provision's use. For the position in 2021, see Malone, "Consequences," *supra* note 42 at 912. The two reported rulings in *R v Wang* record a s 391 count among the four laid in November 2022, without construing the provision: *R c Wang*, *supra* note 42 at paras 1 and 4 (bail); *Wang c R*, *supra* note 42 at paras 37 to 38 (disclosure; observing that the offence is, on its face, broader because it applies to everyone). The count was later withdrawn, before trial: "Trial begins," *The Globe and Mail*, *supra* note 42; The Canadian Press, "Ex-Hydro researcher tells spying trial he wasn't given opportunity to defend himself" (November 5, 2025) (withdrawn in 2024).

⁴⁴ *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10, [2023] 1 SCR 367 at paras 83 and 90 (the criminal law power is essentially prohibitory in character and cannot, as a matter of principle, confer positive rights).

The one prosecution shows two further costs. The court declined to shield the utility's information about its partners and projects, finding that it had not shown a serious risk to an important interest and that the information it sought to protect was too generic to be a commercial secret; in a prosecution the owner is only a witness.⁴⁵ The Crown also acknowledged at trial that some of the information it alleged was confidential when taken might no longer be confidential by trial.⁴⁶ A trade secret does not wait for a verdict.

The civil half, the half businesses use, was left as judge-made law. Ottawa's answer is that the common law of confidence, with fiduciary duty and contract behind it, already supplies remedies.⁴⁷ It made the same case to its WTO partners in 2016, describing a strong regime and citing an OECD index that, it said, ranked Canada second of 37 economies, while acknowledging that Canada has no single federal trade-secrets act.⁴⁸

Canadian courts do protect trade secrets well in a circumstance where a duty of confidence exists. The common law does not reliably protect them against the stranger. Breach of confidence works against the employee or licensee who misuses what was entrusted; it works poorly against the industrial spy, the network intruder, or the competitor who acquires the information at several removes. Alberta's law reform institute concluded in 1986 that industrial espionage as such may not be actionable in Canada.⁴⁹ Quebec's general law of civil liability reaches the stranger, but defines neither the secret nor the wrong.⁵⁰ The government's own summary of the chapter, which says item by item where Canada already complied, is silent on

⁴⁵ Oral ruling of Marcoux JCQ in *R v Wang* (Court of Québec, October 2025), unreported, as reported in "Revers pour Hydro-Québec au procès pour espionnage de Yuesheng Wang," *Radio-Canada* (October 9, 2025) (Hydro-Québec had not discharged its heavy burden of showing a serious risk to an important public interest), "Judge rejects Hydro-Québec's motion to redact information in spying trial," *CBC News* (October 9, 2025), Sidhartha Banerjee, "Alleged Chinese spy trial: Judge rejects Hydro-Quebec's motion to redact information," *The Canadian Press* (October 9, 2025) (no "serious and real risk for a commercial interest"; information "too generic to constitute a commercial secret"), and "Trial begins," *The Globe and Mail*, *supra* note 42; CUSMA, *supra* note 2, art 20.74 (confidentiality in judicial proceedings).

⁴⁶ "Trial begins," *The Globe and Mail*, *supra* note 42 (opening statement of the federal Crown prosecutor, Sabrina Delli Fraine, that the prosecution contends the information was confidential when the accused was alleged to have shared or mentioned it, and that "it may very well be that the evidence reveals that today, in 2025, some of this information is no longer confidential").

⁴⁷ Global Affairs Canada, question period note for the Minister of International Trade, "Intellectual Property: United States Trade Representative's 2024 Special 301 Report" (April 26, 2024), Government of Canada open information portal, record dfatd-maecd 00 005-2024 (Canada's intellectual-property regime described as fully consistent with its international obligations, including under CUSMA and the TRIPS Agreement). See also CUSMA, *supra* note 2, art 20.5.2 (each party free to determine the appropriate method of implementing the chapter within its own legal system and practice).

⁴⁸ World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard on 8-9 November 2016: Addendum*, WTO Doc IP/C/M/83/Add.1 (January 30, 2017), paras 68 and 69 (statement of Canada).

