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Divisible by Design: Canada's Trade Secrets Paper 2 of 3

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

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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,
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Canada's Commitments

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Contents

Introduction	1
Part 1: The Division of Powers	1
1.1 Where trade secrets sit	1
1.2 Secrecy is indivisible; the law that protects it is divisible	2
1.3 The provincial core is settled law	3
1.4 The general branch of trade and commerce	3
1.5 The opening Laskin left, and how it closed	4
1.6 The national concern branch, and the strongest case for federal action	5
1.7 Three routes that do not open	6
1.8 A treaty confers no jurisdiction	7
1.9 Where Parliament can act: the federal perimeter	8
1.10 Coexistence: double aspect, paramountcy, and immunity	11
Part 2: Why Canada's Peers Could Legislate Nationally	12
Part 3: The 1989 Uniform Act and Its Modernization	13
3.1 What the 1989 Act did	13
3.2 A modernized uniform act	16
3.3 A federal perimeter statute	17
3.4 Co-ordination	18
Conclusion	18
About the Author	19
Acknowledgements	19
A Note on Method	19

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

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Introduction

Canada is the only G7 country without statutory civil protection for trade secrets, and the first paper in this series argues that it should build one. This paper, the second in the three-part series, answers the question that comes next: which government can build it.

The answer has three parts. The civil remedy for misappropriation belongs to the provinces, as property and civil rights, and the Supreme Court has already held that Parliament cannot create a freestanding statutory action for it. A treaty does not change that allocation, and CUSMA itself says the civil procedures need not be federal. Parliament does hold a perimeter in the criminal law and in its power over what crosses the border, and the two orders of government can co-ordinate on a design the Supreme Court has approved.

Part 1 sets out the constitutional analysis, including the strongest arguments for federal action and the answers to them. Part 2 explains why Canada's peers could legislate nationally when Canada cannot. Part 3 describes the Uniform Law Conference of Canada's 1989 *Uniform Trade Secrets Act*, the model on which a modern provincial statute can be built, and what it now needs.

Part 1: The Division of Powers

The constitutional question has two parts: where the core of this field sits, and where its federal perimeter lies. Both answers begin with one distinction.

1.1 Where trade secrets sit

For most intellectual property, the constitutional line runs in Ottawa's favour. Patents belong to Parliament under section 91(22) of the *Constitution Act, 1867*, and copyright under section 91(23),¹ and each is governed by one national statute, with the Federal Court available alongside the provincial superior courts.²

* 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 contents and conclusions in this paper.

¹ *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.

² The Federal Court is a statutory court that may exercise only the jurisdiction Parliament confers on it: *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at 766. Federal Court jurisdiction requires a statutory grant by Parliament, an existing body of federal law essential to the disposition of the case, and a law that is a "law of Canada" within s 101 of the *Constitution Act, 1867*. See also *Federal Courts Act*, RSC 1985, c F-7.

Trade secrets are different. No Canadian statute defines a trade secret for civil purposes or creates a civil action to protect one. Protection runs through the common-law action for breach of confidence, supplemented by fiduciary duty and contract.³ Quebec's *Civil Code* addresses trade secrets in two articles, a public-interest defence to liability for disclosure and a rule on damages for their loss, but defines neither the secret nor the wrong; claims proceed under the general law of civil liability.⁴ These claims relate to property and civil rights in the province, assigned to the provinces by section 92(13), and proceed in the provincial superior courts. Trade-secret disputes also draw on neighbouring bodies of law: employment law, which governs the departing employee; equity, which supplies the fiduciary duty and the injunction; and, where disclosure is in issue, the privacy and human-rights statutes. Each is mostly provincial. Federal law reaches federally regulated employers and, for privacy, commercial activity in provinces without their own statute and personal information that crosses provincial or national borders.⁵

1.2 Secrecy is indivisible; the law that protects it is divisible

In one respect, a trade secret is indivisible. Disclosure anywhere destroys the asset everywhere, so that while a patent survives a lapse of enforcement in one province, a trade secret does not survive disclosure in one. That is a strong argument for uniform protection.

The law that protects the secret is divisible, and the Constitution allocates it that way. Misappropriation is conduct (a disclosure in breach of a relationship, an acquisition by improper means, a use by someone who knew or should have known), and each instance occurs in an identifiable place, between identifiable parties, and is adjudicated in a provincial court under provincial law. The owner's interest in uniformity argues for harmonizing provincial law. It says nothing about who may make that law. Arguments for federal primacy in this field tend to conflate the two.

The Supreme Court has drawn this kind of line before. Asked to treat narcotics as a single national subject, it declined, finding the subject not "so global and indivisible that the legislative domain cannot be divided": illegal trade in narcotics fell to Parliament, and the treatment of addicts to the provinces.⁶ Trade secrets divide the same way. Cross-border trade in the fruits of misappropriation sits at the federal perimeter; the civil wrong between the parties sits in the provinces.

³ 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 Matt Malone, *The Law of Trade Secrets and Confidential Information in Canada* (Toronto: LexisNexis Canada, 2023); 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.

⁴ *Civil Code of Québec*, CQLR c CCQ-1991, arts 1472 (public-interest defence to liability for disclosing a trade secret) and 1612 (damages for the loss of a trade secret).

⁵ *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).

⁶ *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).

1.3 The provincial core is settled law

The Supreme Court has already decided the core question. In *MacDonald v Vapor Canada Ltd*, an employer invoked a general prohibition in the *Trade-marks Act* on business practices contrary to honest industrial or commercial usage, to restrain a former employee's use of its confidential information. The Court unanimously held the provision invalid. Chief Justice Laskin wrote for five judges, and three concurred in the result. What was alleged, he wrote, was a breach of contract, a breach of confidence, and a misappropriation of confidential information, and making that the subject of a statutory cause of action lay outside federal competence.⁷ He had earlier observed that the provision appeared broad enough to reach the fruits of industrial espionage.⁸ A freestanding federal civil action against misappropriation is the kind the Court placed beyond federal competence. On the civil core, the Court has ruled.

1.4 The general branch of trade and commerce

A modern claim for a federal civil statute would rest on the general branch of the trade and commerce power, governed by the five indicia in *General Motors of Canada Ltd v City National Leasing*.⁹ Those indicia extended the three that Chief Justice Laskin first set out in *Vapor Canada* itself.¹⁰

Table 1: The *General Motors* test applied to a federal civil trade-secrets statute

General Motors indicium	A federal civil trade-secrets statute
A general regulatory scheme	Not met. A civil cause of action with remedies is not a regulatory scheme in the sense the cases contemplate.
Oversight by a regulatory agency	Not met. Trade-secret claims are adjudicated between parties and administered by no agency.
Trade as a whole, not a single industry	Met. Know-how is used in every sector of the economy.
Provinces constitutionally incapable of enacting it	Not met. The provinces protect trade secrets now and could legislate tomorrow.
Failure of one province would jeopardize the scheme	Not met. Secrecy lost in one province is lost everywhere, but a province without a statute still has working courts and the common law of confidence; one province's gap does not defeat another's statute.

⁷ *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*).

⁸ *Vapor Canada*, *supra* note 7 at 149, per Laskin CJ.

