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

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

Barry Appleton

Interim Director, Balsillie Legal Advisory Centre, Balsillie School of International Affairs

October 2026

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

Prepared for the conference Canada's Trade Secrets, Waterloo, Ontario, November 24, 2026.

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This work was supported by Mitacs through the Mitacs Accelerate Program.

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Contents

Introduction	1
Part 1: Why Trade Secrets Matter	1
Part 2: What the Gap Costs Firms.....	3
2.1 The business evidence	3
2.2 Across the border	4
2.3 The view from a founder's desk.....	5
Part 3: The Security Record.....	6
3.1 The record.....	6
3.2 What the state's tools cannot do.....	8
3.3 What the owner's remedy adds	9
Part 4: Canada's Commitments.....	10
4.1 A ladder of commitments.....	10
4.2 Why Washington asked	12
4.3 The constitutional fault line and the government's account	13
4.4 The adequacy objection	15
4.5 The external record	16
Part 5: Trade Law Against Trade-Secret Theft: The United States and Canada Compared	17
5.1 The American toolkit	18
5.2 Canada's toolkit	19
5.3 Recent changes in Canadian law	20
5.4 What the comparison shows.....	20
5.5 Why Canada should build its own tools	21
Conclusion.....	21
About the Author	22
Acknowledgements	22
A Note on Method.....	22

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

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

Barry Appleton*

Barry Appleton is Interim Director of the Balsillie Legal Advisory Centre at the Balsillie School of International Affairs.

Introduction

The first paper in this series makes the case for a Canadian trade-secrets statute and sets out a plan to build one. The second shows which government can build it. This paper sets out the record on which both rest.

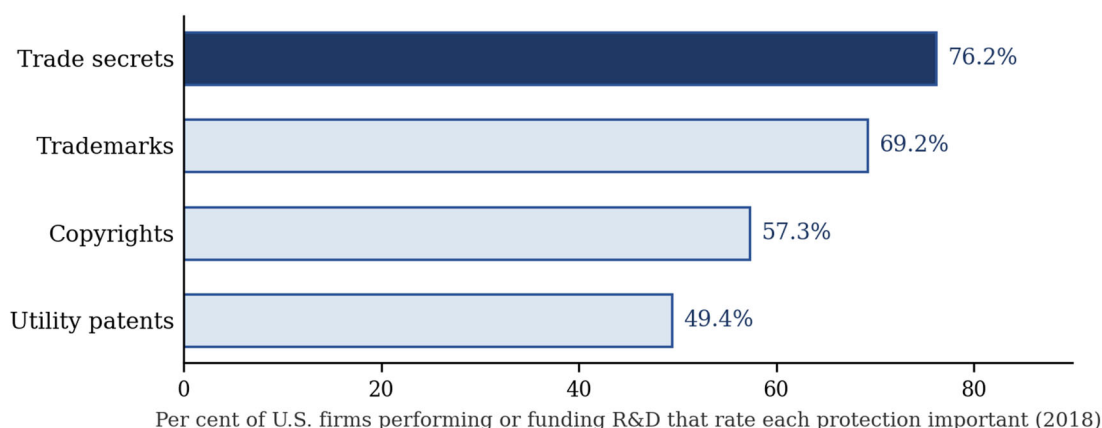
It has five parts. Part 1 explains why trade secrets have become the form of intellectual property firms value most. Part 2 sets out what the absence of a statute costs Canadian firms, at home and abroad. Part 3 gathers the security record: what Canada's intelligence and cyber agencies have reported about economic espionage, what the state's own tools can and cannot do, and why the owner's civil remedy matters. Part 4 traces Canada's commitments, from the Paris Convention to CUSMA, why Washington sought them, and what Ottawa has said and done since. Part 5 compares how the United States and Canada use trade law against trade-secret theft, including recent changes to Canadian law.

Part 1: Why Trade Secrets Matter

Trade secrets are often treated as the residue of intellectual-property law, the protection left over when a patent, a copyright, or a trademark is unavailable. The evidence points the other way. In the United States, where the data are best, more firms that perform or fund research rate trade secrets as important as any other form of protection. In 2018, 76.2 per cent did so, against 69.2 per cent for trademarks, 57.3 per cent for copyrights, and 49.4 per cent for utility patents, and more than half rated trade secrets very important.¹ Canadian survey data, discussed in Part 2, show the same order.

* 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.

¹ 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).

Figure 1: How U.S. firms rate forms of intellectual-property protection, 2018

Source: National Center for Science and Engineering Statistics, InfoBrief NSF 21-339 (2021), table 1.

The reasons are structural. The Congressional Research Service describes the inventor's choice as one among patenting, secrecy, and release into the public domain, so any change in the patent system's effectiveness makes secrecy more or less attractive.² Trade secrets also reach what the registered rights cannot: manufacturing processes, data, algorithms, and customer and supplier information. The Congressional Research Service has observed that as the Supreme Court of the United States narrowed patent-eligible subject matter in software and biotechnology, the broader scope of trade-secret protection took on greater importance.³ Canada is on the same path.

The two regimes also work together. A patent discloses an invention; the know-how needed to make it well, at scale and at cost, usually stays secret, and licensing agreements commonly bundle the two. Trade-secret law acts, in an account the Congressional Research Service adopts, as "both a complement to and competitor for patent law."⁴

Congress drew the conclusion. Its Senate Judiciary Committee reported in 2016 that trade secrets "make up an increasingly important part of American companies' intellectual property portfolios,"⁵ and the Congressional Research Service has described them as increasingly the

² John R Thomas, *The Role of Trade Secrets in Innovation Policy*, Congressional Research Service Report R41391 (January 15, 2014).

³ Christopher T Zirpoli, *An Introduction to Trade Secrets Law in the United States*, Congressional Research Service In Focus IF12315 (January 27, 2023), citing Congressional Research Service Report R45918, *Patent-Eligible Subject Matter Reform: Background and Issues for Congress*. The same In Focus notes that more than a thousand trade-secret cases are filed annually in United States district courts.

⁴ Douglas Lichtman, "How the Law Responds to Self-Help" (2005) 1 J L Econ & Pol'y 215, as quoted in Thomas, *supra* note 2.

⁵ United States, Senate, Committee on the Judiciary, *Defend Trade Secrets Act of 2016* (S Rep No 114-220) (March 7, 2016) at 1, online: <<https://www.govinfo.gov/content/pkg/CRPT-114srpt220/html/CRPT-114srpt220.htm>>.

most valuable intangible assets of American firms.⁶ The *Defend Trade Secrets Act* passed the Senate 87 to 0 and the House of Representatives 410 to 2.⁷

Part 2: What the Gap Costs Firms

2.1 The business evidence

The scale is large and growing. Between 2000 and 2019, Canadian business investment in intangible assets grew faster than investment in machinery, equipment, and structures, rising from 73 to 83 per cent of tangible investment, yet intangibles contributed less to productivity growth in Canada than in the United States or Europe.⁸ Canada invests in knowledge and captures less of its return. Canada's innovation community has argued for years that the country's central economic weakness lies less in research than in its failure to own and protect the intellectual property research produces.⁹ A firm has freedom to operate when it owns and can defend enough intellectual property to build and sell, and the know-how it keeps in-house is often the asset a competitor would most like to take.