⁴⁹ Institute of Law Research and Reform (Alberta) and Federal-Provincial Working Party, *Trade Secrets*, Report No 46 (July 1986) at 8 and para 1.5; see also para 3.44 and n 82 (no Canadian authority on whether information obtained by industrial espionage is actionable). On the relational character of breach of confidence and its misuse requirement, see Malone, "Consequences," *supra* note 42 at 897 to 900; and *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at 635, per La Forest J (the three elements of breach of confidence), and at 657 to 658, per La Forest J (a claim requires misuse to the detriment of the confider; duties of confidence can arise outside a direct relationship where, for example, a third party receives the information from a confidant in breach of the confidant's obligation).

⁵⁰ *Civil Code of Québec*, CQLR c CCQ-1991, arts 1457 (general duty not to cause injury to another by fault) and 1612 (damages for the loss of a trade secret).

whether Canadian law met the trade-secret obligations.⁵¹ Under the annual joint reviews, the question can be raised every year until the agreement expires in 2036.

Part 5: Who Can Build It

5.1 The civil remedy belongs to the provinces

Most intellectual property is federal. Patents and copyright belong to Parliament, and each is governed by one national statute.⁵² The reason for this paper is that trade secrets are different. They are protected through breach of confidence, fiduciary duty, and contract, which are matters of property and civil rights assigned to the provinces, and claims proceed in provincial courts.⁵³ Trade-secret disputes also draw on employment law, equity, and privacy and human-rights statutes, each of which is mostly provincial.⁵⁴

The Supreme Court decided the core question in 1976. In *MacDonald v Vapor Canada Ltd*, Parliament had created a statutory action that an employer used to restrain a former employee's use of its confidential information. The Court held the provision invalid. What was alleged, Chief Justice Laskin wrote, was a breach of confidence and a misappropriation of confidential information, and a statutory cause of action for that lay outside federal competence.⁵⁵

It helps to separate the asset from the law. The secret is indivisible: disclosure anywhere destroys it everywhere, which is a strong argument for uniform protection. The law that protects it is divisible. Each misappropriation happens in an identifiable place, between identifiable parties, and is decided in a provincial court. The owner's interest in uniformity argues for harmonizing provincial law; it says nothing about who may make that law.⁵⁶

⁵¹ Global Affairs Canada, "Canada-United States-Mexico Agreement (CUSMA): Intellectual property chapter summary," Technical summary of negotiated outcomes, under "Trade secrets"; compare the entries under "Copyright and related rights" (criminal remedies for rights management information required) and "Enforcement" (in-transit border authority not presently provided).

⁵² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91(22) (patents), 91(23) (copyrights), and 92(13) (property and civil rights in the province), reprinted in RSC 1985, App II, No 5.

⁵³ Civil protection rests on the common-law actions of breach of confidence, breach of fiduciary duty, and breach of contract. No Canadian statute, federal or provincial, defines a trade secret for civil purposes or codifies the standard for misappropriation. See Malone, *The Law of Trade Secrets*, *supra* note 4; and Matt Malone, "A Comparative History of the Law of Confidential Information and Trade Secrets in Canada and the United States: Towards Harmonization?" (2022) 34:1 IPJ.

⁵⁴ *Toronto Electric Commissioners v Snider*, [1925] AC 396 (PC) (labour relations within provincial jurisdiction, except in federal works and undertakings); *Canadian Human Rights Act*, RSC 1985, c H-6 (federally regulated employers); *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, ss 4(1) (personal information collected, used, or disclosed in the course of commercial activities, and employee information of federal works, undertakings, and businesses) and 26(2)(b) (exemption where a province has enacted substantially similar legislation).

⁵⁵ *MacDonald v Vapor Canada Ltd*, [1977] 2 SCR 134 (decided January 30, 1976) at 172 to 173, per Laskin CJ (Spence, Pigeon, Dickson and Beetz JJ concurring; Martland, Judson and de Grandpré JJ concurring in the result). At 145 to 146, Laskin CJ also rejected the attempt to mount the civil remedy on the back of the *Criminal Code*. Pinpoints to *Vapor Canada* in these notes are verified against the printed report. See also *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65, [2005] 3 SCR 302 at paras 20 and 26 (describing *Vapor Canada*).

⁵⁶ *Schneider v The Queen*, [1982] 2 SCR 112 at 132, per Dickson J for seven judges (upholding British Columbia's *Heroin Treatment Act* as provincial health legislation).