⁹ *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).

¹⁰ *Kirkbi*, *supra* note 7 at para 16 (Dickson CJ, in *Canadian National Transportation and General Motors*, "adopted and extended the three indicia initially set out by Laskin C.J." in *Vapor Canada*); *Attorney General of Canada v Canadian National Transportation Ltd*, [1983] 2 SCR 206 at 268; see also Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters), ch 20.

The third General Motors indicium can be conceded: know-how crosses every sector, but a subject can be that general and still provincial. The decisive indicia are the fourth and fifth. Trade secrets fail both.

Provincial courts protect trade secrets today, and provincial legislatures could codify that protection tomorrow. An Ontario statute would protect a trade secret in Ontario whatever Quebec did; one province's abstention leaves a gap within its own borders; it does not disable another province's statute.

The strongest form of the objection deserves a direct answer. Because disclosure anywhere destroys the secret everywhere, misappropriation in a province without a statute can destroy an asset belonging to a firm in a province that has one. That does not meet the test. A province without a statute is no legal vacuum: breach of confidence, fiduciary duty, and contract still apply there, and in Quebec the general law of civil liability. The courts of an enacting province can take jurisdiction where the dispute has a real and substantial connection to the forum, even if the law of the place of the wrong then governs the claim.¹¹ The fifth indicium asks whether one province's failure to take part would jeopardize the scheme elsewhere, and a gap in one province's statute book, surrounded by working courts and a common law that still protects confidence, does not.

1.5 The opening Laskin left, and how it closed

Chief Justice Laskin did not close every door in *Vapor Canada*. He suggested that a civil remedy of this kind might have survived as part of a general regulatory scheme overseen by a federal agency, while expressly declining to decide whether such administration would be sufficient, or even necessary, to change the result.¹² Some federal advisers argued for re-enacting the provision as a regulatory statute; the Alberta institute answered in 1986 that the problem could instead be met by a uniform provincial act.¹³ Within four years of *Vapor Canada*, the Supreme Court had narrowed the general branch further.¹⁴

When the general branch revived in *General Motors*, it did so on terms that confirm *Vapor Canada*. A federal civil remedy survives when it is remedial, confined by the statute that contains it, and integrated into a valid national regulatory scheme. A freestanding cause of action does not.¹⁵ In *Kirkbi AG v Ritvik Holdings Inc* the Court sustained the statutory passing-

¹¹ *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 (real and substantial connection); *Tolofson v Jensen*, [1994] 3 SCR 1022 (law of the place of the wrong); *General Motors*, *supra* note 9 at 662 to 663 (the fifth indicium). Compare *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 151 to 153 (the national concern branch, which adds a requirement of grave extraprovincial consequences).

¹² *Vapor Canada*, *supra* note 7 at 156 (the reservation on whether regulatory administration would be sufficient or necessary) and 158 to 159 (a provision may take a valid constitutional cast as part of a scheme of legislative control).

¹³ Institute of Law Research and Reform (Alberta) and Federal-Provincial Working Party, *Trade Secrets*, Report No 46 (July 1986) at para 3.27.

¹⁴ *Dominion Stores Ltd v The Queen*, [1980] 1 SCR 844; *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914. On this narrowing, see Deborah Wilk Huitema, "Trade Secrets Analysis" (Research Memorandum to RG Hammond, Alberta Institute of Law Research and Reform, July 25, 1983) [unpublished], online: Alberta Law Reform Institute <https://www.alri.ualberta.ca/wp-content/uploads/2023/05/urp-83_1-Trade-Secretes-Analysis_Huitema.pdf> at 42 to 52.

¹⁵ *General Motors*, *supra* note 9 at 672 to 673 (the civil action in s 31.1 of the *Combines Investigation Act* sustained as remedial, limited by the Act, and integrated into a valid federal scheme) and at 693 (*Vapor*

off action because it rounded out a national trademark regime, distinguishing the provision struck in *Vapor Canada* as unconnected to trademark enforcement.¹⁶

Trade secrets have no register and no regulator. Designating one would not help. Giving the Canadian Intellectual Property Office power to define terms or oversee the regime might seem to supply what the struck provision lacked. A regulator answers only the first two *General Motors* indicia, and the 2011 *Securities Reference* held that the day-to-day regulation of matters within provincial competence remains provincial even under a proposed national regulator.¹⁷ A civil action between an owner and a misappropriator is day-to-day regulation of that kind. The 2011 *Reference* answers, by close analogy, the question Chief Justice Laskin reserved.

Federal civil legislation in this field is available only where it attaches to a genuine federal scheme. Neither economic significance nor a treaty signature supplies one.

1.6 The national concern branch, and the strongest case for federal action

Federal jurisdiction can also be claimed under the national concern branch of peace, order, and good government. After a threshold finding that the matter is of genuine national concern, the *Greenhouse Gas Pollution Pricing Act* references ask two questions. Is the matter qualitatively different from matters of provincial concern? And are the provinces unable to address it, acting alone or together, so that one province's failure would have grave extraprovincial consequences? The Court then weighs the impact on provincial jurisdiction.¹⁸ Provincial inability begins from the fourth and fifth *General Motors* indicia, and trade secrets fail it for the same reason. One province's refusal can defeat carbon pricing in the others. It cannot defeat another province's trade-secret law.¹⁹

Matt Malone, author of the leading Canadian treatise on the law of trade secrets, has made the public case for a federal Canada Trade Secrets Act, invoking both the national concern branch and the trade and commerce power. The transnational character of trade-secret theft and the national-security stakes of economic espionage, he argues, make the field qualitatively different from matters of provincial concern, and the carbon pricing references recognized that international character can support that finding.²⁰ His 2021 article on the criminal offence is

Canada did not preclude other federally created private actions), as applied in *Kirkbi*, *supra* note 7 at paras 23, 24 and 27.

¹⁶ *Kirkbi*, *supra* note 7 at paras 25 to 36 (s 7(b) remedial, limited by the Act, and integrated into a national regulatory scheme for registered and unregistered marks) and at para 26 (distinguishing s 7(e)).

¹⁷ *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.

¹⁸ *Greenhouse Gas Pollution Pricing Act References*, *supra* note 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.

¹⁹ The same conclusion is reachable by an independent route through the national-concern branch's predecessor tests. An internal 1983 research memorandum prepared for the Alberta institute worked through the gap test, the emergency test, and the national-dimensions test then current, and found each one failed on the footing this paper reaches through *General Motors*: provincial non-uniformity in this field does not carry grave consequences for the residents of other provinces, with provincial privacy legislation as the working analogy for a subject validly regulated province by province. Huitema, *supra* note 14 at 53 to 63, especially at 60 (the test of grave consequences for the residents of other provinces), 62 (the privacy statutes of British Columbia, Saskatchewan, and Manitoba) and 63 (the consequences of non-uniformity not "grave" enough to allow federal legislation).

