PRECIS

by Debbie Huitema

1983

Debbie Huitema
(summer student 1983)

PRECIS

1. This paper is prepared for the use of Mr. R.G. Hammond of the Alberta Institute of Law Research and Reform. Its purpose is to present and analyse any constitutional objections that may be raised should the Alberta Legislature pass the proposed Trade Secrets Protection Act as drafted.

2. The paper proposes to accomplish its purpose through a detailed analysis of both the Constitution Act, 1867 to 1981 and the Canadian Charter of Rights and Freedoms. The Constitution Act, 1867 is important because it is the document which sets out the areas over which each of the respective levels of governments have legislative power. The Charter requires analysis because it may prevent any legislative authority from enacting laws in a particular area. Therefore, the paper approaches the problem of whether or not the Alberta Legislature has the constitutional authority to pass the proposed legislation from three different angles:

a) The Constitution Act, 1867, s. 92(13)--the argument for provincial legislative authority in the trade secrets area.

b) The Constitution Act, 1867, sections 91(2), preamble, s. 91; s. 91(27); s. 92(10)(c)--the arguments for federal legislative authority in the trade secrets area.

c) The Charter--whether or not it prevents the Alberta Legislature from passing the proposed Trade Secrets Act, analysed on both a substantive and procedural basis.

3. Chapter 1--s. 92(13)--Property and civil rights in the province

The paper recommends that the pith and substance of the proposed legislation properly falls squarely within this enumerated head of power and would therefore be constitutionally valid if passed by the Alberta Legislature. That is, the proposed legislation directs its attention to concerns of essentially a private nature thereby making it a matter for provincial jurisdiction. The paper notes that the proposed legislation may have extended effect (extra-territorily) in two situations:

a) where it ancilliarily affects federally incorporated companies or federal undertakings;

b) where "persons" (including natural persons and corporations) who are not normally subject to the laws of Alberta "chose" to misappropriate trade secrets by improper means in this province.

4. Chapter 2--s. 91(2)--The regulation of Trade and Commerce

The paper recommends that s. 91(2) is not the proper head of power under which to place trade secrets concerns as dealt with by the proposed legislation. Firstly, the draft Act is not aimed at regulating interprovincial or international trade and commerce. According to Parsons, infra, that would clearly be a federal power. Secondly, the federal "general" trade and

commerce power, as introduced, again by Parsons, infra, is not considered by the courts to be effective in terms of bringing essentially provincial matters into the federal realm. Thirdly, federal attempts to gain legislative authority over numerous areas under a "regulatory scheme", as enunciated in Vapour, infra, have failed.

5. Chapter 2--s. 91--Preamble--Peace, order and good government

Again, the paper recommends that the federal government could not hope to gain legislative authority over the trade secrets area by arguing the p.o.g.g. power. Firstly, the Constitution Act, 1867 cannot be said to have neglected to designate a competent legislative authority in terms of trade secrets legislation. If it had, authority over trade secrets would go to the federal government on the basis of the gap test. Secondly, the concerns of the proposed trade secret legislation cannot be said to be of a "temporary" nature which would qualify it as being within the federal realm on the basis of the p.o.g.g. "emergency" test. Thirdly, the federal government cannot hope to gain the authority to pass the proposed legislation on the basis of the "national dimensions" test. The proposed legislation does not speak to a novel situation--the use of computers, rather, it offers a novel solution to an age-old problem--defining the acceptable parameters in terms of individual relationships. These types of problems have always

been considered to be in the provincial realm. Additionally, effective legislation does not depend on uniform legislation throughout Canada. Although uniformity is preferable, it cannot be said that the enactment of the proposed legislation by a single province would be rendered ineffective by the failure of other provinces to follow suit. Residents of provinces that choose not to enact trade secrets legislation such as proposed here would not be adversely affected by the laws of provinces that did. Likewise, residents of provinces enacting the proposed trade secrets legislation would not be adversely affected by the fact that some provinces choose not to enact the legislation. In other words, the trade secrets concern can be contained in a single province and therefore, has no "national dimension".

6. Chapter 2--s. 91(27)--The Criminal Power

The proposed legislation, as drafted, could not possibly be characterized as a criminal law power. Firstly the paper argues that the pith and substance of the proposed legislation is not one that is included in the classic definition of "criminal law". The "criminal law" has traditionally included matters going to such things as "public peace, order, security, health and morality." Secondly, in order for a piece of legislation to be characterized as criminal law, it is essential that traditional criminal law sanctions be attached to the commitment of an offence. Since the proposed legislation does not purport

to sanction offenders in a criminal fashion, it cannot be criminal law. Thirdly, the federal government cannot legislate in the area by way of a regulatory scheme since any intervention on the part of a federal agency or official in terms of the criminal law occurs only after the commitment of an offence and not before. Therefore, federal agencies cannot make any binding decisions with respect to the rights of the parties.

7. Chapter 2--s. 92(10)(c)--The Declaratory Power

Again, the federal government cannot gain legislative authority over the trade secrets area by declaring it "for the general advantage of Canada". The paper notes that the definition of a "work", over which the federal government may claim authority, may not include the definition of a "trade secret" as contained in the proposed legislation. That is, a "work" is generally a tangible item; a trade secret may not be. Conclusively, it would seem, the federal government is reluctant to claim; and the courts reluctant to grant effective use of, the declaratory power because of its anomalous nature. That is, the declaratory power enables the federal Parliament to unitarily expand its powers in contradiction to both the spirit of the division of powers in the Constitution Act, 1867 and the spirit of federalism. Although its use is perfectly valid, it has become somewhat of a rarity and the paper recommends that it would not be used to attempt to invalidate provincial trade secrets legislation. Of all the constitutional arguments

opposing provincial enactment of the proposed Trade Secrets Protection Act, however, the declaratory power may prove to be the most convincing.

8. Chapter 2--Summary

The paper concludes this discussion by suggesting that the provinces, prima facie, have the power to enact the proposed legislation and that any arguments advancing federal authority would fail. The paper notes that although a single province could validly enact the proposed Trade Secrets Protection Act, it would be preferable to attain uniformity. To that end, the paper suggests that the proposed legislation be put to the Uniform Law Conference of Canada and perhaps to the Federal-Provincial Relations Office. The paper also proposes an inter-delegation of constitutional power between the federal and provincial authorities but does so with the knowledge that inter-delegation would strengthen the statutes of enacting provinces only; it would not give the legislation uniform effect.

9. Chapter 3--The Charter

Section 31 states that the governmental powers are not widened by the Charter. Therefore, if a province has valid jurisdiction to enact the Trade Secrets Protection Act under the Constitution Act, 1867, as the paper suggests it has, then the

Charter does not change this. However, the question to be answered with respect to the Charter is whether provincial enactment would infringe or deny any of the rights and freedoms guaranteed by the Charter. The paper concludes that it would not for the following reasons.

The paper recognizes a fundamental problem in terms of the interpretation of the Charter. It is not yet certain whether the courts are restricted to striking down legislation on a procedural basis or whether its role has been expanded to include questioning legislation on substantive issues. Therefore, the paper approaches the problem from both viewpoints. Substantively, the paper concludes that the pith and substance of the proposed legislation could not possibly infringe the Charter. It argues that the Charter does not grant the "freedom to misappropriate a trade secret by improper means" and even if it does, the infringement imposed on the "freedom" by the proposed legislation is reasonable and demonstrably justified. The paper notes that Canadians are not apt to accept the fact that one can "misappropriate" the valuable information of another without redress. The paper recognizes that it is within the power of provincial legislatures, under certain circumstances, to declare that a piece of legislation will operate in spite of any contradiction to the Charter (pursuant to s. 33). The paper does not recommend the use of the "opt out" clause in terms of enacting the proposed Trade Secrets Protection Act because its use is unnecessary and probably

politically unwise.

On a procedural basis, the paper recognizes and analyses three problems. Firstly, in terms of standing, the paper notes that, under the Charter, virtually anyone can obtain locus standi as long as he is "genuinely interested" in determining the validity of the legislation. Secondly, the paper decides that s. 11(d) of the Charter should not be applicable to the proposed legislation. That is, s. 11(d), on a simple reading of the Charter, concerns itself with criminal law problems. Since the proposed legislation is not criminal law, s. 11(d) should not apply. Even if it does, however, the paper argues that in some trade secrets cases, the only way to gain a "fair" hearing would be to hold a closed trial. Therefore, the fact that the proposed legislation allows the court to hold an in camera hearing is either not an infringement of the Charter, or if it is, it is demonstrably justifiable. Additionally, in that area, the paper notes that, on the basis of case law, the ability of the court to hold in camera trials is acceptable by the Charter as long as the power to do so is discretionary. That is, a blanket prohibition against allowing the public into hearings would probably be struck down; a discretionary prohibition is reasonable. Since the prohibition in the proposed legislation is discretionary, it does not offend the Charter. Probably conclusive in this area is the fact that the rights and freedoms guaranteed by the Charter are not absolute. Due to the inclusion of s. 1 of the Charter, the courts are forced to weigh

the factors of opposing interests. In the balancing of the freedom of the press guaranteed by the Charter against the necessity to protect the secrecy surrounding a trade secret, the paper suggests that the courts will hold that the latter prevails. To do otherwise would effectively destroy any value that a trade secret may hold. In other words, there is no sense in attempting to protect the secrecy of a trade secret if, upon a misappropriation of a genuine trade secret, the court itself has not the power to protect it. Therefore, the court's power to hold in camera hearings, where it feels it is necessary, does not offend the Charter.

The paper does recommend, however, that the wording of s. 8(2)(c) of the draft Act be changed to include "order any person involved in the proceedings not to disclose an alleged trade secret or any information leading to the disclosure of an alleged trade secret without prior court approval". The paper makes this recommendation on the argument that it does no good to protect an alleged trade secret if, at the same time, information from which the trade secret can be deduced is not protected. In other words, to ensure secrecy, the court must have the power to prohibit the publication of both. The paper also suggests that if the phrase "any person involved in the proceedings" does not include spectators at the trial; it should be reworded to include them. This rewording is necessary to ensure that spectators, some of whom may be members of the press, cannot divulge the alleged trade secret without court

approval. The recommendation comes as a result of an analysis of the analogous Young Offenders Act (proposed federal legislation).