5.2 Why Parliament cannot legislate the civil remedy

Two routes to a federal civil statute have been proposed, and both fail on the same point. The test for the general trade and commerce power asks, among other things, whether the provinces are incapable of acting and whether one province's failure would defeat the scheme elsewhere.⁵⁷ The national concern branch of the peace, order, and good government power asks the same question, in substance: whether the provinces cannot deal with the matter, so that one province's failure would seriously harm the others.⁵⁸ Trade secrets fail both tests. The provinces protect trade secrets today and could legislate tomorrow. A province that does not legislate leaves a gap at home; it cannot defeat another province's statute. Paper 2 works through each test in detail.

Matt Malone, author of the leading Canadian treatise, argues for a federal Canada Trade Secrets Act, relying chiefly on the national concern branch and also on the trade and commerce power, and stressing the transnational character of trade-secret theft and its national-security stakes.⁵⁹ Those stakes are real, and they anchor the federal perimeter described below. There is considerable debate whether they turn the ordinary dispute between a firm and a departing employee into a matter the provinces cannot handle. Nor would designating a federal regulator help: day-to-day regulation of provincial matters remains provincial even under a national regulator.⁶⁰ The debate remains theoretical, because the federal government has proposed no regime that would touch provincial jurisdiction over property and civil rights.

5.3 A treaty confers no jurisdiction

The treaty explains why Canada must act. The treaty does not give Parliament power to act. Since the *Labour Conventions* case in 1937, the rule has been that treaty-making gives Parliament no legislative jurisdiction it would not otherwise have; performance falls to whichever legislature holds the subject.⁶¹ The allocation does not excuse Canada internationally, because a state may not invoke its internal law to justify failing to perform a treaty.⁶² It does tell Canada who must legislate. CUSMA agrees: its footnote to the civil obligation says the

⁵⁷ *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 662 to 663 (the five indicia: a general regulatory scheme, oversight by a regulatory agency, concern with trade as a whole rather than a particular industry, provincial constitutional incapacity, and a scheme that one province's non-participation would jeopardize).

⁵⁸ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 146 and 151 (a matter qualitatively different from matters of provincial concern, including at para 151 the content of any international agreements), 148 (extraprovincial and international character as a key consideration), 152 (provincial inability, starting from the fourth and fifth indicia in *General Motors*) and 153 (grave extraprovincial consequences), refining *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

⁵⁹ Malone, "Canada Trade Secrets Act," *supra* note 42 (arguing for a federal Canada Trade Secrets Act grounded in the transnational character of trade-secret theft, and relying on the *Greenhouse Gas Pollution Pricing Act* *References*, *supra* note 58); Malone, *The Law of Trade Secrets*, *supra* note 4 at 165 to 166 (the same argument, attaching the transnational character of trade-secret theft to both the trade and commerce power and the national concern branch).

⁶⁰ *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at paras 114 to 116 and 125, as summarized in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 SCR 189 at paras 14 and 15.

⁶¹ *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326 (PC) (the *Labour Conventions* case) at 351, as quoted in *Schneider*, *supra* note 56 at 134 to 135, per Dickson J: for the distribution of legislative powers, there is no such thing as treaty legislation as such. The image of the federation retaining its watertight compartments as the ship of state sails into foreign waters is Lord Atkin's, in the closing passage of the judgment. See Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters), ch 11.

⁶² *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, art 27.

procedures "do not have to be federal provided that those procedures are available."⁶³ A province that enacts a modern act makes them available.

5.4 What Parliament can do: the federal perimeter

Parliament holds the part of the problem the provinces cannot reach alone. It has used the criminal law power twice. Its power over international trade would support a statute authorizing the Canadian International Trade Tribunal to exclude from Canada goods made with misappropriated trade secrets, as the United States does through its International Trade Commission and the European Union contemplates.⁶⁴ An exclusion order acts on goods at the border, so it needs no personal jurisdiction over a foreign thief no Canadian court could reach. It must treat imported goods no less favourably than domestic goods, a lesson the United States learned before a GATT panel in 1989.⁶⁵ A civil remedy against importers of excluded goods can be attached to that regime, provided it stays tied to it; a freestanding federal action for misappropriation is what *Vapor Canada* struck down.⁶⁶ Paper 2 sets out why the Tribunal, not the courts, should decide exclusions.

The three layers, a federal criminal law, a federal border measure, and provincial civil law, can operate together, as federal and provincial laws on the same subject routinely do.⁶⁷ The one contested margin is the civil remedy against importers, and that is why the federal component must stay narrow.