²⁰ Matt Malone, "Why We Need a Canada Trade Secrets Act," *Slaw* (November 26, 2021) (arguing for a federal Canada Trade Secrets Act grounded in the transnational character of trade-secret theft, and

more cautious, expecting section 391 to survive under the criminal law power and suggesting that the *Securities Reference* argument about economic activity transformed beyond provincial capacity could assist the federal case.²¹ That aspirational argument struggles for the reason already given. The Supreme Court accepted it for systemic risk and refused it for day-to-day regulation.²²

His treatise goes further, suggesting that *Vapor Canada* may not hold today because the provision struck down was fatally vague, and that a clearly drafted statute might change the calculus.²³ It is hard to see how the Supreme Court's reasons bear that reading. Chief Justice Laskin said expressly that vagueness was not a ground of constitutional invalidity.²⁴ The provision failed because it extended civil causes of action belonging to areas of provincial competence. Precise drafting does not change what a statute is about.

The author agrees with Malone on much, but we differ on how far the division of powers constrains policy. Transnational reach and national-security stakes are real. They anchor the federal perimeter set out below. They do not turn the ordinary dispute between a firm and a departing employee into a matter the provinces cannot handle. The transnational case and the domestic case are different cases. A federal statute confined to the first is defensible precisely where one reaching the second is not.

1.7 Three routes that do not open

Adjacency to the federal intellectual-property heads does not help. Patents and copyright are federal because sections 91(22) and 91(23) assign them to Parliament, and each is a national system of statutory rights; a trade secret is defined by the absence of registration. Nor does section 92(10)(a), covering works and undertakings connecting provinces. A provincial activity falls within it only where functionally integrated with an interprovincial undertaking under common management and control, and a freight forwarder with terminals across the country remained provincial because its own operations did not cross provincial lines, though the goods it forwarded did.²⁵ Information carried between provinces on a laptop or in an employee's memory stands in the same position.

relying on the *Greenhouse Gas Pollution Pricing Act References*, *supra* note 11); Malone, *The Law of Trade Secrets*, *supra* note 3 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).

²¹ Matt Malone, "Consequences of the Criminalization of Trade Secret Theft in Canada" (2021) 54:3 UBC L Rev 889 at 914 to 920 (analysing the constitutionality of s 391; concluding at 919 that the Court is likely to sustain the offence under the criminal law power; and suggesting at 919 to 920 that the argument considered in the *Securities Reference*, *supra* note 17 at para 116 could assist the federal case for the provision). At 916 Malone also observes that s 391 is difficult to distinguish from a civil remedy mounted on the criminal law, the move *Vapor Canada* rejected.

²² *Securities Reference*, *supra* note 17 at paras 114 to 116 and 125.

²³ Malone, *The Law of Trade Secrets*, *supra* note 3 at 165 to 166.

²⁴ *Vapor Canada*, *supra* note 7 at 149, per Laskin CJ; see also at 156 and 172 (the provision extended civil causes of action within provincial competence).

²⁵ *United Transportation Union v Central Western Railway Corp*, [1990] 3 SCR 1112 at 1147, as quoted in *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407 at para 79; *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at paras 49 to 53 (functional integration under common management and control); *Fastfrate* at paras 3, 44, 70 and 76 (jurisdiction turns on the operations the undertaking itself performs; a freight forwarder with terminals across the country, using third-party interprovincial carriers, held provincial because its own operations were entirely intraprovincial).

Nor does the defence power in section 91(7). Secrets that touch national defence are already covered by federal law, through the controlled goods regime and the economic espionage offence.²⁶ A civil action available to any firm against any misappropriator, in any industry, would be legislation about commercial confidences, whatever its preamble said about security.

1.8 A treaty confers no jurisdiction

The treaty obligation explains why Ottawa should act; it supplies no authority 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 possess; performance falls to whichever legislature holds the subject matter.²⁷ The rule does not excuse Canada internationally, because a party may not invoke its internal law to justify failing to perform a treaty.²⁸ The Court has considered the argument on these facts. In *Vapor Canada*, the provision was defended as an implementation of the Paris Convention, and the defence failed: nothing in the statute declared an intention to implement the treaty, and Chief Justice Laskin decided the point assuming, without deciding, that a federal implementing power existed.²⁹ That reservation is the strongest opposing reading, but the Court has since answered it. In *Schneider* it called the proposition questionable in light of *Labour Conventions*, and in the carbon pricing references the majority stated that "there is no freestanding federal treaty implementation power."³⁰ *Labour Conventions* has not been overruled, and the leading proponent of federal action accepts the point. Any federal legislation must stand on a head of power it would possess had CUSMA never been signed.

The treaty's own text points the same way. CUSMA leaves each party free to determine the method of implementation within its own legal system, and the footnote to the civil-procedures obligation is explicit: "civil judicial procedures do not have to be federal provided that those procedures are available."³¹ The parties expressly wrote federalism into the treaty obligation. A province that enacts a modern act makes the procedures available within its borders.

²⁶ *Constitution Act, 1867*, *supra* note 1, s 91(7); *Defence Production Act*, RSC 1985, c D-1, Part 2, s 37 (no person may examine, possess or transfer a controlled good unless registered or exempt); *Foreign Interference and Security of Information Act*, RSC 1985, c O-5, s 19 (economic espionage for a foreign economic entity, including to the detriment of national defence).

²⁷ *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326 (PC) (the *Labour Conventions* case) at 351, as quoted in *Schneider*, *supra* note 6 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 Hogg & Wright, *supra* note 10, ch 11.

²⁸ *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, art 27.

²⁹ *Vapor Canada*, *supra* note 7 at 168 to 169 (per Laskin CJ, noting Kerwin CJ's suggestion in *Francis v The Queen*, [1956] SCR 618, that *Labour Conventions* might require reconsideration, and proceeding on the assumption that a federal implementing power existed), 171 (implementation "must be manifested in the implementing legislation and not be left to inference") and 172 (no express declaration of implementation); and at 176 to 177, per de Grandpré J for Martland, Judson and de Grandpré JJ (art 10bis of the Paris Convention does not reach relations between employers and employees). The Supreme Court restated the holding, and recorded that the treaty-power question was left open, in *Schneider*, *supra* note 6 at 134 to 135, per Dickson J.

³⁰ *Schneider*, *supra* note 6 at 134 (the proposition "questionable in the face of" *Labour Conventions*); *Greenhouse Gas Pollution Pricing Act References*, *supra* note 11 at para 149; *Labour Conventions*, *supra* note 27. See also Malone, "Canada Trade Secrets Act," *supra* note 20 (accepting that there is no freestanding federal treaty implementation power).

³¹ *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 20.5.2 (each party free to determine the appropriate method of implementing the chapter within its own legal system and practice) and art

1.9 Where Parliament can act: the federal perimeter

Parliament holds heads of power that address the part of the problem provinces cannot address alone.

The first is the criminal law power, already exercised twice, which can prohibit and punish but cannot supply the civil regime.