Finally, the paper recognizes a procedural problem in terms of the fact that the proposed legislation stipulates that there shall be liability imposed for every misappropriation of a trade secret by improper means. This requirement stands in opposition to the English Breach of Confidence draft Act which says that the court may refuse to impose liability if the disclosure of the trade secret is in the public benefit. The question answered by the paper, then, is whether one draft Act is preferable over the other in terms of enactment by the Alberta Legislature. The paper concludes that the draft Trade Secrets Protection Act is preferable. Firstly, in terms of the procedural problem outlined above--absolute liability as opposed to discretionary liability--the paper concludes that the ultimate and practical effect of the two methods of approach is the same. Under the draft Trade Secrets Protection Act, it is always open to the court to simply decide to award nominal damages in a case where it deems that that action is warranted. Under the draft Breach of Confidence Act, the provisions allow the court to consider the method of appropriation of the trade secret in its decision as to whether or not the disclosure is in the public good. In other words, the English draft Act suggests that if the appropriation is a misappropriation, that is, an individual "takes" a confidence by improper means, it is well

within the court's discretion to deny that misappropriator any protection afforded by the Act. Therefore, under both Acts, a "misappropriator" by "improper means" will face liability. Secondly, the draft Trade Secrets Protection Act is preferable because it concerns itself with a single and very immediate problem--the protection of trade secrets--whereas the English Act is much broader in scope. The paper suggests that it is unnecessary, at this time, to legislate in the areas of breach of confidence of marriage, or contract, or any of the other broad areas covered by the English bill. That is, persons in Canada, for those types of problems can turn to well settled common law for relief. There does not exist, however, relief in terms of trade secrets problems and the paper recommends that the more specific of the two draft Acts is preferable.

On a final note, the paper recognizes that decided Charter cases have struck down legislation containing "reverse onus" or automatic liability clauses. The paper distinguishes reverse onus clauses from the type of "automatic liability" imposed by the proposed legislation on the basis that, firstly, a reverse onus clause is generally contained in criminal law legislation. The proposed Act is not criminal law. Secondly, reverse onus clauses stipulate that on the presentation of evidence proving a certain fact, the court may presume guilt unless the defendant can disprove the presumption. In other words, the onus of proof shifts to the defendant. This does not occur under the proposed legislation. There, liability is "automatic" only _after_ the

court has heard enough evidence on which to base a conclusion that the misappropriation of the trade secret was by improper means.

The paper concludes that the proposed legislation does not infringe the Charter. Coupled with the fact that the power to pass the proposed legislation lies with the provincial legislatures, the paper recommends that the Alberta legislature enact the proposed Trade Secrets Protection Act.

Debbie Huitema

July 25, 1983

DRAFT MEMORANDUM

To: Mr. R.G. Hammond

From: Deborah Wilk Huitema

PART I INTRODUCTION

1. You have asked if there might be any constitutional objections to the proposed trade secrets legislation, as you have drafted it, if enacted by the Alberta Legislature. The fact that Canada is a federal state or a federation causes a unique concern for drafters of legislation in this country. In Canada, by virtue of the BNA Act, 1867, (now the Constitution Acts, 1867 to 1981), sections 91 and 92 (see Appendix A), the governmental power is distributed between the federal (s. 91) and several provincial (s. 92) authorities in a way that causes each individual in the country to be subject to the laws of both the federal and a provincial authority. The distribution of powers between the governmental levels also has the effect of creating two levels of government that are, to a certain extent, legally and politically independent of each other. Therefore, a

drafter of legislation in Canada must ensure that the legislation he is preparing is intra vires (within the power of) the particular level of government which intends to enact it. This distinctive set of issues, concerning the distribution of legislative power, the distribution of executive power and the administration of justice, have to be resolved in federal states. Additionally, since the advent of the Charter of Rights and Freedoms, drafters must not only consider whether their legislation is intra vires based on the Constitution Act, 1867, and the distribution of powers, they must also consider whether their legislation is intra vires any level of government at all on the basis of the Charter. That is, the Parliamentary Supremacy[1] previously enjoyed by the two government levels may

---

1 The Constitution Act, 1867, sought to model the Dominion of Canada's institutions upon those of the United Kingdom. In the U.K., the Parliament has the power to make or unmake any law whatever. That is, there is no fundamental law which cannot be altered by ordinary parliamentary action. Any law, upon any subject matter, no matter how outrageous, is within Parliament's competence. Therefore, there exists in the United Kingdom no judicial review. In Canada, however, because of the separation of powers in the Constitution Act, 1867, the federal Parliament and the provincial legislatures share. The doctrine of Parliamentary sovereignty. That is, no one legislative body can pass "any law whatever" but between them, they can. Therefore, judicial review in Canada, under the Parliamentary Sovereignty doctrine, does not go to the substance of the law passed, no matter how outrageous, but to the form in which it was passed. In other words, the court may question the legislation in terms of whether the enacting body had the power to enact the legislation in the first place. If the legislation falls within a valid head of power,it will stand; no matter what it proposes to do.

be endangered by the Constitution Act, 1981, s. 52, subject to the limits contained in s. 1 (R. v. Pugsley, 1982). Since s. 52 declares the Constitution of Canada to be the supreme law of Canada, all laws inconsistent with it will be of no force and effect unless the inconsistencies can be shown to be within "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (s. 1). In summary then, drafters must be wary of both the division of powers under the Constitution and the "supreme law" of the Charter.

2. Traditionally, the problem arising out of the Constitution Act, 1867; that of which level of government has the power to pass--say the Trade Secrets legislation--has been handled in either one of two ways. The first method is that of judicial review. That is, the legislation is passed, challenged on a constitutional footing, and the courts, on the principle of *ultra vires*, decide the legislation's fate. Basically, if the legislation is within the enacting government's power, it will stand; if beyond, it will fall. This method will obviously take on an additional twist in light of the Charter. Not only must the court decide if the legislation falls under an enabling empowering section, it must also decide if the legislation can be valid as law at all under the Charter; arguably giving the courts a "new" function in terms of acting as a "check" for legislative law making bodies. Under any system, this is a method that drafters of legislation wish to avoid. There is no sense in writing and passing legislation only to have it

declared of no effect. As a result then, it is always open to drafters and indeed, is the aim of this paper, to ensure that their legislation will be valid by analysing it before the fact.

3. The second method by which the problem presented by the Constitution Act, 1867 can be resolved has, in fact, no foundations in the Constitution Act, 1867. That is, the problem can perhaps be handled by joint and complimentary action by both legislative bodies through co-operative federalism on the basis of humanitarian and egalitarian sentiments. In fact, there have already been Federal-Provincial conferences held specifically for constitutional debates where representatives of both levels of government have met to enter into informal arrangements in order to solve the distribution of powers problem. The Charter (see Appendix B), itself, in sections 37 and 49, provides for more of those constitutional conferences to be held in the future.

4. In terms of the draft Trade Secrets Protection Act this memo will proceed to answer your questions, in light of the above problems by an analysis of the following areas:

1) The prima facie case for provincial jurisdiction--s. 92(13) Constitution Act, 1867.

2) Possible constitutional challenges to the proposed provincial legislation both under the Constitution Act, 1867 and

under the Charter.

3) The possibility of concurrent federal-provincial legislation in the area, specifically valid provincial trade secrets legislation and valid federal regulatory legislation (discussed in Chapter 2, part ii) and inter-delegation (discussed in Chapter 2, part v.).

PART II - REPORT

Chapter I - The Constitution Act, 1867 The Provincial Argument for Jurisdiction

1.1 Traditionally, when attempting to characterize a piece of legislation which is otherwise unclear, the provinces have argued s. 92(13), property and civil rights in the province or s. 92(16), generally all matters of a merely local or private nature in the province, in order to bring the scope of the legislation within their purview. The latter section, 92(16), was probably intended by the Fathers of Confederation to be a "catch all", one that would bring provincial matters that they had not foreseen into the provincial realm. As history and the decided cases show, 92(16), however, is rarely used, with 92(13) being used more often and with more success.

1.2 "Property and civil rights" is a familiar phrase that

has evolved into a "compendious description of the entire body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government" (Hogg (1977), p. 297). While true that the Constitution Act, 1867 did make some inroads in terms of the application of the classic "property and civil rights definition" by "taking away" from it, in order to give the "new" central Parliament something to do (for example, s. 91(2)--trade and commerce; 91(15)--banking; s. 91(23)--copyrights; s. 91(28)--marriage and divorce), it remains true that even after proper accommodation for the catalogue of exclusive federal powers has been made, property and civil rights still covers most of the legal relationships between persons in Canada. The law relating to property, succession, the family, contracts and <u>torts</u> is mainly within provincial jurisdiction under s. 92(13). Moreover, the original distinction between private and public law has tended to break down for constitutional purposes, as governments have increasingly intervened to regulate the economic life of the nation (Hogg (1977), p. 298). For example labour relations, once throught of as being a purely private matter between employer and employee, is now heavily regulated by statute, yet is still considered within the provincial purview under s. 92(13).

1.3 In my view, the fact that s. 3(1) of the proposed Trade Secrets legislation defines "misappropriation of a trade secret" as a <u>tort</u> clearly brings the legislation within the pro-

vincial purview. The old adage "saying so does not necessarily make it so", however, has its application in this particular context. Should the legislation be passed and challenged, the court will not concentrate its decision, nor give absolute credence, to the fact that the legislation defines itself as based upon a power over which the province has authority. Rather, the court will look, in order to characterize the legislation, to the overall purpose and effect of the draft act; its pith and substance. Both the purpose and the effect must fall within a valid provincial power. If the legislation "says" it does, or it "seems" to, but the court finds it does otherwise, it will be struck down on the principle of colourability. Arguably, on a reading of the proposed legislation, it does not attempt to do other than what is implied by the words, That is, in my view, it does not attempt to surreptiously encroach on any federal governmental power. Its intention is to leave all existing common and statute law intact as it pertains to trade secrets. It does not propose any alteration in criminal law (clearly, an aspect within federal jurisdiction), nor does it attempt to change contract or "trust" (breach of confidence) law (although, presumably, it could, since these are clearly within provincial purview). Rather, the legislation restricts both the action and the remedies to what might be termed "private law" between "subject and subject", thus remaining within the classic definition of "property and civil rights." That is, the draft legislation contemplates a situation in which someone has a "trade secret" (commercially valuable information etc. as defined by the draft

Act s. 1(e)) that they want protected, have tried to protect, and someone else comes along and "misappropriates" (draft Act, s. 1(c)) by "improper means" (draft Act, s. 1(b)). The remedies provided, as well, are those normally available in tort law, something clearly within provincial purview. In my view, it is difficult to contemplate any reason why a court would conclude that the provisions of this particular legislation are ultra vires the Alberta Legislature since the pith and substance of the legislation is property and civil rights.