⁶³ CUSMA, *supra* note 2, art 20.5.2 (each party free to determine the appropriate method of implementing the chapter within its own legal system and practice) and art 20.70(a), n 80; the footnote is noted in Malone, *The Law of Trade Secrets*, *supra* note 4 at 53 and reproduced in the Annex.

⁶⁴ Directive (EU) 2016/943, *supra* note 35, art 4(5) (importation of infringing goods an unlawful use); *Tariff Act of 1930*, s 337, 19 USC § 1337; *TianRui Group Co v International Trade Commission*, 661 F 3d 1322 (Fed Cir 2011).

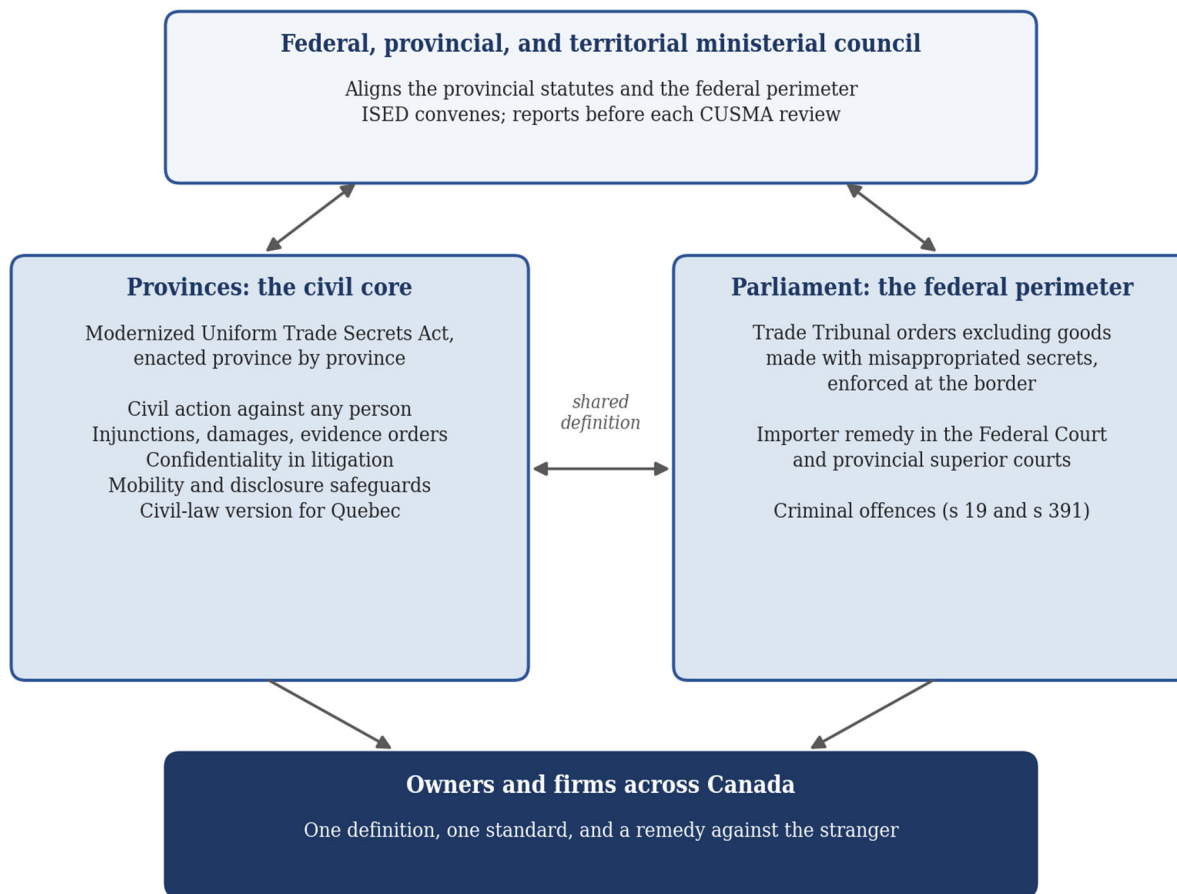
⁶⁵ *United States: Section 337 of the Tariff Act of 1930* (1989), GATT Doc L/6439, BISD 36S/345, Report of the Panel adopted November 7, 1989 (section 337 inconsistent with art III:4, and the United States' art XX(d) defence inapplicable to those inconsistencies); *General Agreement on Tariffs and Trade 1994*, arts III:4 and XX(d); see also CUSMA, *supra* note 2, c 2 (national treatment). The United States amended section 337 in 1994.