Three findings carry the business case for a statute. The first concerns how Canadian firms protect what they know. Among businesses that developed product innovations in Canada between 2020 and 2022, non-disclosure agreements were the most common means of protecting them, at 45.0 per cent, ahead of trademarks at 43.7 per cent and patents at 33.0 per cent.¹⁰ Each agreement is only as strong as the uncodified law of confidential information behind it.

The second is that the law changes 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 in computers, with no significant change in low-technology industries.¹¹ A statute that defines the secret and the wrong makes the return on research easier to capture, and the sectors that responded are the sectors Canada most wants to grow. An OECD study of 37 countries found a positive association between the strength of trade-secret protection and indicators of innovation and international economic flows.¹² Canada later

⁶ Congressional Research Service, *Protection of Trade Secrets: Overview of Current Law and Legislation*, Report R43714 (April 22, 2016), summary.

⁷ Senator Chuck Grassley, "Senate Passes Judiciary Committee Bill to Guard Trade Secrets" (April 4, 2016) (Senate vote of 87 to 0); United States, House of Representatives, Committee on the Judiciary, "House Approves Bipartisan Trade Secrets Legislation" (April 27, 2016) (House vote of 410 to 2).

⁸ 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).

⁹ James W Hinton and Fabrice Blais-Savoie, "Canada's Deteriorating AI Position: A Comparative IP Perspective," *Balsillie Papers* vol 8, issue 3 (December 2025), doi:10.51644/bap83 (tracing Canadian losses in artificial-intelligence patent ownership and cross-border ownership flows). On intellectual-property ownership as a condition of allied supply-chain reliability, see Barry Appleton, Ann Fitz-Gerald and James W Hinton, *Allied by Design, Vulnerable by Default*, submission to the Office of the United States Trade Representative, Docket No USTR-2026-0034 (March 19, 2026).

¹⁰ Statistics Canada, "Survey of Innovation and Business Strategy, 2020 to 2022," *The Daily* (February 20, 2024).

¹¹ 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).

¹² Douglas C Lippoldt and Mark F Schultz, "Uncovering Trade Secrets: An Empirical Assessment of Economic Implications of Protection for Undisclosed Data," OECD Trade Policy Papers No 167 (Paris: OECD Publishing, 2014). The index's components are definitions and coverage; specific duties and

told its WTO partners that the same index ranked its regime second of the 37; Part 4 returns to it.

The third sets the limit. Where states adopted the inevitable disclosure doctrine, letting employers enjoin departing employees on the theory that a new job would inevitably reveal old secrets, inventors' innovation declined.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. A modern Canadian act should take the first and refuse the second. Managers rank secrecy ahead of patents as a way of capturing the value of innovation,¹⁴ and for a country whose firms patent little, the quality of trade-secret law is a condition of the investment it says it wants. The U.S. Justice Department made the same point to Congress in 2018: uncertainty about the legal protection of trade secrets discourages companies from entering partnerships or expanding their business in a country.¹⁵

The demand from Canada's innovation community is explicit. The Canadian SHIELD Institute told the Commons Finance Committee in 2025 that firms must piece together protection from provincial contract and tort law, which creates uncertainty, and that a harmonized national standard would lower risk for smaller firms and encourage investment in confidential technologies.¹⁶ The Intellectual Property Institute of Canada called in 2017 for legislation establishing statutory civil remedies.¹⁷ Both framed the answer as federal. They seek a single standard firms can rely on across the country. Paper 1 shows how a uniform act with a federal perimeter delivers it.

Practitioners see the gap first. Since October 25, 2021, Ontario has prohibited non-competition agreements with most employees, subject to exceptions for executives and the sale of a business.¹⁸ The policy protects mobility, and a modern act should respect it. The law of confidential information now carries most of the weight the restrictive covenant once carried, in a province with no statute on either the secret or the wrong.

2.2 Across the border

Trade-secret disputes rarely stay within one country. When Bombardier alleged in 2018 that former employees recruited in Canada and the United States had carried its aircraft-certification

misappropriation; remedies and restrictions on liability; enforcement, investigation, and discovery; and system functioning. The study reports association, not causation.

¹³ Andrea Contigiani, David H Hsu & Iwan Barankay, "Trade Secrets and Innovation: Evidence from the 'Inevitable Disclosure' Doctrine" (2018) 39:11 Strategic Mgmt J 2921.

¹⁴ Contigiani, Hsu & Barankay, *supra* note 13, managerial summary (managers often list trade secrecy as their most important means of appropriating the returns to innovation, more often than formal intellectual-property protection).

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 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.

¹⁷ Intellectual Property Institute of Canada, "Ideas for Inclusion in National IP Strategy" (July 17, 2017), as described in Matt Malone, *The Law of Trade Secrets and Confidential Information in Canada* (Toronto: LexisNexis Canada, 2023) 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.

¹⁸ *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).

know-how to a rival jet program, the Montreal company sued in federal court in Seattle under the *Defend Trade Secrets Act*.¹⁹ Some defendants and some of the conduct were American. The statutory claim it pleaded has no Canadian equivalent. A Canadian firm with the resources to litigate in the United States can obtain a statutory remedy there that its own country does not offer, and as disputes move, precedents and expertise develop elsewhere.

Canada also has no systematic measure of the know-how its firms lose to misappropriation, or of the disputes they take abroad. The large foreign estimates of loss rest on undisclosed methods and cannot simply be borrowed.²⁰ CUSMA already requires its intellectual-property committee to exchange information on the value of trade secrets and the losses misappropriation causes.²¹ Canada could lead that work, and a province that enacts a statute could measure what its courts see.

2.3 The view from a founder's desk

Seen from a founder's desk, the gap has five practical consequences.

The first arrives at diligence. When asked what protects the company's core technology, a founder in the United States points to federal and state statutes that define the asset, the wrong, and the remedies. A Canadian founder points to confidentiality agreements and case law. The answer is priced accordingly.

The second arrives with the stranger. The Five Eyes guidance Canada's security agencies share with technology companies advises firms to understand the laws in force wherever they operate.²² A Canadian firm that follows that advice finds that the weakest law it must reckon with is its own.

The third is speed and cost. A large firm can afford to discover its rights through litigation. A start-up of twenty people usually cannot. Defined statutory remedies matter most to the firms least able to litigate without them.

The fourth is partnership. Growth requires sharing know-how with manufacturers, customers, universities, and licensees, often across borders, yet breach of confidence reaches a downstream recipient only by tracing a duty back through the relationship in which it arose. A statute reaching third parties who take misappropriated information knowingly or with gross negligence, as CUSMA contemplates, makes each disclosure safer.

¹⁹ "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).

²⁰ Malone, *The Law of Trade Secrets*, *supra* note 17 at 6 to 7 (describing United States estimates published without disclosed methodology).

²¹ *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 20.14(2)(c) (the Committee on Intellectual Property Rights "shall ... exchange information regarding trade secret-related matters, including the value of trade secrets and the economic loss associated with trade secret misappropriation").

²² Canadian Security Intelligence Service, *CSIS Public Report 2024* (June 18, 2025), under "Five Eyes Economic Security Initiative (Secure Innovation)," advising firms to understand "what in-country laws are in effect for countries in which you operate"; see also note 30 below.