1.4 The Court may, however, see fit to declare the proposed legislation invalid on the basis that it may have effect on matters that are inherently within federal power. I do not see this as a viable result. Even though this legislation may touch on matters coming within federal purview; trade and commerce for example, the general rule, that of "pith and substance", is that a provincial law of general application which is in relation to a provincial matter (as this draft legislation is) may validly affect federal matters as well. In other words, as long as the dominant matter of provincial legislation is a provincial concern, the legislation may affect a federal power which is only ancillary (Bank of Toronto v. Lambe (1887)). The exception to this general rule, known as interjurisdictional immunity (McKay v. The Queen (1965)), is that if the effect of the provincial law would be to impair the status or essential powers of a federally incorporated company or to "sterilize" the effect of a federally regulated enterprise

(a power granted to the federal government under s. 92(10)(c)), then the provincial law, although valid in the generality of its application, will not apply to the federally incorporated company or federally regulated enterprise. (Incidentally, this exception operates only to protect federal law from provincial encroachment. It does not, at all, protect provincial law from federal encroachment.) One may argue that since there is no federal legislation to the contrary in the trade secrets area which will bring into play the paramountcy doctrine[2], the above discussion would not concern a drafter of provincial trade secret legislation. That is not so. It is not necessary that there be in existence a conflicting federal law in order for the interjurisdictional immunity doctrine to come into effect. (John Deere Plow Company v. Wharton (1915): where a provincial law prohibiting all extra-provincial companies from operating in the province was held not to apply and A.-G. Man v. A.G.-Can (Manitoba Securities) (1929) where a provincial law imposing a licensing scheme for the raising of corporate capital was also held inapplicable). In other words, a contrary federal law is

---

2

Where there exists a federal and a provincial law covering the same matter and each is valid and they are inconsistent with each other, the paramountcy doctrine dictates that the federal legislation prevails and the provincial legislation be rendered inoperative (not invalid) to the extent of the inconsistency.

not required; it is enough that a valid provincial law operates to reduce the effect of the federal company or federally regulated undertaking. The gist of the above argument is that although the draft bill is intra vires the provincial government on 92(13), it may not apply to impair the effect of federally incorporated companies or regulated undertakings (intra-provincial pipelines, ferries, etc.).

1.5 I would argue, for two reasons, that the above contention is not insurmountable. Firstly, on the basis of Lymburn v. Mayland (1932) and Canadian Indemnity Co. v. A.-G. B.C. (1976), provincial laws whose impact on corporate status or powers was deemed "less serious" have been held applicable to federally incorporated companies. Although the definition of "less serious" is very unclear at best, it is difficult to envision a situation whereby a federally incorporated company or federally regulated undertaking would be rendered ineffective by the fact that it was not allowed to misappropriate another's trade secret. In other words, entities should not be allowed to take what is not theirs simply because they have connections to the federal government.

1.6 Secondly, the concept of interjurisdictional immunity is based on the concept of "reading down." The latter doctrine states that whenever possible, a statute is to be interpreted as being within power by construing the language of the statute narrowly so as to keep it within the permissible scope of power

of either the Legislature or the Parliament. The doctrine can only be used where the statute can bear the limited (valid) meaning as well as the extended (invalid) one and the principle stipulates that the limited one be selected (Quebec North Shore Paper Co. v. Canadian Pacific (1976)). The argument in terms of upholding the draft bill as being valid provincial legislation with no limitation in application is based on the conflict between the reading down and interjurisdictional immunity doctrines and the pith and substance doctrine. Put simply, in the former two, valid provincial legislation is not allowed to interfere with federal undertakings but in the latter, a provincial law in relation to a valid provincial matter (dominant in pith and substance) may validly affect a federal matter. The cases (above mentioned) decided on the basis of interjurisdictional immunity did not discuss the application of the pith and substance doctrine and, indeed for every case asserting an interjurisdictional immunity, there are dozens which deny such an immunity by application of the pith and substance doctrine (Hogg (1977), p. 94, Workmen's Compensation Board v. CPR (1920), Oil, Chemical and Atomic Workers v. Imperial Oil (1963), Carnation Co. v. Quebec Agricultural Marketing Board (1968), Re C.F.R.B. (1973)). Therefore, on the basis of case law, the pith and substance doctrine seems to overpower principles to the contrary and since the pith and substance of the proposed legislation is property and civil rights, it should not be considered by the courts to be ineffective against federally incorporated companies or federal undertakings.

1.7 The Ontario Law Reform Commission met a similar constitutional challenge when it did its work on proposed provincial products liability legislation (Report on Products Liability (1979)). The Ontario Commission proposed to enact a principle of strict liability for defective products. There, as here, it was felt that there was no doubt that the provincial legislature had the constitutional authority to pass the proposed legislation under s. 92(13) of the Constitution Act, 1867. The Ontario Commission's only problem was the extent to which the provincial "regime may embrace extra-provincial manufacturers or suppliers." (Report on Products Liability (1979) p. 119; see attached in Appendix C.) Obviously, the constitutional problem faced by the Ontario Commission was meshed with a conflict of laws concern. The same problems, however, face the proposed trade secrets legislation, especially with respect to the extent of its scope as being a power valid under 92(13). Since "information" knows no provincial boundaries, so to speak, it could well be an area of "national dimensions" which would put the legislation within the purview of the federal government under s. 91(2), trade and commerce.

1.8 The Statute of New Westminister, 1931 (R.S.C., 1970), Appendix II, No. 26), s. 3 specifically grants extra-territorial competence to the Federal parliament. Croft v. Dunphy (1933) confirmed this.

> Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may

> competently legislate ... their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign state.

Croft v. Dunphy (1933) at p. 163)

The State of Westminster, 1931, s. 3 does not, however, nor would it make sense if it did so, grant extra-territorial competence to the provincial legislatures and the principle enunciated in Croft, supra is not general enough to include them either. The Constitution Act, 1867, itself, seems to impose a territorial limitation on the scope of power of provincial legislatures. For example, sections 92, 93 and 95 all open with the words "in each province." Case law agrees. The leading case is Royal Bank of Canada v. The King (1913) wherein Alberta enacted a statute expropriating the proceeds of a bond issue. The Privy Council concluded that the statute was invalid because it prevented the Royal Bank, whose head office was in Quebec, from withdrawing their funds. This decision was made even though the funds were deposited in a branch in Alberta and a bank account is ordinarily deemed to be located in the branch of the bank which holds the account. In effect, the Alberta law was struck down, even though it only affected Quebec incidentally and, therefore, on the pith and substance rule, should have been upheld. Other supporting cases include Credit Foncier Franco-Canadien v. Ross (1937) where Alberta legislation reducing or eliminating interest due on certain types of loans

was struck down even though a debt is deemed to be situated where the debtor resides, and Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission (1937), where an Ontario statute purporting to cancel a contract between Ontario and Quebec Hydro was struck down because the statute affected Quebec; even though the contract was made in Toronto, specifying both delivery and payment to be in Toronto. This series of facts and decisions may seriously affect the effectiveness of the proposed trade secrets legislation in that it is quite conceivable that the latter may, in its application, seek to deny an entity from out of the province of Albert from doing something that it is not contrary to the law of their home province to do. In other words, on the basis of the cases, the proposed trade secrets legislation may be struck down as interfering with the "other province's" constitutional authority.

1.9 The Ontario Law Reform Commission on products liability rose to the challenge, however, arguing more recent cases: Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd. v. Her Majesty The Queen in right of the Province of Manitoba (1976) and R. v. Thomas Equipment Ltd. (1979). Both cases show a definite change in the attitude of the Court with respect to provincial legislation having extra-territorial effect. Where earlier cases definitely prohibited it, these cases show a change in the trend. In the former, "Manitoba legislation purported to impose liability on polluters of

certain rivers flowing into Manitoba from Saskatchewan and Ontario even though the polluter's acts were lawful, and indeed, specifically licensed in the Provinces where they occurred." (Report on Products Liability (1979) p. 119--see Appendix C). The majority of the Supreme Court of Canada held that the Manitoba legislation was invalid on the basis that the pollution of inter-provincial water courses was a subject matter reserved for federal legislation. On a careful reading of the case, however, it would seem that the Court split on a more subtle issue. The majority seemed to say that Manitoba had no constitutional authority where the polluting acts were done elsewhere. The minority held that the fact that the damage was suffered in Manitoba was sufficient to give it constitutional authority to legislate in the area. The argument faced, therefore, by the products liability legislation and by the draft Trade Secrets Protection Act, is that just as one province cannot make unlawful conduct that is lawful where undertaken, so too, one province cannot purport to impose liability on, say a Quebec entity, if the liability would not also be imposed by Quebec law.

1.10 It is my feeling that the finding of the Interprovincial case, *supra*, can be distinguished in terms of its application to the proposed trade secrets legislation. First, foremost, and probably conclusive is that the proposed Act does not seek to prosecute acts done outside the province of Alberta. On a reading of the proposed legislation, it would

seem to me that it seeks only to prohibit "misappropriations" occurring within Alberta's provincial boundaries. Therefore, if an Albertan entity misappropriated from another Albertan entity, there is no question that the conduct would be caught by the proposed Act and incidentially, no question that it is validly caught by virtue of it being a "property and civil rights" issue. If an entity from outside of the province of Alberta (say Quebec) misappropriated from an Albertan entity in Alberta, it is, again, my feeling that the proposed act is constitutionally valid in "catching" that behaviour. This contention is based, again, on distinguishing the effect of Interprovincial on the proposed legislation. In that case, the "outside" provinces were specifically licensed to do what was unlawful to do in Manitoba. It is highly unlikely that one would be specifically licenced by another province to misappropriate trade secrets. That is, although there may not be other provincial legislation prohibiting it; it is highly unlikely that there will exist provincial legislation specifically allowing it. Therefore it is difficult to raise the agument that Alberta will be "interfering" with another province's constitutional authority if it enacts this legislation.

1.11 To draw another analogy from the Interprovincial case in this area, and to come to the conclusion drawn by the Ontario Law Reform Commission, if an entity from outside of the province of Alberta does not wish to be caught by the proposed legislation, all it simply need do is not "misappropriate a trade

secret" in this province. To elaborate, in the Interprovincial case, once a "polluter" in Ontario, licensed to dump a certain amount of pollutants into an Ontario river had done so, the pollutants had no choice but to follow the natural course of the river and end up in Manitoba. There exists no such inevitability when one turns to the problem as it faces the proposed trade secrets legislation. As stated, if one does not wish to face liability, one simply avoids it by not misappropriating in this province. In other words, it becomes a conscious choice. If an extraprovincial entity chooses to misappropriate here, it will be caught; if it doesn't, it won't.

1.12 I, as was the Ontario Law Reform Commission, am strengthened with respect to the conclusion that an extra-provincial entity would be validly caught by the proposed legislation should they "choose" to misappropriate in this province by the Thomas Equipment case, supra. In that case, the Supreme Court of Canada held, by a 6 to 3 majority, that the Alberta Farm Implement Act (R.S.A. 1970, c. 136) applied to an out-of-province (New Brunswick) supplier of farm implements on the basis that its liability arose out of its conduct in Alberta. The decision by the Supreme Court of Canada reinforced the conclusion of the dissenting judgment of Sinclair, J.A. of the Court of Appeal (39 C.C.C.(2d) 106 at 117).

> If a manufacturer wants to have his farm implements sold here, he must comply with the rules of the game, as it were, established by the legislature of Alberta.