The second is the first branch of trade and commerce, the regulation of international and interprovincial trade.³² A federal measure authorizing the exclusion from Canada of goods manufactured using misappropriated trade secrets would regulate imports and leave confidential relationships to provincial law. The European Union's directive treats importing such goods as an unlawful use, and the United States excludes them under section 337 of the *Tariff Act of 1930*.³³ The measure reaches the case the common law handles worst: the foreign competitor with no relationship to the owner, where federal authority is clearest. Because an exclusion order acts on goods at the border, it needs no personal jurisdiction over a foreign misappropriator whom no Canadian court could reach. It must also respect Canada's trade obligations. A GATT panel found in 1989 that section 337 treated imported goods less favourably than domestic goods accused of the same infringement, contrary to article III:4, and rejected the United States' reliance on article XX(d) to justify the difference; the United States amended the statute.³⁴ A Canadian regime should give importers procedures and defences no less favourable than those domestic producers face under provincial law, so that it satisfies article III:4 on its own terms.

The American practice shows how such a regime works, and where it can overreach. Section 337 reaches misappropriation abroad, and in 2020 the International Trade Commission barred a Korean manufacturer's product for 21 months on that basis. Critics argued that the order extended American law to a dispute between two foreign firms over a foreign secret, and that a licensee had used it to shield a dominant product from competition; after the parties settled, the Commission vacated its finding.³⁵ A Canadian measure should be drawn to answer each

20.70(a), n 80; the footnote is noted in Malone, *The Law of Trade Secrets*, *supra* note 3 at 53 and reproduced in the Annex to Paper 1.

³² *Citizens Insurance Co of Canada v Parsons* (1881), 7 App Cas 96 (PC); see *Kirkbi*, *supra* note 7 at para 15 (the two branches of s 91(2)).

³³ 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, 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).

³⁴ *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 31, c 2 (national treatment). The United States amended section 337 in 1994.

³⁵ *TianRui Group Co v International Trade Commission*, 661 F 3d 1322 (Fed Cir 2011); United States International Trade Commission, *Certain Botulinum Toxin Products*, Inv No 337-TA-1145, Notice of Commission Final Determination (December 16, 2020), 85 Fed Reg 83610-11 (December 22, 2020) (21-month limited exclusion order and cease and desist order); Notice of Commission Decision to Vacate Its Final Determination on Remand, 86 Fed Reg (November 2, 2021), Federal Register document 2021-23866 (orders rescinded May 3, 2021; appeals dismissed as moot July 26, 2021; final determination vacated). For criticism, see American Antitrust Institute, comments to the International Trade Commission (2020) (licensee using a foreign trade-secret dispute to shield a dominant product); R Street Institute, "In Botox Dispute, ITC Claims Power to Block Imports For Whatever Reason it Wants" (January 29, 2021).

criticism. The complainant must hold the secret and carry on business in Canada; the injury must be to its own Canadian business, and the Tribunal must weigh the public interest; and the order reaches only goods imported into Canada.

Canada's existing machinery cannot do this work. The existing border program of the Canada Border Services Agency covers trademarks, copyright, and geographical indications, not patents or trade secrets, and the anti-dumping statute addresses price discrimination and subsidy, not misappropriation.³⁶ Parliament is, however, building the machinery for a goods-based prohibition in another field: Bill C-35 would enact a standalone ban on importing goods made with forced labour, enforced by the Agency.³⁷ A trade-secret measure should differ in one respect. Because it turns on a private right and a contested question of fact, it should operate by adjudicated order after a hearing, not by a customs officer's classification of the goods.

The Canadian International Trade Tribunal is the body to make that order. It is Canada's counterpart to the International Trade Commission in the work that matters here. It conducts adjudicative inquiries into whether imports injure Canadian producers. It is a court of record with a superior court's powers over witnesses and documents. And its statute protects confidential information so strictly that only independent counsel who have given undertakings, and experts acting under their direction, may see it, on pain of fines up to a million dollars and exclusion from future proceedings.³⁸ No Canadian court has comparable experience in trade inquiries, and none offers a better-developed regime for keeping a complainant's secrets out of a competitor's hands. Its decisions are reviewed by the Federal Court of Appeal.³⁹ The Tribunal can also begin before any statute changes: the federal Cabinet may refer any matter affecting Canada's economic, trade, or commercial interests in goods to it for inquiry and report.⁴⁰

One constitutional question must be answered in the design. Section 96 of the *Constitution Act, 1867* protects the core jurisdiction of the superior courts against Parliament as well as the provinces.⁴¹ The Supreme Court tests a grant of power to a tribunal in three steps. Does the power broadly conform to one the superior courts exercised at Confederation? If so, does the tribunal exercise it as a judicial function, deciding a dispute between parties? And if so, is the power, in its institutional setting, merely ancillary or necessarily incidental to a broader administrative scheme?⁴²

³⁶ Canadian Intellectual Property Office, "IP border enforcement: Customs action"; *Special Import Measures Act*, RSC 1985, c S-15.

³⁷ Bill C-35, *An Act respecting the prohibition of the importation of goods produced by forced labour*, 1st Sess, 45th Parl, 2026 (first reading June 12, 2026).

³⁸ *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), ss 17 and 45 to 49; 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).

³⁹ *Federal Courts Act*, RSC 1985, c F-7, s 28(1)(e).

⁴⁰ *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), s 18.

⁴¹ *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 (Parliament may not grant a youth court exclusive jurisdiction over contempt of a superior court, because doing so removes part of that court's core jurisdiction); *Reference re Code of Civil Procedure (Que)*, art 35, 2021 SCC 27 (the core jurisdiction of the superior courts).

⁴² *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714; *Reference re Amendments to the Residential Tenancies Act (NS)*, [1996] 1 SCR 186 (restating the three steps, and cautioning that a scheme's novelty should be assessed by asking whether the power is merely ancillary to the administrative scheme or necessarily incidental to a valid legislative goal).

An exclusion order should survive, but the argument turns on the last step rather than the first. History draws a line that the design can follow. Under the customs law in force at Confederation, a collector could detain goods and refer the case to the Minister of Customs, who directed their seizure or release, and the Governor in Council could remit penalties and forfeitures; deciding whether goods entered was administrative. Contested forfeitures and penalties were different: people sued for them in the superior courts or the court of vice-admiralty, with county and circuit courts handling only claims of two hundred dollars or less.⁴³ The Province of Canada's 1859 consolidation shows the same division before Confederation. The Governor could remit penalties and forfeitures; the Attorney General recovered them before the courts; and a person aggrieved by a seizure sued the customs officer in the ordinary courts, where a judge's certificate that the officer had probable cause limited damages to twenty cents.⁴⁴ The allocation was older still. From 1764, imperial trade statutes allowed customs penalties and forfeitures to be sued for in a court of record or a court of vice-admiralty, at the election of the prosecutor, and in Quebec and Lower Canada that court heard revenue cases concurrently with the common-law courts until Confederation.⁴⁵ Contested forfeitures were therefore the business of superior jurisdiction, shared with lower courts only for small claims. An order that excludes goods sits on the administrative side of that line. An order that forfeited them or imposed a penalty would sit on the judicial side. But the courts characterize a power by the type of dispute it resolves, not by its remedy, and they ask whether inferior bodies shared that kind of dispute in a practical way.⁴⁶ A finding that an importer's goods were made with a misappropriated secret resembles the breach-of-confidence claims that courts of equity decided in 1867, and a

⁴³ *An Act respecting the Customs*, SC 1867, c 6 (31 Vict), s 99 (penalties and forfeitures recoverable in the superior courts of law or the court of vice-admiralty, and, where not exceeding \$200, in county or circuit courts in Ontario, Quebec, and New Brunswick) and s 100 (power of the Governor in Council to remit penalties and forfeitures preserved); *An Act imposing Duties of Customs, with the Tariff of Duties payable under it*, SC 1867, c 7 (31 Vict) (collector may detain goods and report the case to the Minister of Customs, who may direct their seizure or release); *Constitution Act, 1867*, s 122 (the customs laws of each province continued until altered by Parliament). The pattern continued in *The Customs Act, 1883*, SC 1883, c 12 (46 Vict), as amended by SC 1884, c 29 (47 Vict), reproduced in United States, Department of State, *Papers Relating to the Foreign Relations of the United States, 1886*, doc 239.