The fifth cuts the other way. Innovators are defendants as well as owners. A start-up founded by engineers who left an incumbent is exactly the company a larger competitor may sue to slow it down. The statute they need defines the wrong precisely, protects the general skill and knowledge people carry between jobs, and imposes costs on claims brought to intimidate. A Canadian firm should hold its know-how on terms as secure as its American competitors', and its founders should be as free to leave and build as theirs.

Jim Balsillie made the underlying point to a parliamentary committee in 2023. Research strategies that ignore who owns the resulting intellectual property, he testified, create "a system of IP philanthropy for foreign economies."²³

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 have a rational alternative, which is to incorporate and build where a trade-secrets statute exists. The talent follows the company, and the tax base follows the talent. An intangible economy hollows out that way, through a steady departure of firms each making a rational choice the law gave it no reason to resist.

Part 3: The Security Record

3.1 The record

Trade secrets are where economic security meets ordinary commerce. The know-how a hostile state most wants from a Canadian firm is usually unpatented, because a patent would publish it. Canada's security agencies have said so for most of a decade. In December 2018, the Director of the Canadian Security Intelligence Service told the Economic Club of Canada that foreign interference and espionage were the greatest threat to the country's prosperity and national interest, and that economic espionage, whoever was behind it, was a long-term threat to the economy.²⁴ Canada's cyber agencies assess that the state programs of China, Russia, Iran, and North Korea pose the greatest strategic cyber threat to the country, and that state-sponsored actors conduct commercial espionage against Canadian businesses, universities, and governments to take intellectual property.²⁵ The national cyber threat assessments recorded in 2018 that intellectual property had been stolen from service providers and their clients in

²³ Jim Balsillie, Chair, Council of Canadian Innovators, *Evidence*, House of Commons, Standing Committee on Science and Research, 44th Parl, 1st Sess, No 37 (March 30, 2023) (opening statement). Later in the same meeting he added that, absent an appropriation strategy, public investment simply transfers wealth to foreign countries.

²⁴ 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>>.

²⁵ National Security and Intelligence Committee of Parliamentarians, *Annual Report 2020* (April 12, 2021), ch 1 (malicious cyber activity; Communications Security Establishment assessment that the state-sponsored programs of China, Russia, Iran, and North Korea pose the greatest strategic threat, and that state-sponsored actors conduct commercial espionage against businesses, academia, and government to steal intellectual property); Canadian Centre for Cyber Security, "National Cyber Threat Assessments" (guidance on the threat of state-sponsored actors).

engineering, mining, manufacturing, and pharmaceuticals, and in 2020 that state-sponsored actors were seeking trade secrets and targeting research on COVID-19.²⁶

China is the leading example on the public record. In December 2018, Canada joined its allies in attributing to China's Ministry of State Security a campaign that had compromised managed service providers from as early as 2016 and, through them, their clients. The American indictment described a provider whose compromised clients included firms in Canada. Washington charged two of the hackers; the federal public safety minister said no charges were pending in Canada.²⁷ An earlier intrusion at the National Research Council was attributed in July 2014 to a Chinese state-sponsored actor whose apparent objective was to steal intellectual property and trade secrets. Two Canadian companies that worked with the Council were approached by Chinese businesses after the breach.²⁸

The threat continues. Canada's intelligence service reports that in 2024 the country was a frequent target of the People's Republic of China, which it said was willing to use clandestine and deceptive means to acquire intellectual property and emerging technologies, with artificial intelligence, quantum computing, biotechnology, and aerospace among its priorities.²⁹ The same report says that hostile states "take advantage of weaknesses in Canada's legal and regulatory frameworks to undermine Canadian interests," and names the Hydro-Québec case.³⁰ Its 2025 report calls foreign espionage "a long-term threat to Canada's economy and our collective prosperity," and records that Chinese intelligence services began posting job advertisements through cover companies to recruit Canadians with access to proprietary information.³¹ In 2025, the Canadian Security Intelligence Service joined allied agencies in warning start-ups that pitch competitions run by entities tied to the Chinese state can cost them their intellectual property,³²

²⁶ Canadian Centre for Cyber Security, *National Cyber Threat Assessment 2018*, under "Commercial espionage"; Canadian Centre for Cyber Security, *National Cyber Threat Assessment 2020*, under "Stealing intellectual property and proprietary information."

²⁷ "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).

²⁸ "Chinese cyberattack hits Canada's National Research Council," *CBC News* (July 29, 2014) (attribution by the Government of Canada's Chief Information Officer to "a highly sophisticated Chinese state-sponsored actor"); Jim Bronskill, "Chinese hackers attacked the National Research Council," *The Canadian Press* (December 13, 2014) (Canadian Cyber Incident Response Centre case study, released under the *Access to Information Act*, finding that the apparent objective was the theft of intellectual property, trade secrets, and other sensitive or proprietary information); Susan Lunn, "2 Canadian companies approached by China after NRC cyberattack," *CBC News* (November 4, 2014). On the private sector, see "Chinese hackers suspected of raiding Nortel for decade," *The Globe and Mail* (February 14, 2012).

²⁹ *CSIS Public Report 2024*, *supra* note 22, "Intelligence operations," under "People's Republic of China."

³⁰ *CSIS Public Report 2024*, *supra* note 22, under "Economic and research security" and "Critical infrastructure." The same section describes the Five Eyes Secure Innovation initiative, launched in October 2024 to help emerging technology companies, researchers, and investors protect their intellectual property from hostile state actors.

³¹ Canadian Security Intelligence Service, *CSIS Public Report 2025* (published March 2026; released May 1, 2026).

³² Canadian Security Intelligence Service, "Canadian and U.S. intelligence partners issue guidance to protect Western tech startups from exploitation in international pitch competitions," news release

and the Business Council of Canada describes Canada as an attractive target for industrial espionage.³³ The threat is not confined to one state. A former United States defence secretary has estimated that a dozen or fifteen countries steal American technology, allies among them.³⁴

3.2 What the state's tools cannot do

Ottawa has built defences around that asset. None of them belongs to the firm. Research in sensitive technology areas funded by the federal granting councils may not involve researchers affiliated with named foreign institutions connected to military or state-security bodies.³⁵ The Minister may impose interim conditions to prevent injury to national security while an investment is under review.³⁶ Section 19 of the *Foreign Interference and Security of Information Act* makes economic espionage a crime. Ottawa's 2018 intellectual-property strategy barely mentioned trade secrets.³⁷ Each of these defences depends on the state detecting the threat and choosing to act.

The criminal law also has limits of reach and of time. American prosecutors can reach theft that occurs wholly abroad only if the offender is American or an act in furtherance occurs in the United States, and the Justice Department has told Congress that such thefts are rarely even reported to American law enforcement.³⁸ The one Canadian prosecution under section 19 has run nearly four years without a verdict.³⁹ The American experience also shows how a strategy

(September 4, 2025); see also Jim Hinton and Alexis Conrad, "CSIS warning shows Ottawa can't keep ignoring Canada's IP crisis," *The Globe and Mail* (September 18, 2025).

³³ Business Council of Canada, *Economic Security is National Security* (September 7, 2023) ("Canada has become an attractive target for states seeking to advance their domestic industries through espionage").