Therefore, if an out-of-province entity chooses to enter the Alberta market and misappropriate while conducting its business; it should expect to be caught by that legislation. Surely, if the tort is committed in Alberta, there can be no objection to the application of Alberta law.

1.13 The problem, therefore, on the basis of this analysis arises out of the situation where an Alberta entity has its trade secrets misappropriated outside the province of Alberta. The problem necessarily becomes a conflict of laws issue. Additionally, it is my feeling that the Royal Bank of Canada, Ross and Beauharnois cases, supra, would take precedence in this area. In other words, it would more than likely be impossible to impose liability for misappropriation occurring outside the province under the authority of the Alberta legislation. This would probably be seen, by the courts as a definite constitutional encroachment of the Alberta Legislature and therefore be struck down as ultra vires to them. This seemingly insurmountable problem advances a strong argument for uniform legislation across Canada. I recommend, as did the Ontario Law Reform Commission, that the Uniform Law Conference of Canada explore the possibility of adopting this proposed legislation as a Uniform Protection of Trade Secrets Act. Ideally, the best solution to all the constitutional problems raised in this area would be for all of the provinces to enact identical, or at least similar in spirit, legislation to the legislation proposed here. The problems faced by a single or a few provincial

legislatures enacting the proposed legislation are canvassed above. The alternative to enactment by all the provinces is to put "trade secrets" legislation within the federal purview and gain "uniformity" by having a federal law governing all of geographic Canada in the trade secrets area. For reasons discussed in Chapter Two, it is felt that this is not possible due to the belief that "trade secrets" legislation comes within provincial jurisdiction by virtue of s. 92(13), Constitution Act, 1867. The other alternative, also discussed in Chapter Two, is that of provicial legislation "supplemented" by a federal regulatory scheme.

Chapter II - The Constitution Act, 1867 Constitutional Challenges to Proposed Trade Secrets Legislation

2a This chapter will entail a discussion of the federal heads of power (according to the Constitution Act, 1867, s. 91 and s. 92(10(c)) under which trade secrets legislation *may* be placed. There are two very closely related reasons for this. The first reason is to support the argument that trade secrets regulation is within the provincial and not the federal purview; thereby showing that a single piece of federal legislation governing all of geographic Canada is not a viable alternative to the commercial and market problems solved by this particular piece of draft legislation. The second reason, inexorably intertwined with the first, is that of discussing possible

constitutional arguments that the province of Alberta may face should it pass the draft legislation. That is, if the Legislature of Alberta passes it, it is necessarily claiming constitutional authority. Any challenge to that authority would have to be a claim that the authority lies with the federal government and not the provincial. In addition, since the advent of the Charter, a constitutional objection may be based on the rights and freedoms therein contained.

2b Therefore, this chapter will discuss the first two issues in light of the division of powers under the Constitution Act, 1867 (s. 91(2)--trade and commerce; s. 91--preamble--peace, order and good government; s. 91(27)--criminal law; s. 92(10(c)--the federal declaratory power). The problems presented by the rights and freedoms granted under the Charter will be discussed in Chapter 3.

A. Under the Constitution Act, 1867

i) s. 91(2)--REGULATION OF TRADE AND COMMERCE

2.1.i Quite often, in constitutional debates, the provincial property and civil rights (s. 92(13)) power is pitted against the federal trade and commerce (s. 91(2)) power. This is so because, on the face of it, these powers seem to overlap; both seem to be the traditional foundation for economic legislation within each government's sphere. That is, "trade

and commerce" is carried on by means of contracts which give rise to "civil rights" over "property" (Hogg (1977) p. 267). Indeed, my initial reaction to the proposed trade secrets legislation was that it fell under the trade and commerce power because of the "nature of the beast" that it proposes to define and regulate. In other words, I felt that "information, methods, techniques" (from the definition of "trade secret" in the draft act s. 1(e)) and the like were species of "economic beasts" that could not possibly know provincial boundaries. Therefore, it seemed necessary and natural that the legislating of trade secrets be given to the federal power, the only one which can cross those provincial boundaries without any initial obstructions.

2.2.i However, it is important at this stage, to remember that the proposed legislation does not purport to regulate contracts *per se*. In fact, it specifically denies that responsibility. What it does purport to do is legislate behaviour or conduct in terms of misappropriation of trade secrets by improper means as a tort. Therefore, if the overlap between trade and commerce and property and civil rights is in the area of contract, the particular "overlap" problem has little or nothing to do with legislation regarding a tort, which according to the classic definitions of "property and civil rights" and "trade and commerce" is clearly within the provincial domain.

2.3.i If, however, the "overlap" problem cannot be confined to the area of contract, it becomes necessary to differentiate between exactly what areas (or matters) each enumerated head covers. The classic definition of "property and civil rights" as given above, is a "compendious description of the entire body of private law which governs the relationships between subject and subject ..." The classic definition of the federal "trade and commerce power" was enunciated in Citizens' Insurance Co. v. Parsons (1881) by Sir Montague Smith as not including "the power to regulate by legislation the contracts of a particular business or trade" (at p. 113) and as including "political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion (again, at p. 113). In other words, the overlap between the two heads of power has been and is continuing to be eliminated by judicial interpretation through the process of "mutual modification" (a narrowing of the areas of concern of the "opposing" enumerated heads by interpreting each as excluding the other). To that end, Parsons, supra, left us with a dichotomy. What is commonly known as the "first branch of Parson's" stipulates that, in general, intraprovincial trade and commerce is a matter within provincial power under property and civil rights. That is, the regulation of a single, particular industry within a province comes within the provincial jurisdiction: for example, insurance. The second branch of Parson's confines the federal

trade and commerce power to interprovincial or international trade and commerce and "general" trade and commerce. In light of the fact that the proposed legislation involves a tort committed within the province of Alberta and does not purport to have extra-territorial effect (although it may have according to the discussion in Chapter I) it would seem that the first branch and the first part of the second brach of Parson's is satisfied in terms of the proposed legislation being within provincial purview. What causes problems is the second half of the second branch. Parsons did not define the "general" trade and commerce power; that is, when trade and commerce became sufficiently interprovincial so as to come within the federal power. Is the trade secrets legislation of this type, in spite of the fact that it legislates a tort? Are there overwhelming economic or commercial factors which put it within the federal domain? Is the proposed legislation "general" enough as it does not purport to regulate a "single trade" so as to bring it within federal purview?

2.4.i Before the abolition of appeals to the Privy Council, that particular court would have probably put the trade secrets legislation into the provincial domain. The Privy Council under the leadership of Sir Montague Smith and Viscount Haldane tended to restrict the scope of the federal trade and commerce power including that of the "general" trade and commerce power. In A.-G. Can. v. A.-G. Alta. (Insurance) (1916), a federal statute purported to establish a licensing

regime for insurance companies, other than provincial companies, carrying on business wholly within the province of incorporation. The federal Act emphasized the fact that its intention was to impose federal regulation on an industry which spread across the country without regard for provincial boundaries (Hogg (1977) p. 269). Conceivably, the draft trade secrets legislation may have the effect of imposing its liability on companies who also have no regard for provincial boundaries. In terms of the Insurance case, supra, the Privy Council held that the scope of the industry or of particular companies was irrelevant and struck down the legislation. Presumably, on this basis, it would have upheld the draft trade secrets legislation if enacted by Alberta, struck it down if enacted by the federal government.

2.5.i In Re Board of Commerce Act, 1919 and Combines and Fair Prices Act (1922), it was suggested that "the trade and commerce power had no independent content and would be involved only as ancillary to other federal powers" (Hogg (1977) p. 269) as it was declared insufficient to uphold the federal legislation. The trade and commerce power was struck down for the same reason in Toronto Electric Commissioners v. Snider (1925). In these last two cases, the federal legislation purported to control not particular trades, but more general aspects of the economy such as prices and labour. These aspects are governed by economic forces which ignore provincial boundaries, yet "the pervasiveness and interdependence of the

legislation's subject matter was not sufficient to carry them out of property and civil rights and into the federal fold" (Hogg (1977), p. 269). The analogy to be drawn then, is that "misappropriation" of a "trade secret" is also, conceivably, an aspect governed by economic forces which ignore provincial boundaries. However, if, on the above cases, a federal attempt to legislate in this area is struck down--surely it must be within the provincial purview to do so. It is inconceivable that a court would decide that no governmental authority has the constitutional competency to legislate in this area, because that would result in an intolerable gap in the law. Therefore, on the basis of the cases, if the federal government cannot, the provinces can and must.

2.6.i The Privy Council went on to strike down federal attempts to use the trade and commerce power to regulate marketing. In R. v. Eastern Terminal Elevator Co. (1925) (a decision of the Supreme Court of Canada still subject to Privy Council appeal), A.-G. B.C. v. A.-G. Can. (Natural Products Marketing) (1937) (a decision of the Privy Council) and Canadian Federation of Agriculture v. A.-G. Que. (The Margarine Reference) (1951) (again a decision of the Privy Council), the court concluded that the federal statutes in question were invalid because although they dealt with aspects that were interprovincial in nature, they all included within their purview some transactions which could be completed within the province. These latter transactions were matters within

property and civil rights in the province and on that basis, the entire federal legislation was struck down. (The doctrine of "severance"--whereby a court has the power to sever an ultra vires section of a statute, leaving the intra vires sections intact provided the intra vires sections can stand independent of the ultra vires sections--is rarely used in Canada). Again, an analogy can be drawn. To reiterate,"trade secrets" as defined by the draft act probably knows no provincial boundaries. However, according to the above cases, the federal government would have no authority to legislate in the area because they might be infringing on the property and civil rights power in that it is quite conceivable that the entire act of misappropriation occur within the province. There is no doubt that the Privy Council; in its tendency to limit the federal trade and commerce power, would have given constitutinal authority to the provinces to legislate in the area of misappropriation of a trade secret.

2.7.i Whereas the Privy Council tended to restrict the federal trade and commerce power, it has been the tendency of the Supreme court of Canada, since the abolition of appeals to the Privy council in 1949, to widen it. The most striking departure came in R v. Klassen (1959) (a decision of the Manitoba Court of Appeal, leave to appeal to the Supreme Court of Canada refused). Privy Council decisions, as stated, had "consistently decided that federal regulation under the trade and commerce power could not embrace wholly intraprovincial

transactions, even when the main object was to regulate the interprovincial or export trade" (Hogg (1977), p. 271). Yet in Klassen, supra, the federal legislation was held to validly apply to a purely local work--a feed mill which processed locally-produced wheat and sold it as feed to local farmers. The court concluded that the application of the federal statute to the purely intraprovincial transaction was valid as being incidental to the principal purpose of the Federal Act--to regulate interprovincial and international grain trade, a power which went to the federal government by virtue of the first part of the second branch of Parsons, supra. If farmers were allowed to sell grain locally, without having it counted as part of their quota, it would interfere with the regulatory scheme of the federal government. The federal government had the power to regulate in this area because the nature of grain is interprovincial and seen to be of benefit to all Canadians. The Klassen decision was confirmed by the Supreme Court of Canada in Caloil v. A.-G Can. (1971), a decision upholding the trade and commerce power in terms of a federal statute prohibiting the geographic transportation of oil west of Ottawa, again, even though some wholly intraprovincial transactions would be caught by it.