⁴⁴ *Consolidated Statutes of Canada, 1859*, c 16, s 44 (a remission of a revenue penalty by the Governor has the effect of a pardon; the Attorney General may sue for any penalty or forfeiture under a revenue law "before any Court or other judicial authority before which such penalty or forfeiture is recoverable under such Law"), and c 17, *An Act respecting Duties of Customs and the Collection thereof*, ss 91 to 94 (actions against customs officers for seizures or acts done in office: one month's notice, tender of amends, a three-month limitation period, and, where the court or judge certifies that the officer acted on probable cause, damages limited to twenty cents and no costs), at 211 and 246. The 1867 Dominion statute re-enacted this structure: see note 43 above.

⁴⁵ *Sugar Act 1764* (GB), 4 Geo III, c 15, s 41 (forfeitures and penalties under the acts relating to the trade and revenues of the British colonies in America may be "recovered in any court of record, or in any court of admiralty" in the colony where the offence was committed, "or in any court of vice admiralty" appointed over all America, "at the election of the informer or prosecutor"; the same Act introduced the certificate of probable cause for customs seizures); *Vice Admiralty Court Act 1768* (GB), 8 Geo III, c 22; Donald Fyson, with Evelyn Kolish and Virginia Schweitzer, *The Court Structure of Quebec and Lower Canada, 1764 to 1860* (Montreal: Montreal History Group, 1994, 1997, and 2023), "Court of Vice-Admiralty" (the Court, established in 1764, mainly heard revenue matters; its revenue jurisdiction was concurrent with the common-law courts, and the prosecuting customs officials chose the forum), online: <https://www.profs.hst.ulaval.ca/Dfyson/Courtstr/v_adm.htm>.

⁴⁶ *Sobeys Stores Ltd v Yeomans*, [1989] 1 SCR 238 at 255 (the inquiry focuses on the type of dispute, not a technical analysis of remedies); *Reference re Amendments to the Residential Tenancies Act (NS)*, [1996] 1 SCR 186 (where inferior tribunals enjoyed a meaningful concurrency of power, a shared involvement in the field, the jurisdiction was not one dominated by the superior courts; the historical inquiry should be realistic).

complaint against an identified importer has the features of a dispute between parties. The first two steps may therefore be met.

The design answers the third. The Tribunal's finding would be one element of a regulatory decision about imports, made within a scheme for regulating international trade that the Tribunal already administers. The order would act on goods, not on the parties; it would award no damages and grant no remedy against the person; and it would weigh the public interest before excluding anything. A power of that kind is ancillary to a valid regulatory scheme, which is what the third step permits. The statute should keep the line clear: the Tribunal decides only whether goods are excluded; it considers the public interest before doing so; the importer remains free to re-export the goods; and any forfeiture, penalty, or claim for damages proceeds in the courts.

The statute should also say who may complain and what must be shown. A complainant should be a person carrying on business in Canada that holds the trade secret, and should show that the imports injure or threaten to injure its Canadian business, as section 337 requires injury to an American industry. An injury requirement suits the Tribunal's expertise, keeps the regime focused on Canadian producers, and helps it satisfy Article III:4. The Tribunal will need capacity for the work. Its statute provides for up to seven permanent members and allows temporary members alongside them, and the perimeter statute should provide for members with intellectual-property expertise and fund the new caseload.⁴⁷

The third route is the ancillary doctrine applied in *General Motors* and *Kirkbi*. A civil remedy against the importer of excluded goods would be remedial, confined to the exclusion regime, and integrated with it.⁴⁸ A freestanding federal cause of action for misappropriation would be none of these, and *Vapor Canada* forecloses it. The line between the two is the contested margin of this field. A remedy that drifts from the exclusion regime toward misappropriation generally becomes the provision *Vapor Canada* struck.

The *Impact Assessment Act Reference* adds a final discipline. A federal scheme must be tailored to the aspects of a matter within federal jurisdiction, and an overbroad scheme cannot be saved on the assumption that it will be administered constitutionally.⁴⁹ A perimeter statute confined to imports and the criminal law is defensible. A national claim over trade secrets at large would invite the same finding of overreach.

1.10 Coexistence: double aspect, paramountcy, and immunity

The result has three layers: a federal criminal prohibition, a federal statute directed at cross-border trade in infringing goods, and a provincial civil regime. They coexist under the double aspect doctrine, which permits Parliament and a province to legislate on the same subject from different perspectives. A recent full treatment by the Supreme Court confirms that such overlap is expected in a federal state, and that a party alleging paramountcy bears a high burden of

⁴⁷ *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), s 3 (up to seven permanent members, appointed by the Governor in Council) and provisions for temporary members; Canadian International Trade Tribunal, *2024 Annual Report*, "Who we are" (up to seven permanent members and up to five temporary members); *Tariff Act of 1930*, s 337, 19 USC § 1337(a)(1)(A) (injury to an industry in the United States).

⁴⁸ *General Motors*, *supra* note 9 at 672 to 673; *Kirkbi*, *supra* note 7 at paras 23 to 27; contrast *Vapor Canada*, *supra* note 7.

⁴⁹ *Reference re Impact Assessment Act*, 2023 SCC 23 at paras 6 and 204 (the designated projects scheme ultra vires because effects within federal jurisdiction do not drive its decision-making), 206 (such a scheme must be consistently focused on federal matters) and 74 (an ultra vires law cannot be saved by the prospect of constitutional administration).

proving operational conflict or frustration of federal purpose.⁵⁰ A federal statute that expressly preserves provincial remedies, as the American statute preserves state law, substantially reduces that risk by design.⁵¹

Interjurisdictional immunity needs a closer answer, because the Court reaffirmed the doctrine in 2025. In *Opsis Airport Services* it held Quebec's private security licensing regime inapplicable at a federally regulated airport and marine terminal, confirming that the doctrine applies only where a provincial law impairs the "basic, minimum and unassailable" core of an exclusive federal power.⁵² Airport security lies at the core of aeronautics. Ordinary commercial confidentiality lies at the core of no federal power. A bank's trade secrets are no part of what makes it a bank. Provincial trade-secrets legislation would apply to federally regulated firms as it applies to every other firm.

Nor would provincial silence protect a federal statute. Validity turns on what the statute is about, whether or not it conflicts with any provincial law, and any litigant against whom it is invoked may challenge it. *Vapor Canada* proves the point. No province had legislated on trade secrets in 1976, and the challenge came from a private defendant resisting an injunction.⁵³

The concession in this architecture should be stated plainly. Accepting a federal perimeter means accepting that the field is not purely provincial and that the line between core and perimeter is contested at its margin. The concession strengthens the argument, because the contested margin is the reason the federal component must stay narrow.