³⁴ 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).

³⁵ Government of Canada, *Policy on Sensitive Technology Research and Affiliations of Concern* (announced January 16, 2024; in force May 1, 2024), applying to applications to the federal granting councils and the Canada Foundation for Innovation for research advancing listed sensitive technology areas.

³⁶ *National Security Review of Investments Modernization Act*, SC 2024, c 13 (Bill C-34, royal assent March 22, 2024), amending the *Investment Canada Act*, RSC 1985, c 28 (1st Supp), to authorize the Minister to impose interim conditions to prevent injury to national security during a review.

³⁷ Malone, *The Law of Trade Secrets*, *supra* note 17 at 3, discussing Innovation, Science and Economic Development Canada, *Intellectual Property Strategy* (2018). On section 19, see Paper 1 of this series.

³⁸ Department of Justice, *Report to Congress*, *supra* note 15 at 2 to 3, citing 18 USC § 1837, and at 6 (FBI jurisdiction does not extend to wholly foreign theft).

³⁹ *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

built on prosecution can go wrong. The Justice Department told the Senate in 2018 that more than 90 per cent of its cases alleging economic espionage by or for a state involved China.⁴⁰ Four years later it ended its initiative against Chinese economic espionage, 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.⁴¹ A remedy the owner controls does not depend on where the state chooses to focus.

3.3 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.⁴² 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.

The American record shows the remedy at work. Micron sued the companies it accused of taking its memory-chip technology in December 2017, under the federal and California trade-secrets statutes. Its civil claims ended in settlements with both defendants; the prosecution of the state-owned Chinese manufacturer ended in an acquittal in 2024.⁴³ AMSC, whose wind-turbine

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.

⁴⁰ John C Demers, Assistant Attorney General, National Security Division, United States Department of Justice, Statement before the Senate Committee on the Judiciary, "China's Non-Traditional Espionage Against the United States: The Threat and Potential Policy Responses" (December 12, 2018).

⁴¹ "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).

⁴² *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).

⁴³ *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: 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

software was taken for a Chinese customer through a recruited employee, lost more than a billion dollars in shareholder equity and almost 700 jobs before a conviction and settlement recovered part of the loss.⁴⁴ A Canadian owner in either position would have no statute to sue under.

Part 4: Canada's Commitments

Figure 2: A century of commitments, and no civil statute

	Canada's international commitments	Canadian legislation
1923	Paris Convention, art 10bis: protection against unfair competition	
1989		Uniform Trade Secrets Act adopted; no province enacts it
1994, 1995	NAFTA art 1711 and TRIPS art 39: legal means against misappropriation	
2001		Economic espionage offence (now FISIA s 19)
2016	APEC best practices endorsed; regime presented to the TRIPS Council	
2018	CPTPP: protection against state-owned enterprises	
2020	CUSMA Chapter 20: civil action against any other person	Criminal Code s 391 enacted; no civil statute
2022		First s 19 prosecution; no verdict as of October 2026
2026	Annual CUSMA review begins	Civil trade-secrets statute: none

4.1 A ladder of commitments

CUSMA is the highest rung on a ladder Canada has climbed over the past century. Since 1923, Canada has been bound by article 10bis of the Paris Convention to assure effective protection

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).

⁴⁴ United States, Department of Justice, "Court Imposes Maximum Fine on Sinovel Wind Group for Theft of Trade Secrets" (July 6, 2018) (loss of more than US\$1 billion in shareholder equity and almost 700 jobs; conviction January 24, 2018; restitution by settlement of US\$57.5 million); United States, Department of Justice, "Chinese Company Sinovel Wind Group Convicted of Theft of Trade Secrets" (January 24, 2018).

against unfair competition, meaning competition contrary to honest industrial or commercial practice.⁴⁵ The TRIPS Agreement made the duty specific. Persons must be able to prevent information within their control from being disclosed to, acquired by, or used by others in a manner contrary to honest commercial practices, including breach of contract, breach of confidence, and knowing acquisition by third parties.⁴⁶ Article 1711 of NAFTA, in force from January 1994, required the legal means to the same end.⁴⁷ The CPTPP, in force for Canada since December 30, 2018, and now binding it to eleven partners including the United Kingdom, requires those means against misappropriation by others, "including state-owned enterprises," and adds criminal procedures for at least one of three categories of conduct.⁴⁸ In November 2016, Canada joined the other APEC economies in endorsing best practices for trade-secret protection, which call for broad standing to bring claims, civil and criminal liability, robust procedures in enforcement proceedings, and protection against further disclosure of secrets that governments require firms to submit.⁴⁹

The same month, at the WTO's TRIPS Council, the United States, the European Union, Chinese Taipei, and Japan presented their trade-secret regimes, and Canada responded. It told the Council that it had "a strong regime for the protection and enforcement of trade secrets," citing an OECD index that, it said, ranked Canada's "overall regime second among the 37 major economies that were assessed." It also acknowledged that it "does not have a single federal trade secrets act," and that its civil causes of action stemmed primarily from contract, unjust enrichment, and fiduciary duty.⁵⁰

The early rungs asked little of the civil law. TRIPS and NAFTA required only a legal possibility of preventing misappropriation, and Canada claimed compliance through the common law, as did Australia and New Zealand.⁵¹ At that level, an adequacy argument has force.

⁴⁵ *Paris Convention for the Protection of Industrial Property*, March 20, 1883, as revised at Stockholm, July 14, 1967, art 10bis(1) and (2). Canada acceded on August 21, 1923, with effect from September 1, 1923: World Intellectual Property Organization, WIPO Lex, "Contracting Parties: Paris Convention (Canada)."

⁴⁶ *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(1) and (2), and n 10.

⁴⁷ *North American Free Trade Agreement*, December 17, 1992, Can TS 1994 No 2, art 1711(1).

⁴⁸ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, March 8, 2018 (in force for Canada December 30, 2018), incorporating *Trans-Pacific Partnership Agreement*, art 18.78(1) and (2), and art 18.78.3(d) (a party may limit criminal procedures to acts directed by or for the benefit of or in association with a foreign economic entity). The United Kingdom's accession took effect on December 15, 2024. The text of art 18.78 is set out in Malone, *The Law of Trade Secrets*, *supra* note 17 at 53 to 55.

⁴⁹ Asia-Pacific Economic Cooperation, *Best Practices in Trade Secret Protection and Enforcement Against Misappropriation* (endorsed by APEC Leaders and Ministers, Lima, November 2016), as described in Department of Justice, *Report to Congress*, *supra* note 15 at 4 to 5 and 24.

⁵⁰ 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), agenda item 2 (Reviews of National Implementing Legislation), paras 67 to 71 (statement of Canada); see also paras 30 to 44 (United States, introducing the *Defend Trade Secrets Act*), 45 to 59 (European Union), 60 to 63 (Chinese Taipei), 64 to 66 (Japan), and 72 to 76 (New Zealand, describing common-law civil protection and the criminal offence in the *Crimes Act 1961*). Canada's statement at para 67 thanks the United States, the European Union, Chinese Taipei, and Japan for their presentations and responds to their interest; para 68 contains the ranking.