2.8.i The implication of these latter cases to the draft Trade Secrets Protection Act may seem to be that the federal government could claim it as being within their exclusive authority as being "necessarily incidental" to the effective operation of a federally regulated scheme based upon a federal

power. There are many arguments against that proposition. Firstly, the nature of these commodities (grain in Klassen, oil in Caloil, and later eggs in A.-G. Man. v. Manitoba Egg and Poultry Association (1971) and pigs in Burns Foods v. A.-G. Man. (1975)) is such that they are tangible items which actually "flow" across provincial boundaries. It is the existence of this "flow" that makes it relatively easy for the federal authority to argue, and for the courts to uphold, the regulation of intraprovincial transactions on the ground that such regulation was incidental to the main object of regulating interprovincial flow. "Trade secrets", as defined in the draft act, are arguably not "commodities" of the same type. That is, the regulation of them intraprovincially could not hamper the federal government's attempt to regulate federally because there exists no "federal flow" into which the "provincial flow" can join. In other words, in order to claim the authority over trade secrets on this basis, the federal government has to show that the regulation of trade secrets is necessarily incidental to a power over which they have undeniable authority. This latter, necessary step is something they cannot show, based on the arguments contained in this chapter. In addition, although trade secrets may "flow" across provincial boundaries, they will more than likely "flow" between "rightful owner" and "misappropriater". There is no need for trucks or pipelines which would entail the requirement of interprovincial licenses and therefore federal authority. There is also little need to "regulate" anyone (such as truckers) besides the "rightful

owner" and the "misappropriater" in the transaction. In other words, it is difficult to see how the "misappropriation of a trade secret" could fit into a federally regulated scheme. It is essentially private in nature. I suggest that should the federal government seek costitutional authority in this area, any arguments based on Caloil or Klassen would be seak ones, on the basis of the above counter argument, that "trade secrets" are a "less obvious" interprovincial "commodity" than those that have upheld federal legislation. I am strengthened in this argument by the fact that the above "tangible" commodities had a ready national market. "Whenever a market for a product is national (or international) in size, as opposed to local, there is a strong argument that effective regulation of the market can only be national ..." (Hogg (1977), p. 272). The argument is probably based on Parsons, supra. Arguably, the market for a "trade secret" (as defined by the draft act) will not be national, therefore, the "strong argument" referred to in the above quote, will not have application to this particular draft legislation. Although most everyone knows how to put grain, oil, eggs and pigs to good use, it is conceivable that the use of a "trade secret" may require an element of expertise which would restrict its "market" to a select few, thus removing it from the "national" domain. Although a "misappropriator" may put the "trade secret" out for national use at a time subsequent to the misappropriation, I strongly argue that the initial misappropriation (for which the draft legislation seeks to impose liability) is not one that can be labelled for a

"national market". Therefore, I would suggest the federal authority would not capture constitutional competency on this point.

2.9.i. I am encouraged in this stance by the decision of the Supreme Court of Canada in MacDonald v. Vapour Canada (1976). In that case, as in the argument for federal authority over trade secrets legislation, the only federal aspect which could really be claimed for the law was the fact that it had application throughout Canada, "but generality of application has never been sufficient of itself to shift a law dealing with property and civil rights in a province into a federal head of power" (Hogg (1977), p. 274). The Supreme Court of Canada, per Laskin C.J. gave just such a response when the argument was advanced in Vapour. The issue in Vapour was the validity of s. 7 and particularly, s. 7(e) of the Federal Trade Marks Act (R.S.C., 1970, c. T-10) (see Appendix D). The section prohibited, and provided a civil remedy (s. 53 of the Trade Marks Act), for any "act" or "business practice" which was "contrary to honest industrial or commercial usage in Canada". (Essentially, this is what the proposed trade secrets legislation is aimed at imposing liability for.) The Federal Court of Appeal ([1972] F.C. 1145) upheld the law on the basis that a law laying down a set of general rules as to the conduct of businessmen in their competetive activities in Canada was within the general category of trade and commerce. The Supreme Court of Canada, per Laskin C.J., unanimously reversed this decision.

> The plain fact is that s. 7(e)is not a regulation, nor is it concerned with the trade as a whole nor with general trade and commerce.... I do not read s. 91(2) (trade and commerce) as in itself authorizing federal legislation that merely creates a statutory tort, enforceable by private action, and applicable, as here, to the entire range of business relationships in any activity, whether the activity be itself within or beyond federal legislative authority. If there have been cases which appeared to go too far in diminuation of the federal trade and commerce power, an affirmative conclusion here would, in my opinion, go even further in the opposite direction.
>
> Vapour, p. 164

2.10.i What Laskin C.J. is essentially saying is that the creation or extension of civil causes of action of an essentially contractual or tortious character is a matter within property and civil rights in the province. It is my feeling that the same comments are applicable to the proposed trade secrets legislation. Therefore, I would conclude that the federal authority could not, on a constitutional basis, hope to legislate in this area on the basis of the trade and commerce power as it is an area wholly within the provincial purview. Federal legislation would be an infringement on provincial authority.

2.11.i However, Laskin C.J. in his judgment did suggest that trade and commerce might have been available as a valid head of authority if the law had been part of a "regulatory scheme" administered by a "federally appointed agency."

> The provision (s. 7(e)) is not directed to trade but to the ethical conduct of persons engaged in trade or in business, and in my view, such a detached provision cannot survive alone unconnected to a general regulatory scheme to govern trading relations going beyond merely

> local concern. Even on the footing of being concerned with practices in the conduct of trade, its private enforcement by civil action gives it a local cast because it is as applicable in its terms to local or intraprovincial competitors as it is to competitors in interprovincial trade.
>
> Vapour, p. 165, emphasis added.

2.12.i In terms of what he said, Laskin C.J. could just as well have been referring to the draft trade secrets legislation for it too regulates the "ethical conduct of persons ..." and provides for civil remedies in the event of a breach. For the most part, his words support my argument that the type of activity the draft legislation is directed to is within provincial purview. However, the suggestion that the federal government may have jurisdiction as part of a "regulatory scheme" is upsetting. His Lordship did not define "regulatory scheme", nor did he explain why its existence would satisfy the general trade and commerce power. There is no basis for the suggestion in previous case law and indeed, there have been cases where federal statutes creating "regulatory schemes" administered by federally appointed agencies were declared unconstitutional (for example, A.-G. Can. v. A.-G. Alta. (Insurance) (1916), supra; Re Board of Commerce (1922), supra; R. v. Eastern Terminal Elevator Co. (1926), supra. These latter cases were, however, decided by the "restrictive" Privy Council and not the more "expansive" Supreme Court of Canada. Therefore, it is possible that Laskin C.J.'s comment in Vapour may evolve into a new use for the federal, "general" trade and commerce power, one that the federal government may use to bring trade secrets legislation within their purview. This is

especially true in light of the fact that the originating dispute in Vapour concerned a contract; fundamentally within the provincial domain. If Laskin C.J. could suggest that a "regulatory scheme" would bring such a fundamentally provincial concept into the federal trade and commerce purview--it is far easier to suggest that the situation outlined in the draft legislation (specifically, an absence of contract) could be caught by a federal regulatory scheme. The fact that it is fundamentally tort law may not save it if it may have not been enough to save the contract in Vapour.

2.13.i Laskin C.J. said in Vapour, supra, that s. 7(a) through (d) of the federal Trade Marks Act were not valid under the trade and commerce power because to hold so would result in a clear invasion of provincial jurisdiction. However, they were upheld as rounding out regulatory schemes prescribed by the federal Parliament in the exercise of its legislative power with respect to patents, copyrights, trade marks and trade names. If s. 7(e)--"do any act or adopt any other business practice contrary to honest industrial or commercial usage in Canada"--could be so limited, it, too, would stand on the same basis but Laskin C.J. could not see it as being so limited and therefore, struck it down as being ultra vires the federal Parliament. In other words, sections 7(a) through 7(d) could operate as being "necessarily incidental" to the federal power over patents, copyrights, trade marks and trade names, but once the subject matters covering these areas had been distributed over sections 7(a) through (d), there

was no federal subject matter left for s. 7(e) to regulate. It was, therefore, directly aimed at regulating property and civil rights, an area over which the federal government has no authority, and so struck down.

2.14.i The cases which later judicially considered Laskin, C.J.'s decision in Vapour have been confusing to say the least. Burnaby Machine and Mill Equipment Ltd. v. Berglund Industrial Supply Co. Ltd. (1982), a decision of the Federal Court, Trial Division, held that the Supreme Court of Canada did not absolutely strike down s. 7(e) as being ultra vires the federal Parliament. That is, it was struck down on the facts of Vapour only and was therefore, held to apply in Burnaby Machine. On the other hand, Seiko Time Canada Ltd. v. Consumers Distributing Co. Ltd. (1980), a decision of the Ontario Supreme Court held that the Supreme Court of Canada had struck down the entire s. 7 of the Trade Marks Act as being ultra vires the federal Parliament. Motel 6 Inc. v. No. 6 Motel Ltd. (1981), another decision of the Federal Court, Trial Division, held 7(b) to be ultra vires the federal Parliament because it could not possibly be said to round off federal legislation with respect to trade marks.

2.15.i In other words, the lower courts in Canada are having a great deal of trouble interpreting and applying Vapour. I could find no rhyme or reason to the decisions. Some upheld federal regulatory schemes encroaching on provincial purview on the basis of Vapour. Some decisions struck down federal regulatory schemes

encroaching on provincial puview on the basis of the same case. In other words, the lower courts are either reluctant to allow expansive federal power on the basis of a regulatory scheme, or else they do not fully understand what a "federal regulatory scheme" is. On an analysis of traditional constitutional law, especially in light of the fact that Laskin C.J. saw fit to leave unexplained the definition of a "federally regulated scheme", I would suspect that the courts are both reluctant to apply and do not understand the concept of a "federally regulated scheme" and therefore are floundering.