⁶⁶ *General Motors*, *supra* note 57 at 672 to 673; *Kirkbi*, *supra* note 55 at paras 23 to 27; contrast *Vapor Canada*, *supra* note 55.

⁶⁷ *Murray-Hall*, *supra* note 44 at paras 76 and 77 (double aspect) and 85 (the high burden on a party alleging operational conflict or conflict of purpose).

Part 6: The Plan

Figure 1: The proposed architecture: a provincial civil core, a federal perimeter, and a ministerial council



6.1 Modernize the 1989 Uniform Act

The model already exists. The Uniform Law Conference of Canada adopted a *Uniform Trade Secrets Act* in 1987, publishing it in 1989, after Alberta's law reform institute and a federal-provincial working party found federal jurisdiction over a civil action at best doubtful and recommended a uniform provincial act.⁶⁸ It was ahead of its time. It gave an action against any person who acquires a secret by improper means, including commercial espionage, which is the stranger remedy CUSMA now requires. It protected general skill and knowledge, allowed

⁶⁸ Uniform Law Conference of Canada, *Uniform Trade Secrets Act* (April 1989), online: Uniform Law Conference of Canada <https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Trade-Secrets-Act_1.pdf>. The Alberta institute records the Conference's adoption of its draft statute at the August 1987 meeting in Victoria; the text the Conference published is dated April 1989. The draft is *Trade Secrets*, Report No 46, *supra* note 49, Part IV. On the working party's conclusion that federal jurisdiction over a civil action for misappropriation was at best doubtful, see *Trade Secrets*, Report No 46, *supra* note 49 at para 1.18.

disclosure in the public interest, and gave injunctions, damages, an accounting of profits, and confidential hearings.⁶⁹ No province enacted it.

The subject has moved on around the Act. Its definition should match CUSMA's, and it should add orders preserving evidence, coverage of state-owned enterprises, protection for good-faith disclosure to regulators, safeguards against claims brought to intimidate, and a text suited to data sets, cloud-held code, and model weights.⁷⁰ A modernized act should keep independent development and reverse engineering as complete defences, and should forbid injunctions that stop a person taking a job on the strength of what they know rather than evidence of threatened misappropriation.⁷¹ Quebec should adapt the substance within its *Civil Code*. Traditional and Indigenous knowledge held in confidence should be addressed with Indigenous governments, respecting section 35 of the *Constitution Act, 1982*.⁷² The American Uniform Law Commission's redraft is under way, and a Canadian text developed now can draw on it.

6.2 Build Canada's own trade tool, starting with the Tribunal

Canada should not leave the border to the United States. The Canadian International Trade Tribunal already conducts adjudicative inquiries into whether imports injure Canadian producers. It has a superior court's powers to compel witnesses and documents, a statutory regime for protecting confidential information that only independent counsel bound by undertakings, and experts acting under their direction, may see, and decisions reviewed by the Federal Court of Appeal.⁷³ That is the machinery a trade-secret exclusion needs.

⁶⁹ *Uniform Trade Secrets Act* (1989), *supra* note 68, ss 5 (general knowledge, skill, and expertise), 6 and 7 (the two causes of action, including acquisition by improper means, defined in s 1(1) to include commercial espionage), 8 (remedies), 10 (public-interest defence), and 11 (preserving secrecy in proceedings). Paper 2 describes each provision.

⁷⁰ *Criminal Code*, *supra* note 2, s 391(5), and *Foreign Interference and Security of Information Act*, *supra* note 42, s 19(4) (differing definitions); CUSMA, *supra* note 2, arts 20.69 (state-owned enterprises) and 20.73 (provisional measures, including orders to preserve evidence); Directive (EU) 2016/943, *supra* note 35, arts 5 (disclosure to reveal wrongdoing), 7(2) (abusive claims), and 10 and 12 (measures against infringing goods); *Defend Trade Secrets Act*, *supra* note 30, 18 USC § 1833(b) (immunity for confidential disclosure to government officials). Paper 2 discusses each gap.