⁵¹ Malone, *The Law of Trade Secrets*, *supra* note 17 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

CUSMA changed the terms. Its trade-secret section runs to nine articles, against NAFTA's one, and adds the civil action against "any other person," provisional measures, confidentiality in litigation, damages, and criminal enforcement.⁵² Each rung asked more of the civil law, and the common law stood still. Parliament's own conduct confirms the change. It enacted section 391 of the *Criminal Code* because CUSMA required a general trade-secret offence. NAFTA and TRIPS required none, and the CPTPP's criminal obligation, which a party may confine to misappropriation for the benefit of a foreign economic entity, could be met by the existing economic-espionage offence.

4.2 Why Washington asked

The trade-secret chapter was a template, written with third countries, not Canada, in mind. In 2013, the United States adopted a strategy against the theft of American trade secrets by foreign competitors and governments, undertaking to use its "trade policy tools to press other governments for better protection and enforcement."⁵³ In 2015, Congress wrote the goal into law, directing negotiators to seek intellectual-property standards similar to those of United States law and to eliminate government involvement in intellectual-property violations, including cyber theft.⁵⁴ The Trade Representative's 2017 objectives for the NAFTA renegotiation applied that mandate to trade secrets by name, seeking effective civil, administrative, and criminal enforcement and court jurisdiction over the commercial activities of foreign state-owned enterprises.⁵⁵ Washington's account of the result lists every element, from civil and criminal procedures to protection against state-owned enterprises, confidentiality in litigation, and penalties for officials who disclose.⁵⁶ The United States exported its legal architecture as the North American standard to counter third-country espionage.

Washington pressed the same template on China at the same time, by other means. The Trade Representative opened a Section 301 investigation in August 2017, the month the NAFTA renegotiation began. Its March 2018 findings concluded that for more than a decade China had conducted and supported cyber intrusions into American commercial networks to obtain trade secrets and other commercially valuable information.⁵⁷ The Phase One agreement of January

Mitigate Disclosure Risk" (December 19, 2022) (protection through the equitable doctrine of breach of confidence).

⁵² NAFTA, *supra* note 47, art 1711; TRIPS, *supra* note 46, art 39; CUSMA, *supra* note 21, arts 20.69 to 20.77, including art 20.71(1) (criminal procedures and penalties for the unauthorized and willful misappropriation of a trade secret). On s 391 as enacted to meet the CUSMA requirement, see Malone, "Consequences," *supra* note 39 at 911 to 912.

⁵³ Executive Office of the President, *Administration Strategy on Mitigating the Theft of U.S. Trade Secrets* (February 2013), action item 1; The White House, "Launch of the Administration's Strategy to Mitigate the Theft of U.S. Trade Secrets" (February 20, 2013).

⁵⁴ *Bipartisan Congressional Trade Priorities and Accountability Act of 2015*, Pub L No 114-26, § 102(b)(5), 129 Stat 320, codified at 19 USC § 4201(b)(5)(A). See also Congressional Research Service, *Intellectual Property Rights and International Trade*, RL34292 (May 12, 2020) (the 2015 objectives seek provisions to prohibit cyber and trade-secret theft).

⁵⁵ Office of the United States Trade Representative, *Summary of Objectives for the NAFTA Renegotiation* (July 17, 2017; updated November 17, 2017), under "Intellectual Property" and "State-Owned and Controlled Enterprises."

⁵⁶ Office of the United States Trade Representative, "United States-Mexico-Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement" (2018).

⁵⁷ 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 V; Office of the United States Trade Representative, *Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation* (November 20, 2018); Office of the United States Trade

2020 then required China to treat electronic intrusions, breach or inducement of breach of a duty of confidence, and unauthorized disclosure or use as misappropriation. It also required China to ease the owner's burden of proof and to make preliminary injunctions available. For the United States, the agreement recorded that existing American law already conformed.⁵⁸ The Trade Representative has since listed the continental agreement and the China agreement side by side as answers to the same problem.⁵⁹

American industry did not single Canada out. In 2017, the United States Chamber of Commerce's own index gave Canada the top score in its category for trade secrets and market access, one of six economies to receive it, alongside the United States, Japan, and Switzerland.⁶⁰ Its recent editions count the 2020 criminal offence among Canada's strengths, and the 2024 edition's list of Canadian weaknesses does not mention trade secrets.⁶¹ Canada was covered by the template, never named as its target. The case for legislation therefore rests on Canadian law itself, and the adequacy discussion below shows that it can. The history also changes the character of the gap. Canada's missing civil action is a hole in the continental perimeter the chapter was built to secure.

4.3 The constitutional fault line and the government's account

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),⁶² and each is governed by one national statute, with the Federal Court available alongside the provincial superior courts.⁶³

Representative, *Four-Year Review of Actions Taken in the Section 301 Investigation* (May 14, 2024) (cyber-enabled theft continued and may have expanded). The tariffs imposed on these findings were sustained against procedural and statutory challenge in *In re Section 301 Cases*, 628 F Supp 3d 1235 (Ct Intl Trade 2023), aff'd *HMTX Industries LLC v United States*, No 2023-1891 (Fed Cir, September 25, 2025), cert denied, No 25-1012 (US, June 15, 2026); the courts did not review the findings of theft. A WTO panel found the first tariffs inconsistent with the GATT and not justified under article XX(a): *United States: Tariff Measures on Certain Goods from China* (2020), WTO Doc WT/DS543/R (panel report circulated September 15, 2020; appealed October 26, 2020).

⁵⁸ *Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China*, January 15, 2020, c 1, s B, arts 1.3 to 1.9, especially arts 1.4 (acts constituting misappropriation), 1.5 (burden of proof) and 1.6 (provisional measures). The 2018 Special 301 Report had criticized China for choosing not to establish a stand-alone trade-secrets law: Office of the United States Trade Representative, *2018 Special 301 Report* (April 2018).

⁵⁹ Office of the United States Trade Representative, *2022 Special 301 Report* (April 2022), under "Trade Secrets" (the USMCA described as having the most robust trade-secret protection of any prior United States trade agreement, and the Phase One agreement's trade-secret commitments set out alongside it).

⁶⁰ United States Chamber of Commerce, Global Intellectual Property Center, *The Roots of Innovation: U.S. Chamber International IP Index*, 5th ed (released February 8, 2017), category 4 (trade secrets and market access), with the category scores as reported in "U.S. Chamber of Commerce Releases International IP Index," *Patent Docs* (March 2, 2017) (the United States, Switzerland, New Zealand, Japan, Israel, and Canada each receiving the category's top score of 3).

⁶¹ United States Chamber of Commerce, *2024 International IP Index* (Canada: strengths, including new criminal sanctions for theft and misappropriation of trade secrets under USMCA; weaknesses, limited to educational exceptions to copyright and pharmaceutical patent enforcement) and *2025 International IP Index* (Canada: strengths); in the *2026 International IP Index* (March 11, 2026), Canada ranks 18th of 55 economies.

⁶² *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.