2.16.i However, I would suggest that a more definitive answer with respect to Laskin C.J.'s suggestion of a "regulatory scheme administered by a federal official or agency" has come from the Supreme Court of Canada itself. The truth of the matter is, as suggested by recent cases, Dominion Stores Ltd. v. The Queen (1979) and Labatt Breweries of Canada Ltd. v. A.-G. Can. (1979) and by J.C. MacPherson in his article "Economic Regulation and the British North American Act" (1980-81), that Laskin C.J.'s "suggestion" has never really flown. In the first place, federal councel rarely argue the fact that the federal government may be able to legislate in a provincial area by virtue of a regulatory scheme authorized by the federal "general" trade and commerce power. Counsel did not argue it in Dominion Stores, (1979), supra; they did in C.N. Transport v. Alta. Prov. Ct. (1982), infra. In the second place, the majority of the Supreme Court of Canada seem to be reverting to the restrictive approach in terms

of the scope of the federal "general" trade and commerce power that was evidenced by the Privy Council. Indeed, Estey J.'s majority decision in Dominion Stores ignored more recent decisions of the Supreme Court of Canada (Klassen, supra, Caloil, supra and was instead based on earlier decisions of the Privy Council (Parsons, supra) even though the principles of the cases stand at odds with each other. The more recent cases allowed federal encroachment into provincial purview when it was necessarily incidental to the integrity and efficient management of a federal piece of legislation; the older cases completely disallowed it. By choosing to follow the older cases, Estey J. suggests that the current trend of the majority of the Supreme Court of Canada is to disallow federal encroachment based on the federal "general" trade and commerce power in the provincial sphere, even when it appears to be necessarily incidental. It would seem, then, that only for a short period of time (during the era of Klassen, supra, and Caloil, supra) was the Supreme Court of Canada willing to broaden the scope of the federal "general" trade and commerce power. Indeed, Laskin C.J. still is. As J.C. MacPherson says at page 189 to 190 of his article (1980-81), the fact

> should come as no surprise to those familiar with Laskin C.J.'s academic and judicial writings. Alone on the court he takes the position that the trade and commerce power gives the federal government sweeping powers over many facets of the Canadian economy. For Laskin C.J., if the activity in question is economic in nature and important to the country as a whole, in either a geographic or qualitative sense, then the federal government should have the power to regulate it. He is quite prepared to expand the second branch of Parsons (the "general" trade and commerce power) to accommodate this result.

2.17.i The majority of the Supreme Court of Canada, however, are not prepared to go as far as Laskin C.J., at least they have not done so thus far. The majority of the court emphasizes the need for judicial restraint in the interpretation of s. 91(2) (regulation of trade and commerce) lest provincial jurisdiction be seriously truncated. Therefore, in terms of "economic" legislation (which the draft legislation is of a type), the majority of the Supreme Court of Canada seem unwilling to give the federal government any expansive powers which would allow any encroachment into provincial purview. Although Dominion Stores, supra, and Labatt's, supra, were decided on commodity standard control issues, it is my feeling that the attitude of the Supreme Court of Canada would remain the same should the draft trade secrets legislation be challenged. That is, they would put it within provincial purview. I am encouraged in this suggestion by the following:

> The startling, but seemingly inevitable, doctrinal conclusion to be drawn from Estey J's judgment in Labatt, particularly when coupled with Dominion Stores, is that the second branch of the Parsons definition of the general trade and commerce power is a badly endangered species. Indeed it may well be extinct.
>
> J.C. MacPherson (1980-81), p. 191)

2.18.i In conclusion, therefore, I would suggest that the draft legislation would fall squarely within provincial purview with no visible opposition from the federal trade and commerce power unless, in the future, Laskin C.J. is able to persuade the

majority of the Supreme Court of Canada to accept his view. Vapour was decided in 1977. His lordship has, to my knowledge, as yet been unsuccessful in this bid. His interpretation may get remain a threat, but on the basis of the cases, I believe that it is not a serious one.

2.19.i The Alberta Court of Appeal, as evidenced in Canadian National Transportation Ltd. and Canadian National Railway company v. Alberta Provincial Court and A.-G. Can. (1982) seems to agree with me. In that case, the applicants were charged under s. 32(1)(c) of the federal Combines Investigation Act (R.S.C. 197Ø, c. C-23) with conspiring to prevent or lessen competition in the interprovincial transportation of general merchandise. The federal Act was upheld under the federal criminal law power (s. 91(27) of the Constitution Act, 1867), but the decision of the Alberta Court of Appeal in terms of the federal trade and commerce power, I feel, would be as applicable to a federal attempt to regulate in the trade secrets area as it was to the federal attempt in the above case. The Court decided that the validity of the Act in question could not be supported under the federal power to regulate trade and commerce because the Act was not directly concerned with the regulation of trade and commerce generally on a national level, but merely with the suppression of "harmful and iniquitous commercial practices" (CN Transport (1982) at p. 698). When viewed from its commercial aspect as a regulatory scheme, the Act was legislation in relation to property and civil rights, and as such would fall within provincial jurisdiction under s. 92(13),

if it were not supported by the criminal law power.

2.2Ø.i On the basis of this decision then, I would suggest that the Alberta Court of Appeal would find the proposed trade secrets legislation to be within the provincial purview. Firstly, it, too, seeks to suppress harmful and dishonest commercial practices and secondly, it cannot be characterized as criminal law. It does not contain any of the criminal law "trappings" (discussed in Part iii of this Chapter) required to categorize it as criminal law. Therefore, the obstacle preventing the Alberta Court of Appeal from placing the matter in issue in the above case within the provincial realm (the fact that it was held to be criminal law) would not exist in a dispute over the proposed trade secrets legislation. The Alberta Court of Appeal would probably hold the proposed legislation, as drafted, to be within provincial purview.

2.21.i Although they suggested that the federal government may have gained a foothold if the legislation in question (and perhaps federal legislation in the area of trade secrets, if the analogy may be drawn) had directly concerned the regulation of trade and commerce generally on a national level, the court seemed reluctant to actually find so and left it at a mere suggestion. The Court did not define a situation where federal legislation may "directly concern the regulation of trade and commerce generally on a national level" save to say that a regulatory scheme infringing the provincial realm must be justifiable under a

federal head of power, which is what Vapour said, so the Alberta Court of Appeal did not attempt to define "regulatory scheme" past the "definition" given it by Laskin, C.J. What they seemed to be doing was merely paying "lip service" to Laskin C.J.'s suggestion in Vapour but definitively coming down on the side of Estey, J. in Dominion Stores. That is, although there may exist a "door" to which the federal government may legislate on a regulatory basis with respect to provincial matters, on a general trade and commerce base, the "door" has not yet been opened. It is my suggestion, as it is J.C. MacPherson's, that the "door" will never be opened. The notion of a "regulatory scheme" administered by a federally appointed official or agency is too vague to be implemented by the courts in any real way. I would suggest that it could not be implemented by the federal Parliament to gain authority in an area governing the behavior of individuals with respect to each other's trade secrets. Therefore, the federal trade and commerce power does not pose a constitutional threat to valid provincial legislation in the trade secrets area.

ii) Preamble of s. 91--PEACE, ORDER AND GOOD GOVERNMENT

2.1.ii The opening words of s. 91, Constitution Act, 1867, confer on the federal Parliament the power:

> to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.

This power, generally considered to be residuary in its relationship to the provincial heads of power, will hereinafter be referred to as the p.o.g.g. power. Ultimately then, any "matter" which does not fall within one of the enumerated provincial heads of power will go to the jurisdiction of the federal Parliament on the basis of p.o.g.g. Arguably, the draft trade secrets legislation is not of this type since it is my belief that the draft legislation falls squarely within s. 92(3) (property and civil rights in the provinces) and provincial purview. However, it is indeed the practice of the federal Parliament to argue the p.o.g.g. power in constitutional cases. Most often it is pleaded in combination with the trade and commerce power. In fact, the majority of the cases discussed in the section on the trade and commerce power also argued p.o.g.g. and the latter argument proved no more successful than the first. In other words, s. 92(13) has more often than not been successful as a mechanism granting jurisdiction over a disputed "matter" to the provinces rather than to the federal Parliament under either s. 91(2) or the p.o.g.g. power. That is, the history of the p.o.g.g. power closely parallels that of the federal trade and commerce power so short order can be made of it in this report.

2.2.ii The judicial interpretation of the p.o.g.g. power has varied over the years, and is still far from settled. On a perusal of the cases, the court has not yet come to a firm decision as to what set of circumstances will trigger the effective operation of the p.o.g.g. power. Therefore, in terms of the draft trade

secrets legislation, each of the "tests" enunciated by the courts will be canvassed as to its ability to bring the draft legislation within federal purview. This discussion is necessary as it proves to be impossible to predict which "test" the courts will apply in a given case. The tests have been conveniently, and ably, condensed to basically three in number by P.W. Hogg in Constitutional Law of Canada (1977). His format for discussion in this area will be closely followed by this report.

2.3.ii The first "test" put forth by Hogg is the "gap" test. That is, the function of the p.o.g.g. power is to fill "gaps" in the scheme of the distribution of powers. The test has been applied to give the federal Parliament the power to enter into treaties (Re Regulation and Control of Radio Communications in Canada (The Radio Reference (1932)), and to uphold the validity of federal legislation attempting to guarantee the equal status of French and English in the institutions of the Parliament and government of Canada (Jones v. A.-G. N.B. (1974). It is my suggestion that the matter with which the draft legislation deals is not one that can be defined as not already coming within one of the enumerated heads of power. That is, p.o.g.g. fills the "gap" where the matter is not already covered by one level or another. As argued, s. 92(13) covers this area of concern, therefore, the "gap" test has no application here. In fact, the "gap" test has only been enunciated by the courts in a few, unique cases where the Constitution Act, 1867, gives an incomplete assignment of power. As suggested, this is not felt to be the case in the trade

secrets area.

2.4.ii The second test, applied more often by the courts, is that of "national dimensions", a phrase coined by the Privy Council in Russell v. The Queen (1882), now termed the "Canada Temperance" test by the Supreme Court of Canada. Russell, supra, did not explain the circumstances under which the p.o.g.g. power would prevail; A.-G. Ont. v. A.G. Can. (Local Prohibition) (1896) did: "... great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada" (at p. 361). Ironically, although the latter case explained the former, the two were decided differently. Russell upheld federal legislation in the temperance area on the basis of the p.o.g.g. power. Local Prohibition upheld provincial legislation in the same area on the basis of s. 92(13). The two cases are difficult to reconcile and caused confusion in their day. The result was the temporary abandonment of the second, the "national dimensions" test in favour of the third, the "emergency" test. Although the word "emergency" does not appear in the preamble to s. 91, the Privy Council (in the Board of Commerce case (1922), supra, and Snider (1925), supra,) held that in order for the p.o.g.g. power to act as authority for federal legislation, "highly exceptional" or "abnormal" circumstances would have to exist; the court suggested that examples would be "war or famine" (Board of Commerce (1922), supra). In other

words, the evil would have to be "so great and so general that at least for the period it was a menace to the national life of Canada so serious and so pressing that the National Parliament was called on to intervene and to protect the nation from diaster" (Snider (1925) supra at p. 412).