Part 2: Why Canada's Peers Could Legislate Nationally

Why can Canada not do what the United States, Germany, and Mexico did? All three are federations, and all three legislated nationally. The answer lies in who holds the civil law. Congress enacted the *Defend Trade Secrets Act* under its commerce power, reaching trade secrets related to products or services in interstate or foreign commerce.⁵⁴ Germany's Basic Law gives the federation concurrent power over the civil law as a whole.⁵⁵ Mexico's industrial-

⁵⁰ *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10, [2023] 1 SCR 367 at paras 76 and 77 (double aspect) and 85 (the high burden on a party alleging operational conflict or conflict of purpose).

⁵¹ *Defend Trade Secrets Act of 2016*, Pub L No 114-153, 130 Stat 376, codified at 18 USC § 1836, 18 USC § 1838 (the federal chapter does not preempt or displace other civil or criminal remedies); *Economic Espionage Act of 1996*, Pub L No 104-294, 18 USC §§ 1831 to 1839.

⁵² *Opsis Airport Services Inc v Quebec (Attorney General)*, 2025 SCC 17 at paras 33 (restraint), 36 (the two conditions) and 37 to 38 (the core as the "basic, minimum and unassailable" content of the power); *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paras 42, 67 and 77; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 (provincial legislation applicable to a claim within federal maritime law; no impairment of the federal core).

⁵³ *Vapor Canada*, *supra* note 7 at 172 to 173. That no province had enacted trade-secrets legislation was still the position in 1983: see the report of the House of Commons Sub-Committee on Computer Crime, quoted in Malone, *The Law of Trade Secrets*, *supra* note 3 at 155 to 156.

⁵⁴ *Defend Trade Secrets Act*, *supra* note 51, 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).

⁵⁵ *Grundgesetz für die Bundesrepublik Deutschland*, art 74(1), no 1 (concurrent legislative power over civil law); *Gesetz zum Schutz von Geschäftsgeheimnissen* of April 18, 2019, BGBl I 466, implementing the European Union trade secrets directive.

property law is federal and applies throughout the republic.⁵⁶ The United Kingdom, France, Italy, and Japan legislate through a single national legislature. Canada's Constitution assigns property and civil rights to the provinces, and the Supreme Court has placed a freestanding federal action for misappropriation beyond Parliament's reach. Australia, a federation in which the civil law also rests with the states, has no trade-secrets statute either; like New Zealand, it relies on the common law, as Canada does.⁵⁷

What Canada lacks, then, is a civil statute. The general federal statute its peers enacted is the one form its Constitution does not permit. Canada's answer to the patchwork is 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. The American debate over the 2016 statute ran along the same line. Critics argued that the uniform state act already supplied the uniformity a federal statute promised; supporters answered that existing federal criminal law and state law were not enough.⁵⁸ Congress chose to legislate because it could. Canada's Constitution gives Parliament no equivalent choice over the civil core, and the uniform act is the route that remains.

Part 3: The 1989 Uniform Act and Its Modernization

3.1 What the 1989 Act did

The primary instrument is provincial legislation, and a model already exists. The Uniform Law Conference of Canada adopted a *Uniform Trade Secrets Act* in 1987, publishing it in 1989, building on a 1986 draft prepared by the Alberta institute with a federal-provincial working party.⁵⁹ The route had been well marked. A 1983 memorandum for the institute concluded that the provinces could legislate, that federal alternatives would fail under each head of power examined, and that uniformity should be pursued through the Conference.⁶⁰ The same year, a House of Commons subcommittee on computer crime called for enhanced civil remedies against the misappropriation of information, found that trade secrecy fell within provincial jurisdiction,

⁵⁶ *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), art 1.

⁵⁷ Malone, *The Law of Trade Secrets*, *supra* note 3 at 160; Chambers and Partners, *Trade Secrets 2025: Australia*, Global Practice Guides (April 2025) (no dedicated legislation and no statutory definition of a trade secret); K&L Gates, "Trade Secrets: An International Perspective on Their Protection and Tips to Mitigate Disclosure Risk" (December 19, 2022) (protection through the equitable doctrine of breach of confidence).

⁵⁸ Christopher B Seaman, "The Case Against Federalizing Trade Secrecy" (2015) 101:2 Va L Rev 317.

⁵⁹ 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 13, Part IV.

⁶⁰ Huitema, *supra* note 14 at 7 (précis) and 30 to 31 (para 1.13), recommending "that the proposed legislation be put to the Uniform Law Conference of Canada" after concluding that the provinces, *prima facie*, have the power to enact trade-secrets legislation and that federal alternatives would fail under the trade and commerce power, the peace, order, and good government power, the criminal law power, and the declaratory power alike.

and urged the two orders of government to study the problem together.⁶¹ In 1986 the institute called federal jurisdiction over a civil action for misappropriation at best doubtful.⁶²

The Uniform Law Conference produced a good statute, and in several respects one ahead of its time. It defined a trade secret as information used or usable in a trade or business, not generally known in it, valuable because it is not generally known, and protected by reasonable efforts at secrecy, and it listed formulas, compilations, computer programs, techniques, and processes as examples.⁶³ It created two causes of action. The first ran against any person who acquires a trade secret by improper means, defined to include commercial espionage by electronic or other means; the second ran against any person who discloses or uses a trade secret knowing, or when they ought to have known, that there was no lawful authority to do so.⁶⁴ The first is the stranger remedy CUSMA now requires, drafted three decades before the treaty. Independent development and reverse engineering were not improper means.

The Act was balanced in the ways a modern statute must be. It imposed no liability for information that amounts to no more than an enhancement of a person's own knowledge, skill, or expertise acquired at work.⁶⁵ It gave a defence where disclosure was compelled by a court or tribunal, or where the public interest in disclosing an offence, other unlawful conduct, or a danger to public health or safety outweighed the secret, anticipating the whistleblower protections Europe adopted in 2016.⁶⁶ It let a person who acquired a secret in good faith and later learned of the wrong apply for a declaration of rights, with the court weighing what had

⁶¹ Canada, House of Commons, Sub-Committee on Computer Crime of the Standing Committee on Justice and Legal Affairs, *Report* (tabled June 29, 1983), *Minutes of Proceedings and Evidence*, 32nd Parl, 1st Sess, Issue No 18, online: Canadian Parliamentary Historical Resources <https://parl.canadiana.ca/view/oop.com_HOC_3201_6_2> at 18 to 19 (provincial jurisdiction; joint study by both orders of government), as quoted in Malone, *The Law of Trade Secrets*, *supra* note 3 at 155 to 156. On the recommendation that "other relevant laws (copyright, patent, trade secrecy, etc.) be examined and modified where necessary" to provide enhanced civil remedies against information misappropriation, see Monique Hébert and Marilyn Pilon, *Computer Crime*, Background Paper BP-87E (Ottawa: Library of Parliament, February 1984, revised November 1991).

⁶² *Trade Secrets*, Report No 46, *supra* note 13 at para 1.18.