⁶³ 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

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.⁶⁴ 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.⁶⁵ 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.⁶⁶

The treaty leaves that allocation where it was. The rule has governed since the *Labour Conventions* case in 1937. The federal executive may bind Canada internationally, but doing so gives Parliament no legislative jurisdiction it would not otherwise possess, and performance falls to whichever legislature holds the subject matter.⁶⁷ The compartments of the federation stay watertight when the state sails into foreign waters. The allocation governs who must legislate. It does not excuse the state, because a party may not invoke its internal law to justify failing to perform a treaty.⁶⁸ The constitutional answer is a reason for federal-provincial co-ordination, and no answer at all to Canada's partners.

Canada made a federal promise over provincial subject matter, and nothing in the public record shows that the two were reconciled before signing. The government's own account is silent on the point. Its technical summary of the intellectual-property chapter states, obligation by obligation, where Canada already complied and where it would have to change its law; on trade secrets it says only that the chapter provides for civil and criminal enforcement.⁶⁹ Practitioners

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.

⁶⁴ 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 17; 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.

⁶⁵ *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).

⁶⁶ *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).

⁶⁷ *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326 (PC) (the *Labour Conventions* case) at 351, as quoted in *Schneider v The Queen*, [1982] 2 SCR 112 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.

⁶⁸ *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, art 27.

⁶⁹ Global Affairs Canada, "Canada-United States-Mexico Agreement (CUSMA): Intellectual property chapter summary," Technical summary of negotiated outcomes, under "Trade secrets"; compare the

saw the difficulty when the text was released, observing in 2018 that the obligations might require new federal and provincial legislation.⁷⁰ Canada's statement to the WTO's 2024 review of its trade policy reports only the amendment to the *Criminal Code*.⁷¹ That amendment, made by the CUSMA implementing legislation in 2020, added a general trade-secret offence; no court has interpreted it, and the only reported charge under it was withdrawn before trial.⁷²

4.4 The adequacy objection

One objection deserves a direct answer because it is Ottawa's own. CUSMA prescribes no statute, code, or forum, the argument runs, and the common law of confidence, with fiduciary duty and contract behind it, already supplies remedies.⁷³

The objection confuses the presence of remedies with the regime's adequacy. It fails on two grounds. The first is reliability. The treaty requires protection a firm can rely on in advance. Canadian law states its terms at a level of generality that litigation must then resolve case by case, and a firm planning an investment cannot know how a court will apply them to its facts.

The second ground, coverage, is more serious. Breach of confidence is relational. It works against the departing employee or the licensee who misuses what was entrusted; it works poorly against the stranger, whether an industrial spy, a network intruder, or a foreign competitor who acquires the information at several removes. Alberta's law reform institute concluded in 1986 that because the judge-made actions presuppose a relationship, industrial espionage as such

entries under "Copyright and related rights" (criminal remedies for rights management information required) and "Enforcement" (in-transit border authority not presently provided).

⁷⁰ Jaymie Maddox and Vincent M de Grandpré, "CUSMA and regulatory amendments create challenges and opportunities for IP owners in 2018," *Osler Update* (Osler, Hoskin & Harcourt LLP, December 18, 2018); see also Blake, Cassels & Graydon LLP, "IP Post-NAFTA: What CUSMA Coming into Force Means for Canadian IP Law" (2020) (Canada did not then provide the criminal procedures and penalties CUSMA required).

⁷¹ World Trade Organization, Trade Policy Review Body, *Trade Policy Review: Report by Canada*, WTO Doc WT/TPR/G/455 (April 24, 2024), s 2 (Canada amended the *Criminal Code* in respect of trade-secret offences, including clarifying their scope).

⁷² *Canada-United States-Mexico Agreement Implementation Act*, SC 2020, c 1 (assented to March 13, 2020), adding s 391 to the *Criminal Code*, RSC 1985, c C-46 (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 39 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 v Wang*, *supra* note 39 at paras 1 and 4 (bail); *Wang v R*, *supra* note 39 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 39; The Canadian Press, "Ex-Hydro researcher tells spying trial he wasn't given opportunity to defend himself" (November 5, 2025) (withdrawn in 2024).

⁷³ 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 21, art 20.5.2 (each party free to determine the appropriate method of implementing the chapter within its own legal system and practice).

may not be actionable in Canada.⁷⁴ The fallback torts are poorly suited to preventing the harm. The Supreme Court has confined one of them, unlawful means, to three-party situations.⁷⁵ The treaty's obligation runs against "any other person."

Quebec's position differs in one respect. Article 1457 of the *Civil Code* imposes a general duty not to cause injury to another by fault. It is not confined to relationships of confidence, so a Quebec owner has a route against the stranger that the common law does not supply.⁷⁶ What Quebec lacks is the rest: a definition of the protected information, a standard of misappropriation, and procedures and remedies built to the requirements CUSMA names.

Against misappropriation by strangers, increasingly the form that matters most, the common law does not reliably reach the wrongdoer, and no Canadian civil law defines the wrong.

4.5 The external record

The Special 301 Watch List on which the United States Trade Representative places Canada proves nothing either way. The listing rests on border enforcement, online piracy, and pharmaceutical pricing, and the report describes CUSMA as the strongest trade-secret instrument in any prior American agreement.⁷⁷ Ottawa rejects the Special 301 process as unsound, and rightly so. It also asserts that Canadian protection is fully consistent with CUSMA.⁷⁸ The second claim does not follow from the first. Whether Canadian law satisfies CUSMA is a question about Canadian law.

The OECD ranking that Canada cited to the TRIPS Council deserves the same answer. A high ranking for what Canadian courts can do is consistent with the gap this series identifies. The question is not whether Canadian courts protect trade secrets well where a duty of confidence exists; they do. It is whether the law reliably reaches the stranger and tells a firm in advance

⁷⁴ 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 39 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).

⁷⁵ *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12, [2014] 1 SCR 177 at para 5 (the unlawful-means tort to be kept within narrow bounds and available only in three-party situations).

⁷⁶ *Civil Code of Québec*, *supra* note 65, arts 1457 (general duty not to cause injury to another by fault) and 1612 (damages for the loss of a trade secret).

⁷⁷ Office of the United States Trade Representative, *2026 Special 301 Report* (April 2026), Section I.E (Trade Secrets), identifying China and Russia as the jurisdictions with reported gaps in trade-secret protection and enforcement, and describing CUSMA as having the most robust protection for trade secrets of any prior United States trade agreement; Canada is not identified in that section. Canada's listing rests on other grounds: see the Country Reports (Canada: existing ex officio border authority not consistently used; online piracy, stream-ripping, and illicit streaming devices; Patented Medicine Prices Review Board reference-basket methodology); and Office of the United States Trade Representative, "USTR Releases 2018 Special 301 Report on Intellectual Property Rights," press release (April 27, 2018) (the 2018 move to the Priority Watch List attributed to border enforcement, pharmaceutical protections and procedures, copyright, and geographical indications).

⁷⁸ Global Affairs Canada, question period note, *supra* note 73 (Canada does not recognize the validity of the Special 301 report, which is said to lack a clear methodology and to rely primarily on industry allegations rather than empirical evidence). The position is long-standing; Canada declined to appear at the 2017 Special 301 hearing on the same ground.

what it protects. The ranking also predates CUSMA, which raised the standard to protection against misappropriation by any other person.⁷⁹

Canadian stakeholders raised the chapter. In Global Affairs Canada's 2024 consultations they urged full implementation of the intellectual-property chapter and asked that it keep pace with technology and ensure "opportunities for commercialization as well as access, including in the areas of copyright and trade secrets."⁸⁰ The government's summary of the 5,143 submissions received in 2025 reported intellectual-property views only on the cultural exemption and pharmaceutical patents,⁸¹ and Canada's own submission to the 2026 joint review did not mention intellectual property.⁸² Silence offers no safety. Under the annual joint reviews the chapter can be raised every year until the agreement expires in 2036, by a counterparty that has shown it will use whatever instrument is available.⁸³

Canada should have its answer built before the question is asked.

