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Writer's Direct Contact
+1-250-852-7692
mmalone@tru.ca

By Electronic Mail

Re: Study re Support for the Commercialization of Intellectual Property

To the Members of the Standing Committee on Science and Research:

This letter encourages Committee members to consider the role and importance of trade secret and confidential information law in their study on the commercialization of intellectual property. Legal protections for trade secrets and confidential information are a key tool in the digital economy to protect many assets, including algorithms, code (including source code), data, formulas, processes, programs, prototypes, and more. Sadly, in Canada, there is a lack of protection for trade secrets and confidential information and an urgent need to reform this area of law.

Demands for enhanced protections of trade secrets and confidential information are becoming a common feature of trade agreements. For example, the European Union-Japan Partnership Agreement (2017), the United States-China Economic Agreement (2020), and the Canada-United States-Mexico Agreement (2018) all increased the requirements for country signatories to protect trade secrets. Whereas the North American Free Trade Agreement (1994) hardly mentioned trade secrets, they featured prominently in the Canada-United States-Mexico Agreement, largely due to American insistence. The trend is clear: our trading partners are continuing to call on Canada to reform this area of law. Canada's weak legal protections for trade secrets and confidential information are a key reason why our allies doubt the efficacy of our intellectual property regime. For example, the United States Trade Representative has repeatedly placed Canada on its "watchlist" of countries with poor intellectual property enforcement by citing this fact.

Several of the laws we have only exist due to the insistence of our allies. The Canada-United States-Mexico Agreement obligated Canada to enact a new criminal law concerning the misappropriation of trade secrets. It was used for the first time in November 2022 when a former employee of Hydro-Québec was charged with stealing the company's trade secrets. As I recently wrote in *The Globe and Mail*, since 1996 the United States has charged at least 419 defendants with criminal theft of trade secrets, in addition to the resurgence of civil litigation in the private sphere. Canada is far behind the United States. For years, the Canadian Security Intelligence Service has warned that theft of trade secrets and confidential information is a threat to our economic security, but we have had no prosecutions to show for it. The Wang prosecution is the first and only one.

One problem with the current approach to trade secrets and confidential information in Canada is the lack of statutory instruments available to victims. To protect patents, there is the *Patent Act*. To protect trademarks, there is the *Trademarks Act*. To protect copyright, there is the *Copyright Act*. But trade secrets and confidential information enjoy no such protection. This absence of law is a problem for Canadian inventors, innovators, and companies seeking to protect their intellectual property. This

problem is particularly acute for small- and medium-sized businesses, for whom formal registration systems of intellectual property are costly. Moreover, as the pace of technological innovation increases, patents are not always the most well-suited form of protection.

Our allies are moving to adopt robust protections for trade secrets and confidential information. In the United States, nearly every state and the federal government have such laws. Since 2016, the European Union has a directive on trade secrets that requires every country to provide protections. Since 2018, even the United Kingdom – where the jurisprudence established principles regarding the breach of confidence that have become the main vehicle at common law in Canada to seek redress for the theft of trade secrets and confidential information – has passed the *Trade Secrets Regulations*.

Far too often, Canadian businesses that are victims of trade secret theft are forced to leave Canada and sue in foreign jurisdictions to defend their rights elsewhere. For example, last year Winnipeg-based Precision Weather filed a trade secret theft lawsuit in Virginia. The year before that, Halifax-based Groundhog did so in New York. In 2018, Bombardier Aerospace filed such a lawsuit in the state of Washington. In all these cases, the underlying theft arguably occurred in Canada. Forcing these companies to go abroad to defend their rights is illogical for several reasons: it is costly, does not come with home turf advantage, and forces Canadian business to act and strategize in an unfamiliar legal setting. Canada should craft a made-in-Canada law regulating the theft of trade secrets.

I hope this submission helps the Committee in its ongoing review.

Cordially,

Matt Malone
Assistant Professor
Thompson Rivers University Faculty of Law