⁶³ *Uniform Trade Secrets Act* (1989), *supra* note 59, s 1(1) ("trade secret": information that is, or may be, used in a trade or business; is not generally known in that trade or business; has economic value because it is not generally known; and is the subject of efforts that are reasonable under the circumstances to prevent it from becoming generally known) and s 1(2) (information includes that set out, contained, or embodied in a formula, pattern, plan, compilation, computer program, method, technique, process, product, device, or mechanism).

⁶⁴ *Uniform Trade Secrets Act* (1989), *supra* note 59, s 1(1) ("improper means" includes commercial espionage by electronic or other means), s 6(1) (right of action against any person who acquires the trade secret by improper means), s 6(2) (independent development and reverse engineering not improper means), and s 7 (right of action against any person who discloses or uses the trade secret if the discloser or user knew or ought to have known that there was no lawful authority to do so).

⁶⁵ *Uniform Trade Secrets Act* (1989), *supra* note 59, s 5.

⁶⁶ *Uniform Trade Secrets Act* (1989), *supra* note 59, s 10(1) (no liability where disclosure was required by a court or tribunal, or where a public interest in the disclosure or use outweighs the upholding of the trade secret), s 10(2) (public interest in the disclosure of an offence or other unlawful conduct, or a matter affecting public health or safety), and s 10(3) (relevant circumstances). Compare Directive (EU) 2016/943, *supra* note 33, art 5(b) (revealing misconduct, wrongdoing, or illegal activity to protect the general public interest).

been paid and how the person had relied on the secret.⁶⁷ It preserved the equitable and common-law obligations of confidence rather than displacing them, and it bound the Crown.⁶⁸

Its remedies were full. The court could grant an interlocutory or permanent injunction, compensatory or exemplary damages, or an accounting of profits, without double recovery, and it could make an adjustment order regulating future use, including payment for continued use or contribution to development costs. An injunction was to end when the secret ceased to be secret, but it could continue long enough to remove the head start the wrongdoer had gained.⁶⁹ The court could preserve secrecy during the proceedings by hearing in private, sealing records, and forbidding disclosure without leave, the procedure CUSMA now requires.⁷⁰ The Act recognized assignment and licensing, and set a two-year limitation period running from discovery.⁷¹

No province enacted it.⁷² The conditions that explained that failure no longer hold. In 1989, no treaty required civil procedures against any person, no annual review measured performance, and know-how was not yet the principal source of firm value.

The subject matter has also moved on around the Act. Its four-part definition departs from the three-part standard in TRIPS, CUSMA, and section 391, and federal law now uses both.⁷³ Its knowledge standard should be aligned with CUSMA's reference to third parties who knew, had reason to know, or were grossly negligent. It says nothing of provisional orders to preserve evidence, of state-owned enterprises, or of measures against goods made with a stolen secret, all of which CUSMA or the European directive now address.⁷⁴ Its public-interest defence is narrower than the protection now given to confidential disclosure to regulators and law enforcement.⁷⁵ It has no safeguard against claims brought to intimidate a competitor or a

⁶⁷ *Uniform Trade Secrets Act* (1989), *supra* note 59, s 9 (declaration of rights on application by a person who acquired, disclosed, or used a trade secret in good faith; regard to consideration given and change of position).

⁶⁸ *Uniform Trade Secrets Act* (1989), *supra* note 59, ss 2 (Act binds the Crown) and 3 (Act does not affect any rule of equity or of the common law by which obligations of confidence arise).

⁶⁹ *Uniform Trade Secrets Act* (1989), *supra* note 59, s 8(1) (injunction, compensatory damages, account of profits, exemplary damages, adjustment order, and any other appropriate order), s 8(2) (no double recovery), s 8(3) (adjustment orders, including payment for future use, contribution to development expenses, and determination of future use), and s 8(4) (termination of an injunction when the trade secret ceases to be one, subject to continuation to eliminate commercial advantage).

⁷⁰ *Uniform Trade Secrets Act* (1989), *supra* note 59, s 11 (orders preserving the trade secret during proceedings, including private hearings, sealing of records, and orders against disclosure without the court's approval). Compare CUSMA, *supra* note 31, art 20.74.

⁷¹ *Uniform Trade Secrets Act* (1989), *supra* note 59, ss 12 (assignment and licence) and 13 (two years from discovery; a continuing disclosure or use is a single claim).

⁷² Malone, "Consequences," *supra* note 21 at 890 to 891.

⁷³ *Criminal Code*, RSC 1985, c C-46, s 391(5) (three elements); *Foreign Interference and Security of Information Act*, RSC 1985, c O-5, s 19(4) (adding the requirement that the information is or may be used in a trade or business, as the 1989 Act did); see Malone, "Consequences," *supra* note 21 at 892, n 9.

⁷⁴ CUSMA, *supra* note 31, arts 20.69 (state-owned enterprises) and 20.73 (provisional measures, including orders to preserve evidence); Directive (EU) 2016/943, *supra* note 33, arts 4(5) (infringing goods), 10 (provisional measures, including seizure of suspected infringing goods), and 12 (corrective measures, including recall and destruction of infringing goods).

⁷⁵ *Defend Trade Secrets Act*, *supra* note 51, 18 USC § 1833(b) (immunity for confidential disclosure of a trade secret to a government official or an attorney solely for the purpose of reporting or investigating a suspected violation of law); Directive (EU) 2016/943, *supra* note 33, art 5.

departing employee.⁷⁶ And it predates the assets that now matter most: data sets, source code held in the cloud, and the weights of trained models, taken remotely and across borders in seconds. The 1989 Act was the right idea. It needs a modern text.

3.2 A modernized uniform act

The Uniform Law Conference should modernize the Act before the provinces are asked to enact it, keeping the architecture that worked in 1989 and updating the rest. The timing is favourable. The Uniform Law Commission's redraft in the United States is under way, and a Canadian modernization now can draw on it, giving Canada's partners a standard they already recognize.⁷⁷

A modernized act should adopt one definition consistent with CUSMA, so that criminal and civil law share it. It should keep the 1989 Act's action against acquisition by improper means by any person, and extend liability to third parties who knew, had reason to know, or were grossly negligent. It should provide injunctions, damages, an accounting of profits, and orders preserving evidence; protect the confidentiality of trade secrets in litigation, including an opportunity to make submissions under seal before a court discloses an asserted secret; and preserve independent development and reverse engineering as complete defences. It should protect employee mobility, keeping the 1989 exclusion for general skill and knowledge and forbidding injunctions that prevent a person from taking a job on the strength of what they know rather than evidence of threatened misappropriation, and it should protect good-faith disclosure to regulators and law enforcement.⁷⁸ It should guard against abuse, so that a claim brought in bad faith carries costs and compensation, as CUSMA's enforcement provisions contemplate.⁷⁹ It should name state-owned enterprises among those against whom it runs. Quebec should adapt the substance within the *Civil Code*.