Part 5: Trade Law Against Trade-Secret Theft: The United States and Canada Compared

The United States does not rely solely on civil and criminal law. It uses its trade laws to investigate, to impose remedies on states and firms, and to stop goods at the border. Canada has the trade laws but uses none of them for this purpose.

⁷⁹ Lippoldt and Schultz, *supra* note 12; 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), para 68 (statement of Canada, citing the index). On the CUSMA standard, see CUSMA, *supra* note 21, art 20.70(a).

⁸⁰ Global Affairs Canada, "What We Heard Report: Consulting Canadians on the Operation of the Canada-United States-Mexico Agreement" (consultations held August 17 to October 31, 2024; 137 submissions), under "Intellectual property."

⁸¹ Global Affairs Canada, "What We Heard: 2025 Public Consultations on the CUSMA Review" (consultations held September 20 to November 3, 2025; report modified February 6, 2026), under "Modernizing Rules and Procedures."

⁸² Government of Canada, *Canada's Recommendations for the Joint Review of the Canada-United States-Mexico Agreement* (dated June 1, 2026; transmitted and reported June 2, 2026), letter from the Hon Dominic LeBlanc to United States Trade Representative Jamieson Greer and Secretary of Economy Marcelo Ebrard. The letter requests renewal of the agreement for a further sixteen-year term, identifies sectoral tariffs on steel, aluminum, automobiles, and forestry as matters requiring parallel discussion, and records that Canada recognizes that the other parties may wish to propose areas where improvements may be warranted. It makes no reference to intellectual property. Meeting Ambassador Greer in Washington the same day, Minister LeBlanc said he had presented proposals responding to long-standing United States concerns but declined to identify them, so the public record is silent rather than complete.

⁸³ Global Affairs Canada, statement by Minister LeBlanc on the imposition by the United States of section 301 tariffs related to forced labour practices (July 23, 2026). The action reached sixty economies. Canada was assessed at ten per cent rather than the twelve and a half per cent applied to most others, and goods compliant with CUSMA rules of origin were exempted. On the annual joint review, see CUSMA, *supra* note 21, art 34.7.

5.1 The American toolkit

Washington investigates. Its Section 301 findings of 2018, reviewed in 2024, describe state-directed theft of trade secrets in detail, and its annual Special 301 review assesses the protection every major trading partner provides.⁸⁴

It imposes remedies on states and firms. The tariffs that followed the Section 301 findings led to the 2020 Phase One commitments described in Part 4. Since 2023, the President has had authority to sanction foreign persons who steal American trade secrets, a power first used in February 2026.⁸⁵ Export controls reach the same conduct. In October 2018, the Commerce Department added Fujian Jinhua, the state-owned memory-chip maker also prosecuted over Micron's technology, to its Entity List, requiring a licence, presumptively denied, for every export of American technology to it.⁸⁶

It stops goods. Section 337 of the *Tariff Act of 1930* lets the International Trade Commission exclude imports produced through unfair practices, including misappropriation of trade secrets, where the effect is to injure an American industry, and the Federal Circuit has held that it reaches misappropriation abroad.⁸⁷ In 2020, the Commission found that a Korean manufacturer had misappropriated a botulinum-toxin manufacturing process and barred its product for 21 months. After the parties settled, the Commission rescinded the order and later vacated its finding, and critics argued that it had reached too far, since the theft occurred abroad between two foreign firms.⁸⁸

The tools have been tested. A GATT panel found in 1989 that section 337 treated imports less favourably than domestic goods, and the United States amended it. American courts sustained the Section 301 tariffs against procedural and statutory challenge, without reviewing the findings of theft, and a WTO panel found the first tariffs unjustified under the GATT.⁸⁹

⁸⁴ Section 301 Findings, *supra* note 57; Office of the United States Trade Representative, *Four-Year Review of Actions Taken in the Section 301 Investigation* (May 14, 2024); Office of the United States Trade Representative, *2026 Special 301 Report* (April 2026).

⁸⁵ *Protecting American Intellectual Property Act of 2022*, Pub L No 117-336, 136 Stat 6147 (January 5, 2023), codified at 50 USC § 1709; 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).

⁸⁶ United States, Department of Commerce, "Addition of Fujian Jinhua Integrated Circuit Company, Ltd (Jinhua) to the Entity List" (October 29, 2018); Bureau of Industry and Security, "Addition of an Entity to the Entity List," 83 Fed Reg (October 30, 2018), Federal Register document 2018-23693 (licence requirement for all items subject to the Export Administration Regulations; presumption of denial).

⁸⁷ *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).

⁸⁸ United States International Trade Commission, *Certain Botulinum Toxin Products, Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, Inv No 337-TA-1145, Notice of Commission Final Determination (December 16, 2020), 85 Fed Reg 83611 (December 22, 2020) (limited exclusion order and cease and desist order for 21 months; misappropriation of manufacturing processes found; trade secret in the bacterial strain not found). The orders were rescinded on May 3, 2021, following settlements, and the final determination was vacated after the Federal Circuit dismissed the appeals as moot: Notice of Commission Decision to Vacate Its Final Determination on Remand, 86 Fed Reg (November 2, 2021). For criticism of the Commission's reach to foreign misappropriation of a foreign trade secret not owned or practised by any American firm, see R Street Institute, "In Botox Dispute, ITC Claims Power to Block Imports For Whatever Reason it Wants" (January 29, 2021).

⁸⁹ *United States: Section 337 of the Tariff Act of 1930* (1989), GATT Doc L/6439, BISD 36S/345 (adopted November 7, 1989); *In re Section 301 Cases*, 628 F Supp 3d 1235 (Ct Intl Trade 2023), *aff'd HMTX Industries LLC v United States*, No 2023-1891 (Fed Cir, September 25, 2025), cert denied, No 25-1012 (US, June 15, 2026); *United States: Tariff Measures on Certain Goods from China* (2020), WTO Doc

None of these tools compensates the firm that lost the secret. Micron's case produced an export-control designation, a federal indictment, and a civil suit; only the civil suit produced a remedy against the state-owned defendant. Trade law reaches goods and governments. The owner still needs a civil statute.