⁷¹ *Criminal Code*, *supra* note 2, s 391(4) (independent development and reverse engineering); CUSMA, *supra* note 2, art 20.74 (confidentiality, including the opportunity to make a submission under seal); Directive (EU) 2016/943, *supra* note 35, arts 5 (exceptions, including disclosure to reveal wrongdoing) and 9 (confidentiality in proceedings); *Defend Trade Secrets Act*, *supra* note 30, 18 USC § 1836(b)(3)(A)(i)(I) (an injunction may not prevent a person from entering into an employment relationship, and conditions on employment must rest on evidence of threatened misappropriation and not merely on the information the person knows) and 18 USC § 1833(b) (immunity for confidential disclosure to government officials); *Uniform Trade Secrets Act* (1989), *supra* note 68, s 5 (general knowledge, skill, and expertise).

⁷² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35; CUSMA, *supra* note 2, art 32.5 (Indigenous peoples rights, subject to the condition that such measures are not used as a means of arbitrary or unjustified discrimination or as a disguised restriction on trade).

⁷³ *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), ss 17 (court of record with a superior court's powers over witnesses, documents, and enforcement of its orders) and 45 to 49 (confidential information); Canadian International Trade Tribunal, "Canadian International Trade Tribunal: 25 years of excellence" (fines up to \$1 million and possible prohibition from appearing in future proceedings for unauthorized disclosure); Canadian International Trade Tribunal, "Confidentiality guidelines"; *Canadian International Trade Tribunal Rules*, SOR/91-499, rr 15 and 16 (designation of confidential information; declarations and undertakings by counsel); *Federal Courts Act*, RSC 1985, c F-7, s 28(1)(e) (judicial review in the Federal Court of Appeal).

The work can begin now, without legislation. The federal Cabinet can refer trade-secret theft to the Tribunal for inquiry under its existing reference power, asking it to report on how misappropriation affects Canadian producers and which goods are involved.⁷⁴ The Minister of Finance, to whom the Tribunal reports, is the natural sponsor of the reference, working with Innovation, Science and Economic Development Canada as convener of the ministerial council. The inquiry would build the evidence base Canada lacks.

Parliament should then enact a short perimeter statute giving the Tribunal power, on a complaint, after a hearing, and with regard to the public interest, to order the exclusion of goods made with misappropriated trade secrets, with the Canada Border Services Agency enforcing its orders. A civil remedy against importers of excluded goods can be brought concurrently in the Federal Court and the provincial superior courts, so a firm can bring its provincial claim, its claim against an importer, and any patent claim in one superior court, as patent owners already can.⁷⁵

A complainant should be a business in Canada that holds the secret and shows that the imports injure or threaten its Canadian business, as the American statute requires injury to an American industry. The Tribunal will need members with intellectual-property expertise and funding for the new caseload. The statute should adopt the uniform act's definition, align the two criminal offences with it, expressly preserve provincial law, and require public reporting on prosecutions.

6.3 Co-ordinate on a model the Supreme Court has approved

In 2018, the Supreme Court upheld a co-operative design for securities regulation: a model statute each province enacts in its own name, a council of ministers from every participating government, and freedom to withdraw.⁷⁶ That machinery transfers. Federal, provincial, and territorial ministers should form a standing council to align the provincial statutes with one another and with the federal perimeter. Innovation, Science and Economic Development Canada is the natural convener, and should fund a Statistics Canada measure of misappropriation losses and of trade-secret litigation taken abroad.

Table 3: The proposed architecture

Component	Enacted by	Constitutional footing
Civil remedy for misappropriation	Each province	Property and civil rights, s 92(13); <i>Vapor Canada</i>
Common definition and standard	Uniform Law Conference and provinces	Uniform model act enacted in each province's own name

⁷⁴ *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), s 18 (inquiry into and report on any matter in relation to the economic, trade, or commercial interests of Canada with respect to any goods or services that the Governor in Council refers to the Tribunal). Such references are rare.

⁷⁵ *Patent Act*, *supra* note 4, s 54(1) (action for infringement may be brought in the court of record of the province in which the infringement is said to have occurred) and s 54(2) (Federal Court jurisdiction under s 20 of the *Federal Courts Act* unimpaired). On the Federal Court's inability to hear claims resting on provincial law, see *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at 766.

⁷⁶ *Pan-Canadian Securities Regulation*, *supra* note 60 at paras 17 to 19 (co-operative federalism as an interpretive aid that cannot make ultra vires legislation intra vires, at para 18; governments acting in tandem, quoting *R v Comeau*, 2018 SCC 15 at para 87, at para 19), paras 21 to 28 (the structure of the co-operative system, including a model provincial statute with no legal force until enacted), and paras 53 to 81 (no fettering of legislative sovereignty and no impermissible delegation).