Traditional and Indigenous knowledge held in confidence raises a question the model act should answer rather than defer. Much of that knowledge is held collectively, transmitted across generations, and governed by Indigenous law rather than by a single owner's decision to keep it secret; a definition built around commercial value and reasonable secrecy measures fits it poorly. Jurisdiction here is not only a federal and provincial question, because section 35 of the *Constitution Act, 1982* and Indigenous self-government bring a third order of authority into the analysis. CUSMA leaves room to act: Article 32.5 permits a Party to adopt measures it deems necessary to fulfil its legal obligations to Indigenous peoples, provided they are not a means of arbitrary or unjustified discrimination or a disguised restriction on trade. The Uniform Law Conference should develop these provisions with Indigenous governments rather than for them,

⁷⁶ Compare Directive (EU) 2016/943, *supra* note 33, art 7(2) (measures where a claim is manifestly unfounded or brought abusively or in bad faith), and 18 USC § 1836(b)(3)(D) (attorney's fees where a claim of misappropriation is made in bad faith). On the risks of weaponized claims and of chilling lawful disclosure, see Malone, *The Law of Trade Secrets*, *supra* note 3 at 167 to 168.

⁷⁷ 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>>.

⁷⁸ *Criminal Code*, *supra* note 73, s 391(4) (independent development and reverse engineering); CUSMA, *supra* note 31, art 20.74 (confidentiality, including the opportunity to make a submission under seal); Directive (EU) 2016/943, *supra* note 33, arts 5 (exceptions, including disclosure to reveal wrongdoing) and 9 (confidentiality in proceedings); *Defend Trade Secrets Act*, *supra* note 51, 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 59, s 5 (general knowledge, skill, and expertise).

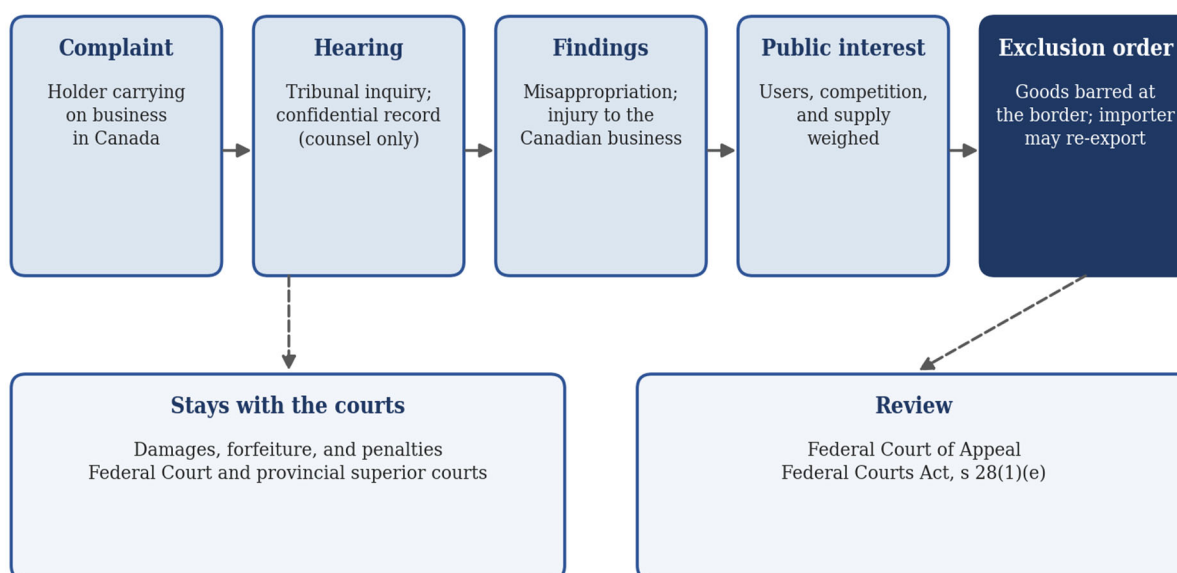
⁷⁹ CUSMA, *supra* note 31, c 20, n 78 (Section J enforcement principles apply to the trade-secrets section, as relevant) and art 20.81(15) (compensation and expenses where enforcement procedures are abused).

and a modernized act should state expressly that it does not diminish rights recognized and affirmed by section 35.⁸⁰

3.3 A federal perimeter statute

Parliament should enact a short statute confined to the perimeter. It should give the Canadian International Trade 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. It should give the Federal Court and the provincial superior courts, concurrently, power to grant injunctions and damages against the importers of excluded goods, integrated with that regime. It should adopt the uniform act's definition, conform sections 391 and 19 to it, expressly preserve provincial law, and require public reporting on the two offences, which in a quarter-century have produced only one publicly reported prosecution, still without a verdict.

Figure 1: How a Tribunal exclusion order would work



Before the statute is enacted, the federal Cabinet can refer trade-secret theft to the Tribunal for inquiry, so that the exclusion regime is designed on evidence.

Concurrent jurisdiction over the importer remedy answers the practical objection most often made to the provincial route: that a firm whose trade secret and patent are both taken must litigate in two courts. It need not. Provincial superior courts already hear patent infringement actions alongside the Federal Court.⁸¹ With concurrent jurisdiction, a firm can join its provincial claim, its claim against an importer, and its patent claim in one superior court. The one thing it cannot do is bring the provincial claim in the Federal Court, and no federal statute the Constitution permits could give it that power.

⁸⁰ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35; CUSMA, *supra* note 31, 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).

⁸¹ *Patent Act*, RSC 1985, c P-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*, *supra* note 2 at 766.

3.4 Co-ordination

The American comparator is often read as the model Canada failed to follow. What transfers is the harmonized state law beneath the federal statute. Canada has its own approved design. In *Reference re Pan-Canadian Securities Regulation*, the Supreme Court held that co-operative federalism lets governments acting in tandem build a regime neither could build alone, though it cannot override the division of powers.⁸² The structure the Court upheld had a model provincial statute with no force until a province enacted it, a council of ministers representing every participating government, and withdrawal on notice. No legislature delegated its primary authority, and no executive agreement fettered a legislature.

That institutional design transfers; the federal head of power does not. The securities statute rested on the general branch, applied to systemic risk,⁸³ while the perimeter here rests on the import and criminal law powers. The machinery is the same: a model act each province enacts in its own name, a standing ministerial council aligning provincial statutes and the federal perimeter, and freedom for any government to withdraw.

Conclusion

The constitutional map is clearer than the debate over it suggests. The civil core of trade-secret law is provincial, settled since *Vapor Canada*, and neither economic significance nor a treaty signature moves it. Parliament's part lies at the perimeter, at the border and in the criminal law, and it must stay narrow, because the one contested margin, a civil remedy against importers, is defensible only as long as it remains tied to the exclusion regime.

None of this is a reason for delay. The provinces can legislate now; the proposed 1989 Act gives them a text to start from, and the co-operative design the Supreme Court approved for securities regulation gives ministers the machinery to keep federal and provincial law aligned. The division of powers decides who must act. It does not excuse anyone from acting.

⁸² *Pan-Canadian Securities Regulation*, *supra* note 17 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).

⁸³ *Pan-Canadian Securities Regulation*, *supra* note 17 at paras 7 and 86 to 116 (the draft federal Act, directed at systemic risk, within the general branch); *Securities Reference*, *supra* note 17 at paras 114 to 116.

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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.