5.2 Canada's toolkit

Table 1: Trade-law tools against trade-secret theft

Function	United States	Canada
Investigate a foreign state's practices	Section 301; annual Special 301 review	No mechanism; a Cabinet reference to the trade tribunal is possible but unused
Remedies against a state	Section 301 tariffs; Phase One commitments	Surtaxes under s 53 of the <i>Customs Tariff</i> , never used for intellectual property
Sanctions and export controls	2023 sanctions statute; Entity List	Sanctions statute does not reach trade-secret theft
Exclude goods made with stolen secrets	Section 337 exclusion orders by the International Trade Commission	None; the Canadian International Trade Tribunal is the natural forum
Border enforcement of intellectual property	Customs enforcement and section 337 orders	Trademarks, copyright, and geographical indications only
Civil remedy for the owner	Federal statute and uniform state acts	None; common law only
Criminal law	<i>Economic Espionage Act</i>	Economic espionage (s 19) and trade-secret offence (s 391)

Canada has no mechanism to investigate a foreign state's protection of trade secrets. The closest tool is dormant: the Governor in Council may refer any matter affecting Canada's economic, trade, or commercial interests to the Canadian International Trade Tribunal for inquiry, but no reference has addressed trade-secret theft.⁹⁰ Canada can impose surtaxes on a country's goods, and did so in 2024 on Chinese electric vehicles, steel, and aluminum, citing China's non-market policies and practices; intellectual property was not among the stated grounds, and Canada replaced the vehicle surtax in March 2026 with a quota.⁹¹ Canada's sanctions statute cannot be used against trade-secret theft at all: it applies only on the call of an international organization

WT/DS543/R (panel report circulated September 15, 2020; appealed October 26, 2020). The courts reviewed procedure and statutory authority, not the findings of theft.

⁹⁰ *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), s 18 (the Tribunal shall inquire 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 it).

⁹¹ Department of Finance Canada, "Canada taking further action to protect workers and critical industries against unfair Chinese competition" (October 1, 2024) (surtaxes under s 53 of the *Customs Tariff*, SC 1997, c 36); Global Affairs Canada, question period note 00036-2025, "Canada's Surtaxes on Imports of Electric Vehicles, Steel and Aluminum from China" (May 27, 2025); Global Affairs Canada, "Canada secures renewed market access with China to boost exports and strengthen economic collaboration" (March 2026) (country-specific annual quota of 49,000 electric vehicles at the most-favoured-nation rate of 6.1 per cent from March 1, 2026, lifting the 100 per cent surtax).

or where there has been a grave breach of international peace and security, gross and systematic human-rights violations, or significant corruption.⁹²

At the border, Canada stops counterfeit trademarks, pirated copyright, and goods bearing false geographical indications, but not goods that infringe a patent or were made with a stolen secret.⁹³ Its trade-remedy statute addresses dumping and subsidies, not intellectual property.⁹⁴ And Canada has no civil statute for the owner.

5.3 Recent changes in Canadian law

Three developments since 2024 bear on the gap. The *Countering Foreign Interference Act* now lets the intelligence service disclose information to any person or entity, including private firms, so a firm can be warned that its secrets are being targeted; however, it has no statute under which to act on that warning.⁹⁵ Bill C-35, introduced in June 2026, would replace the forced-labour tariff item with a standalone statute prohibiting the importation of goods made with forced labour, enforced by the Canada Border Services Agency with power to detain goods for up to 90 days.⁹⁶ It shows Parliament building the machinery for a goods-based import prohibition, in another field. The government expects the electric-vehicle quota in its 2026 arrangement with China to catalyze "considerable new Chinese joint-venture investment in Canada with trusted partners," and joint ventures are one channel through which the American Section 301 investigation found technology was transferred under pressure.⁹⁷ Canadian firms will negotiate those ventures with no statutory civil remedy behind their confidentiality terms. Neither the trade-remedy statute nor the criminal trade-secret offence has been amended in a way that touches this gap.

5.4 What the comparison shows

The United States protects trade secrets in four registers: civil, criminal, trade, and sanctions. Canada has a judge-made civil remedy and two criminal offences that have produced a single

⁹² *Special Economic Measures Act*, SC 1992, c 17, s 4(1.1).

⁹³ 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.

⁹⁴ *Special Import Measures Act*, RSC 1985, c S-15 (last amended June 23, 2022).

⁹⁵ *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).

⁹⁶ 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; awaiting second-reading debate as of October 10, 2026), s 4 (prohibition) and detention provisions (up to 90 days or a longer prescribed period); the bill would repeal the forced-labour reference in tariff item No 9897.00.00 of the *Customs Tariff*.

⁹⁷ 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 electric-vehicle quota "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 Section 301 Findings, *supra* note 57, s I.

prosecution in a quarter-century; it uses neither trade law nor sanctions. The comparison also marks the limits of trade law. Even the fullest American toolkit leaves the owner dependent on a civil statute. For Canada, the first priority is therefore the civil remedy the provinces can enact.

5.5 Why Canada should build its own tools

Nothing prevents Canada from building its own trade tools, and the place to start is the Canadian International Trade Tribunal. Canada should not depend on American investigations to document the theft of Canadian know-how, or on American exclusion orders to stop goods made with it. The Tribunal already does adjudicative trade inquiries, protects confidential business information under a strict statutory regime, and is reviewed by the Federal Court of Appeal.⁹⁸

The first step needs no legislation. The federal Cabinet, on the recommendation of the Minister of Finance to whom the Tribunal reports, can refer trade-secret theft to the Tribunal for inquiry and report, asking it to identify the goods and sectors affected and the losses to Canadian producers. The Tribunal has up to seven permanent members and may add temporary members, so an inquiry of this kind is within its existing means.⁹⁹ That inquiry would give Canada its own evidence base. The second step is the perimeter statute. Parliament should give 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: a Canadian counterpart to section 337, drawn more tightly than the American model. Paper 2 sets out its design and constitutional footing. Further tools can follow on the evidence the Tribunal produces, including whether Canada's sanctions statute should reach state-directed trade-secret theft, as the United States' 2023 statute does.

Conclusion

The record points one way. Firms rank trade secrets above every other form of intellectual property, and the evidence shows that a clear statute changes how they invest. Canada's security agencies have warned for most of a decade that state-directed espionage targets the know-how Canadian firms hold, and the state's tools depend on detecting the threat and choosing to act. Canada has promised its partners, repeatedly and with increasing specificity, a civil remedy against misappropriation by any person. And where the United States deploys its trade laws against trade-secret theft, Canada's trade laws are silent.

What the record does not contain is a Canadian statute that delivers it. The first two papers in this series explain why that gap exists and how the provinces and Parliament, acting together, can close it.

⁹⁸ *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), ss 17, 18, 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); *Federal Courts Act*, RSC 1985, c F-7, s 28(1)(e).

⁹⁹ *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), ss 3 and 18; Canadian International Trade Tribunal, *2024 Annual Report*, "Who we are" (accountable to Parliament through the Minister of Finance; up to seven permanent members and up to five temporary members).

About the Author

Barry Appleton is Interim Director of the Balsillie Legal Advisory Centre at the Balsillie School of International Affairs, Adjunct Professor at Wilfrid Laurier University at its School of International Policy and Governance (SIPG), Co-Director and Distinguished Senior Fellow of the Center for International Law at New York Law School, and Managing Partner of Appleton and Associates International Lawyers LP. Prof. Appleton, a former constitutional federalism negotiator, served as a rapporteur for the Division of Powers working group in the Charlottetown Round constitutional negotiations.

Acknowledgements

This work was supported by Mitacs through the Mitacs Accelerate Program. The author gratefully acknowledges the scholarly leadership of his colleagues at the Balsillie School of International Affairs and of Matt Malone, a highly respected authority on trade secrets in Canada.

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.