Component	Enacted by	Constitutional footing
Exclusion of goods made with stolen secrets	Parliament, through orders of the Canadian International Trade Tribunal	International trade, first branch of s 91(2)
Civil remedy against importers of those goods	Parliament	Ancillary to the federal exclusion regime; <i>General Motors</i> ; <i>Kirkbi</i>
Criminal offences	Parliament	Criminal law, s 91(27); in force
Co-ordination and alignment	Federal and provincial ministers	Co-operative federalism; <i>Pan-Canadian Securities Regulation</i>

6.4 Who acts first

Sequence is important but uniformity does not require simultaneity. Each province that enacts closes the gap for firms within it. Ontario, which has reshaped the employment side of this field by banning most non-competition agreements, and Manitoba, which created a department for innovation and new technology in 2024, are natural first movers.⁷⁷ Other provinces could also join this process. Two provinces acting together could ask the Uniform Law Conference to modernize its Act on a stated timetable, and the federal Cabinet can refer the issue to the Tribunal the same month. Canada's negotiators should report progress at each annual CUSMA review and accept no new trade-secret commitment beyond what Canadian law already performs. That is code before clause, applied as policy.

Conclusion

A trade secret is the purest asset of the intangible economy. It exists only as far as the law protects its owner's right to withhold it, and the market will not pay for what the law will not protect.

Canada has no civil trade-secrets statute because the government that made the promise could not keep it, and the governments that could were never asked. The provinces govern civil law on confidential information. Signing CUSMA did not change that; it made the gap visible, and the annual CUSMA review makes it recurring. Canada's partners have not waited. Canada drafted a sound uniform act in 1989 and left it on the shelf, gathering dust.

The remedy is legislation, in the right order, by the governments that hold the power to pass it. The provinces enact a modern uniform act. Parliament polices the border and the criminal law. Ministers keep the two aligned. The security threat makes the case more urgent, and it points the same way: the state's tools wait for the state, while the owner's remedy is one the provinces can give.

The Constitution does not stand in the way. The model exists, and so does the jurisdiction. What remains is the decision, taken by Ottawa and the provinces together, to build the code before the next clause is signed.

⁷⁷ *Employment Standards Act, 2000*, SO 2000, c 41, s 67.2, as enacted by the *Working for Workers Act, 2021*, SO 2021, c 35, Sched 2 (prohibition effective October 25, 2021; exceptions for executives and for the sale of a business); "Manitoba Premier Wab Kinew shuffles cabinet, creates technology portfolio," *The Canadian Press* (November 13, 2024) (the new department to grow the province's technology industry, modernize government services, and develop an intellectual-property strategy).

Annex: CUSMA's Trade Secrets Provisions

Canada-United States-Mexico Agreement, Chapter 20 (Intellectual Property Rights), Section I (Trade Secrets), Articles 20.69 to 20.77. The footnotes to Section I are omitted and should be consulted in the authoritative text, except footnote 80 to Article 20.70, on which this paper relies; it is reproduced beneath that article.

Articles 20.70, 20.73, and 20.75 were subject to a five-year transition period for Mexico under Article 20.89.3(e). No transition period applied to Canada, which was required to implement Section I on the Agreement's entry into force on July 1, 2020.

Article 20.69: Protection of Trade Secrets

In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention, each Party shall ensure that persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (including state-owned enterprises) without their consent in a manner contrary to honest commercial practices.

Article 20.70: Civil Protection and Enforcement

In fulfilling its obligation under paragraphs 1 and 2 of Article 39 of the TRIPS Agreement, each Party shall:

- (a) provide civil judicial procedures for any person lawfully in control of a trade secret to prevent, and obtain redress for, the misappropriation of the trade secret by any other person; and
- (b) not limit the duration of protection for a trade secret, so long as the conditions in Article 20.72 (Definitions) exist.

Footnote 80 (to "civil judicial procedures" in Article 20.70(a)): For greater certainty, civil judicial procedures do not have to be federal provided that those procedures are available.

Article 20.71: Criminal Enforcement

1. Subject to paragraph 2, each Party shall provide for criminal procedures and penalties for the unauthorized and willful misappropriation of a trade secret.