2.5.ii When appeals to the Privy Council were abolished in 1949, the Supreme Court of Canada reverted and decided all but one case on the "national dimensions" or "Canada Temperance" test. That one case, the Anti-Inflation Reference (1976), however, shows that the "emergency" test is still alive in Canada and must, therefore, be dealt with in terms of its application to the trade secrets legislation.

2.6.ii I would suggest that the federal government could not claim the trade secrets legislation as being within their purview under the p.o.g.g. power by reason of emergency for two reasons. First, the matter of concern in the draft legislation could not possibly be defined as an evil "so great and so general" as to become a "menace to the national life of Canada". "Trade secrets" cannot possibly be put into a class with" war and famine". Secondly, and conclusively, the p.o.g.g. power can only become operative in an "emergency" context where the evil is of a temporary nature. (This is necessarily so as an "emergency" is generally, and rightly, seen as a temporary phenomenon.) The requirement that the "evil" be temporary in nature was alluded to in Snider (1925), supra, and confirmed in Anti-Inflation Reference

(1976), supra. The federal Parliament can legislate in provincial areas only while the evil is in existence. In other words, the p.o.g.g. power gives to the federal Parliament temporary jurisdiction over all subject matters needed to deal with an emergency. In order to trigger this temporary jurisdiction, the nature of the "evil" itself must be temporary; one that has not always existed and one that is known will eventually subside. The matter to which the draft trade secrets legislation speaks is not of such a temporary nature. Unlike the issue decided in Anti-Inflation Reference (1976), supra, where federal wage and price controls were upheld in the face of the "evil" of inflation--behaviour of individuals with respect to the trade secrets of other individuals is not a new concern, nor is it a behaviour that can be expected to subside. Inflation, by the simple laws of economics, can be expected to rise and fall. Although the "misappropriation of trade secrets" may become greater in hard economic times, it can hardly be characterized as being of a temporary nature. It is my suggestion that it cannot be confined under the "temporary" umbrella, that it is ongoing and unpredictable and that, therefore, the federal Parliament could not legislate in the area under the p.o.g.g. power by virtue of the "emergency" test. The provinces would have valid jurisdiction.

2.7.ii The only test remaining, then, that may pose a threat is the "national dimensions" or "Canada Temperance" test. As stated, it is the test most used by the Supreme Court of Canada,

reverted to when the Privy Council decided (in A.-G. Ont. v. Canada Temperance Federation (1946)) that although an emergency may trigger the operation of p.o.g.g., the application of the p.o.g.g. power was not confined to emergencies. Therefore, in addiion to supporting "temporary" federal legislation in an "emergency", the p.o.g.g. power would also perform in the following context:

> ... the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must, from its inherent nature, be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, although it may in another aspect touch on matters specially reservice to the provincial legislatures.
>
> A.G. Ont. v. Canada Temperance Federation (1946 at p. 205)

Please note: the "Aeronautics" case referred to above is Re Aerial Navigation [1932] 1 D.L.R. 58. The "Radio" case is Re Regulation and Control of Radio Communication [1932] 2 D.L.R. 81.

2.8.ii The cases that have used this test to uphold federal legislation in "areas which go beyond local and provincial concern or interests" have generally been cases in which the issue revolved around "new" technological developments which the Fathers of Confederation could not have possibly foreseen when they divided the legislative powers. For example, aeronautics went to the federal Parliament in Johannesson v. West St. Paul (1952). Radio broadcasting met the same fate in Re C.F.R.B.

(1973). The subject matter of the draft trade secrets legislation, especially since it purports to cover computer information misappropriation (surely, computers are a technological development that was not foreseen in 1867 and therefore is a "new" matter) may well, then, go into the federal purview on the basis of this second function of the p.o.g.g. power; the national concern. The problem, essentially then, becomes one of defining when the subject matter of legislation attains such dimensions as to affect the body politic of the Dominion. I agree with Hogg when he says (at p. 259 of his book) that the ultimate test could not be that it meets a national concern in a geographic sense as was suggested by the cases. Surely, this would evolve into a severe restriction on provincial jurisdiction and would warp, to an unacceptable extent, the spirit of the Constitution Act, 1867, in terms of its distribution of powers. Hogg proposes (and I agree since the decided cases can be explained on the reasoning) that the "national dimensions" test is satisfied where the subject matter in dispute shows "a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to co-operate would carry with it grave consequences for the residents of other provinces" (Hogg (1977) p. 261). Hogg's suggestion, therefore, is that when the problem to be solved is beyond the powers of the province to deal with; the failure of one province to legislate in the area would render the enacted legislation of the other provinces useless, the federal Parliament should be given the power to legislate over the problem area. To

illustrate, the fact that nine provinces legislated to take preventive measures against some sort of epidemic would do no good if the tenth did not, and the epidemic spread from there to effect the residents of the nine provinces that did. Similarly, the Johannesson (1952), supra, case was decided in favour of the federal Parliament because the failure of one province to accept uniform procedures for the use of air space and ground facilities would endanger the residents of other provinces engaged in inter-provincial and international air travel. Also, in the case of Re CFRB (1973), supra, the failure of one province to adhere to national and international arrangements for the assignment of radio frequencies would cause interference with radio reception in neighbouring provinces and in the United States (Hogg (1977) p. 260). It is my argument that the proposed trade secrets legislation is not of the class discussed above, either in form or in effect.

2.9.ii Firstly, I suggest that the form, the pith and substance, of the draft legislation is not restricted to "computers" or any other new technological development but rather that it is mainly concentrated on regulating the relationships between individuals in terms of their behaviour towards each other's trade secrets. There is no "new" aspect in the governing of relationships by way of tort law. In other words, the proposed legislation does not speak to a novel situation, but offers a novel solution to an age old problem. Therefore, there is no doubt that the "concern" of the proposed legislation--the

governing of personal relationships--is a provincial matter and would therefore, as it always has historically, fall under provincial jurisdiction. Secondly, I would argue that the proposed trade secret legislation is not of a type that would satisfy the "national dimensions" test as proposed by Hogg, _supra_. There is no reason to believe that co-operation by all the provinces is an essential ingredient to the effectiveness of the proposed legislation. As mentioned earlier, uniformity across the nation is desirable in terms of protection of "information", to allow both the "rightful owner" and the "misappropriator" to know where they stand in terms of the law, but the fact that one or nine of the provinces chose _not_ to enact the legislation would not cripple its effectiveness in Alberta nor would it adversely effect the residents of the non-enacting provinces (except as outlined in Chapter 1. Tortfeasors in Alberta would be held liable. If they wished to misappropriate trade secrets without liability, they could go to a province where it was not "outlawed", but they could not do it here. An analogy can be drawn to those provinces which have singularly passed privacy legislation; the Privacy Act, R.S.B.C. 1979, c. 336 (British Columbia), the Privacy Act, Consolidated Statutes of Saskatchewan, c. P-24, and the Privacy Act, Consolidation of the Manitoba Statutes, 1983, c. P-125. If one wishes to evade the liability imposed by these provinces as a result of an invasion of privacy occurring in these provinces, one need not conduct themselves in a manner that will be seen as an 'invasion of privacy' in those provinces. Although privacy legislation may be one that cries out for uniform legislation, the

respective provincial Acts stand as valid provincial legislation, even though the other seven provinces have chosen not to legislate in the area.

2.10.ii The fact that not all provinces have legislated in the privacy area and that all may not legislate in the trade secrets area may lessen the efforts of "national, rightful owners" to protect their trade secrets but they would be protected in Alberta and would have to seek common law remedies in those provinces without similar legislation.

2.11.ii In summary then, the effectiveness of trade secrets legislation passed in one province is not dependent on trade secrets legislation being passed in other provinces. It would help if the laws were uniform, but if they were not, it is my suggestion that the consequences would not be "grave" enough to allow federal legislation in this provincial sphere.

2.12.ii I am strengthened in this contention by the words of the unanimous majority decision of Prowse J.A., of the Alberta Court of Appeal in the C.N. Transport (1982), supra, case. The Court, in that case, was faced with the federal counsel's argument that the federal legislation in question was valid on the basis of the p.o.g.g. power in both an "emergency" and a "national concerns" context. The Court did not accept the argument, and its words, at p. 702 to 703 of the decision, are as applicable to the proposed trade secrets legislation as they were to the Combines

Investigation Act.

> I do not think that the ethical practices dealt with by the Combines Investigation Act as crimes can be said to be directed at national emergency or to a subject matter that did not exist at the time of Confederation. The latter power is directed at novel situations, not novel solutions that have plagued mankind for generations and were recognized at common law at the date of Confederation.
>
> It is urged that the p.o.g.g. powers of the federal government are involved because the commercial practices prescribed by the Combines Act have become matters of "national concern transcending the local authorities' power to meet and solve by legislation." In my view, however, the mere fact that all provinces are faced with similar problems does not invoke the p.o.g.g. power as a matter going beyond provincial concern or interest. That argument, which I reject when applied to the trade and commerce power, can for the same reasons, not be applied to the p.o.g.g. power.
>
> Emphasis added.

2.13.ii To conclude then, the "gap" test and the "emergency" tests proposed by the courts pose no threat to the argument that the trade secrets legislation falls within provincial jurisdiction. The "national concern" or "Canada Temperance" test is another issue. It may, but probably will not. It has been suggested that uniformity across the provinces would be the ideal method of enacting trade secrets legislation. However, the lack of uniformity would entail no great harm to the spirit of the proposed legislation.

> Uniformity is desirable with respect to many topics, for many reasons, but of course the distribution of legislative powers in a federal system necessarily involves a substantial subordination of the value of uniformity to that of provincial autonomy even when there is no objective necessity for regional variations.
>
> Hogg (1977) p. 259

iii) s. 91(27)--THE CRIMINAL LAW POWER

2.1.iii The criminal law as it relates to the proposed trade secrets legislation has been rigorously canvassed in the body of the main report and need not be reiterated here.

2.2.iii From a constitutional standpoint, the criminal law power has been a strong source of federal legislation; much more so than either the trade and commerce power or p.o.g.g. power discussed previously. Indeed, the criminal law power has not suffered the fluctuating judicial interpretations experienced by the other two. Under the definition given it by Rand J. in Reference re Validity of s. 5(a) of the Dairy Industry Act (The Margarine Reference) (1949), that a prohibition was not criminal unless it served a public purpose which can support it as being in relation to criminal law, the criminal law power has, in fact, been the basis for the upholding of many federal "economic statutes." (For example, P.A.T.A. (1951), upheld anti-combines (competition) laws on the criminal law power; A.-G. B.C. v. A.-G. Can. (Price Spreads) (1937) supported, under the criminal law power, prohibitions on price discrimination.)