2. With respect to the acts referred to in paragraph 1, a Party may, as appropriate, limit the availability of its procedures, or limit the level of penalties available, to one or more of the following cases in which the act is:

- (a) for the purposes of commercial advantage or financial gain;
- (b) related to a product or service in national or international commerce; or
- (c) intended to injure the owner of that trade secret.

Article 20.72: Definitions

For the purposes of this Section:

trade secret means information that:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has actual or potential 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;

misappropriation means the acquisition, use, or disclosure of a trade secret in a manner contrary to honest commercial practices, including the acquisition, use, or disclosure of a trade secret by a third party that knew, or had reason to know, that the trade secret was acquired in a manner contrary to honest commercial practices. Misappropriation does not include situations in which a person:

- (a) reverse engineered an item lawfully obtained;
- (b) independently discovered information claimed as a trade secret; or
- (c) acquired the subject information from another person in a legitimate manner without an obligation of confidentiality or knowledge that the information was a trade secret; and

manner contrary to honest commercial practices means at least practices such as breach of contract, breach of confidence, and inducement to breach, and includes the acquisition of undisclosed information by third parties that knew, or were grossly negligent in failing to know, that those practices were involved in the acquisition.

Article 20.73: Provisional Measures

In the civil judicial proceedings described in Article 20.70 (Civil Protection and Enforcement), each Party shall provide that its judicial authorities have the authority to order prompt and effective provisional measures, such as orders to prevent the misappropriation of the trade secret and to preserve relevant evidence.

Article 20.74: Confidentiality

In connection with the civil judicial proceedings described in Article 20.70 (Civil Protection and Enforcement), each Party shall provide that its civil judicial authorities have the authority to:

- (a) order specific procedures to protect the confidentiality of any trade secret, alleged trade secret, or any other information asserted by an interested party to be confidential; and
- (b) impose sanctions on parties, counsel, expert, or other person subject to those proceedings, related to violation of orders concerning the protection of a trade secret or alleged trade secret produced or exchanged in that proceeding, as well as other information asserted by an interested party to be confidential.

Each Party shall further provide in its law that, in cases in which an interested party asserts information to be a trade secret, its judicial authorities shall not disclose that information without first providing that person with an opportunity to make a submission under seal that describes the interest of that person in keeping the information confidential.

Article 20.75: Civil Remedies

In connection with the civil judicial proceedings described in Article 20.70 (Civil Protection and Enforcement), each Party shall provide that its judicial authorities have the authority at least to order:

- (a) injunctive relief that conforms to Article 44 of the TRIPS Agreement against a person that misappropriated a trade secret; and
- (b) a person that misappropriated a trade secret to pay damages adequate to compensate the person lawfully in control of the trade secret for the injury suffered because of the misappropriation of the trade secret and, if appropriate, because of the proceedings to enforce the trade secret.

Article 20.76: Licensing and Transfer of Trade Secrets

No Party shall discourage or impede the voluntary licensing of trade secrets by imposing excessive or discriminatory conditions on those licenses or conditions that dilute the value of the trade secrets.

Article 20.77: Prohibition of Unauthorized Disclosure or Use of a Trade Secret by Government Officials Outside the Scope of Their Official Duties

1. In civil, criminal, and regulatory proceedings in which trade secrets may be submitted to a court or government entity, each Party shall prohibit the unauthorized disclosure of a trade secret by a government official at the central level of government outside the scope of that person's official duties.

2. Each Party shall provide for in its law deterrent level penalties, including monetary fines, suspension or termination of employment, and imprisonment, to guard against the unauthorized disclosure of a trade secret described in paragraph 1.

Source: Global Affairs Canada, *Canada-United States-Mexico Agreement (CUSMA): Chapter 20, Intellectual Property Rights* (consolidated text), online: international.gc.ca. Footnote 80 is verified against the text of Chapter 20 published by the Office of the United States Trade Representative.

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A Note on Method

In writing this paper, the author used artificial-intelligence tools, Thomson Reuters Westlaw CoCounsel, Harvey.AI and Anthropic Claude, to assist with research, drafting and revising passages of the text, restructuring, tabular presentation, verification, note review, and formatting. All substantive conclusions are the author's own. Sources have been checked against the originals wherever available; where a source is cited through another work, the note says so. The author accepts full responsibility for the content of the paper. No artificial intelligence tool is an author of this paper.