2.3.iii The next question is, of course, what type of "public service" would a law have to serve before it could be considered "of the criminal realm". Rand J. in Margarine Reference, supra, gave a non-exhaustived list which included "public peace, order, security, health, morality". It is my

suggestion that should the federal Parliament seek jurisdiction in the trade secrets area, they would do so under either "security" or "morality", both dubious terms to say the least. They could argue "security" in terms of the protection of one's property (but would meet the quare of whether or not "information" was "property"). They could argue "morality" in terms of whether or not the draft legislatin touched on the "good and bad" of Canadian citizens as a whole. The provinces, however, as they successfully did in Margarine Reference could come back with a pith and substance argument. In that case, the law in issue prohibited the manufacture, importation or sale of margarine. Although the law perfectly fitted the criminal form of a prohibition coupled with a penalty and the federal Parliament argued that the main objective was to protect the nation's "health" (from Rand J.'s list), the court had no trouble deciding that the pith and substance of the law was the protection of the dairy industry and therefore related to property and civil rights in the province. I would suggest that the same result would materialize should the proposed trade secrets legislation be challenged on this basis. The pith and substance of the draft act is the regulation of the relationships between private individuals through the mechanism of tort law; not "security" or "morality". The remedies, too, are not criminal, but civil, and that may be conclusive in terms of placing the power over this draft legislation within provincial purview. Hogg (1977 pp. 287-289) comes to the conclusion that it is quite permissible for a federal criminal law to carry with it civil sanctions, although

the civil remedies could not be the only sanctions. "The presence of traditional criminal sanctions as the primary mode of enforcement would be essential to the validity of the statute as a criminal law" (Hogg (1977) p. 288 from Vapour (supra)). Rocois Construction Inc. v. Quebec Ready Mix Inc. (1979), a decision of the Federal Court, Trial Division, supports the above quote. In the Rocois case, federal legislation purporting to give only a civil cause of action for damages against persons engaging in the prohibited conduct was declared to be ultra vires the federal parliament. The federal legislation in question was s.31.1(1)(a) of the Combines Investigation Act, R.S.C. 1970, c. C-23. The Court had, basically, the following to say.

> The Act is largely concerned with criminal law and therefore justifiable under s.91(27) of the British North America Act, 1867. However, the disputed provisions cannot be considered to be in relation to or properly ancillary to criminal law. The provisions in s.31.1(1)(a) of the Act were adopted to govern a purely civil action, benefiting only private parties, and between private parties, the instituting of which remains completely independent of any criminal process. They are not criminal provisions in themselves, and they cannot become so merely because the action to which they relate is one which may result from the commission of acts that have been declared to be criminal: the civil effects resulting from the commission of an act remain civil effects whether the act is prohibited as criminal or not.
>
> Racois, Headnote pp. 15-16.

The court might just as well have been referring to the proposed trade secrets legislation. It too, governs a purely civil action, benefits only private parties and is between only private parties. It is not necessary to call upon the criminal process

to institute an action under the proposed Trade Secrets Protection Act. Therefore, since the proposed legislation does not contain traditional criminal sanctions, it, prima facie, does not fall within the criminal law power (federal purview) but within property and civil rights (provincial purview).

2.4.iii In addition, the Supreme Court of Canada seems reluctant to deal with the criminal law power since its decision in R. v. Hauser (1979). This suggestion is gleaned from Labatt, supra, where, although the argument could have been raised that the legislation in issue in that case may have been upheld by the criminal law power in terms of the protection of the nation's health through effecive quality control, all nine judges failed to discuss the criminal law power. Hauser, supra, left two "ghosts." The first is that it decided that the Narcotic Control Act (R.S.C. 1970, c. N-1) was not criminal law. If the provisions of the Narcotic Control Act were not criminal law; it would be difficult for the court to hold that the milder provisions of the Food and Drug Act (R.S.A. 1970, c. F-27), at issue in Labatt, were criminal law. Evidently, the court in Labatt chose not to deal with it. By the same token, if the Narcotic Control Act is not criminal law, it would be very difficult indeed to say that the proposed trade secrets legislation is criminal law. Its provisions are milder still than those that appear in the Food and Drug Act.

2.5.iii The second "ghost" left by Hauser is that of the

powerful judgment written by Dickson J. His lordship drew a sharp distinction between federal criminal and non-criminal legislation and concluded that enforcement of the latter is federal; enforcement of the former is provincial. Dickson J. stated that the constitutional reason for the distinction was a reading of s. 92(14) of the Constitution Act, 1867, (see Appendix A) with s. 91(27) of the same Act. His lordship stated that the former was a specific substraction from the latter, in that although as a general rule the government which makes a law can enforce it, the existence of s. 92(14) creates an exception to that rule in the area of criminal law. Parliament can create criminal laws by virtue of s. 91(27), but s. 92(14) excludes federal power to enforce those laws. The enforcement of the laws is within provincial purview by virtue of s. 92(14).

2.6.iii Spence J. disagreed, stating that the federal government had jurisdiction to enforce all its laws. Indeed, J.C. MacPherson (1980-81) has difficulty in accepting Dickson J.'s distinctions (p. 204-205). Firstly s. 92(14) says "the administration of justice", not "the administration of criminal justice". Therefore, for MacPherson, no distinction arises. Secondly, since "crime" is fast becoming a "national" rather than "local" phenomena (in terms of organized crime and the like), he sees no reason to restrict criminal law enforcement to a local jurisdiction. Thirdly, if criminal law enforcement is local, he sees no reason why non-criminal law enforcement should not also be local.

2.7.iii His arguments are persuasive, but the fact remains that Dickson J.'s interpretation is taking prevalence in the lower courts (R. v. Kripps Pharmacy Ltd. (1980) and R. v. Hoffman-Laroche Ltd. (1980)). The implications this has for the criminal law power are serious. Why would the federal Parliament pass laws that it could not enforce; that could conceivably be circumvented by the provinces choosing not to prosecute?

2.8.iii As yet, the issue has not been resolved. There seems to be a development of two very distinct schools of thought; those agreeing with Dickson J. and those disagreeing with him. The implication for the proposed trade secrets legislation is that it may be faced with a criminal law power argument that is not as strong or prevalent as it once was. In any case, with respect to the pith and substance argument canvassed above, I suggest that the proposed trade secrets legislation could not be termed "criminal law" at all. The fact that the remedies provided for by the proposed legislation are civil, and not criminal, strengthen my argument.

2.9.iii Incidentally, in terms of the "regulatory scheme" argument introduced and discussed under the federal trade and commerce power, Hogg ((1977), p. 289) suggests that "the combines and insurance cases encourage the view that the criminal law power will not sustain a regulatory scheme which relies upon more sophisticated tools than a simple prohibition and penalty." In

other words, the question to be considered is whether the criminal law power will sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority (as suggested by Laskin C.J. in Vapour, supra). A criminal law is "administered" by law enforcement officials and the courts only in the sense that they can bring the machinery of punishment into action after the prohibited conduct has occurred. There is not normally any intervention by an administrative agency or official prior to the application of the law. In other words, with respect to administrative functions in terms of the criminal law, the agency or official intervenes only after the prohibited act has occurred. It generally has no function before that fact; it cannot create the offence. The creation of offences is a responsibility falling on the Parliament under the criminal law power. If Parliament chooses not to legislate criminally in the trade secrets area, as canvassed in Mr. Hammond's report, a federal agency or official cannot do so. Therefore, in the combines cases (Board of Commerce case (1922), supra and, Reference Re Dominion Trade and Industrial Comm. Act (1936)) the prohibitary or regulatory authority vested in the administrative agency was stopped short of actually determining the rights of the parties. It is suggested the same result would follow in a dispute with respect to the proposed trade secrets legislation. In A.-G. Ont. v. Reciprocal Insurers (1924), the federal law in issue was a provision added to the Criminal Code making it an offence to carry on the business of insurance without a license. (The

action was the Parliament's response to the Privy Council's decision that a federal statute purporting to regulate the insurance industry by requiring that all insurance companies be licensed to carry on their business was _ultra vires_.) The Privy Council in _Reciprocal Insurers_, _supra_ held the provision to be invalid since in pith and substance it was not criminal law. The same result was had in _Morgentaler_ v. _The Queen_ (1975) where the constitutionality of abortion law was challenged.

2.10.iii In summary then, it is doubtful that the federal Parliament could pass legislation, under the head of the criminal law power, that could be seen by the courts as a valid regulatory scheme for trade secrets legislation. It would be completely within provincial purview.

2.11.iii If the federal parliament chose to legislate criminally in the trade secrets area, they would have to redefine "theft" and "property" as they appear in the Criminal Code. The arguments for and against this line of action are canvassed in Mr. Hammond's report. The conclusion of his discussion in this area, in fact, formed part of the reason with respect to why he drafted the proposed legislation as he did. I would suggest, therefore, that the proposed legislation, as drafted, is immune from any federal claim of authority on a criminal law basis.

iv) s. 92(1Ø(c)--THE FEDERAL DECLARATORY POWER

2.1.iv Section 92(1Ø), as a whole, is the section which distributes legislative powers over transportation and communication between the federal and provincial governments. It is the latter of these two concepts which forms the basis for this discussion. The section (see Appendix A) gives the provinces the power to legislate with respect to "local works and undertakings" and then lists three exceptions. The powers under the "exceptions" go to the federal Parliament and have, on the basis of the cases interpreting the section, turned out to be the most important.

2.2.iv A perusal of the section would indicate that it deals only with modes of transportation and communication and has effectively nothing to do with trade secrets legislation. However, much of the controversy in terms of passing trade secrets legislation which would impose liability for the misappropriation of "trade secrets" (as this draft legislation does) is that it may operate to restrict the free flow of "information", which is regarded as vital to the welfare and progress of the nation. If this "free flow of information" could be regarded as "communication" and therefore, within the federal purview, the prohibiting or restricting of the "free flow of information" (as this draft legislation proposes to do) may be seen as ancillary to the federal power.

2.3.iv I would suggest that this is not the case. The first hurdle would be to define "works and undertakings." "Works" is generally defined as a "physical thing" (Montreal v. Montreal St. Ry. (1912)). In terms of the proposed trade secrets legislation, the definition of "trade secrets" may or may not include a physical thing; for instance, the arguments as to whether the "formula" was written on a piece of paper thus making it a physical, tangible item, as canvassed in Mr. Hammond's report, arise. "Undertakings" are generally defined as "not the physical thing ... but an arrangement under which physical things are used" (The Radio Reference, supra). In other words, it is an "organization", an "enterprise", a "network" of men and equipment organizing to "use" the "work". An "undertaking", therefore, has the flavour of being a valid activity, ongoing; something an individual can engage in without feeling guilty or without feeling that they had done anything wrong. For example, one might think of the men and women, making an "honest" living, engaged in the entre activity (undertaking) of broadcasting. Therefore, the "misappropriation" of a trade secret, something which is clearly "wrong" is not an activity which carries with it the same flavour as does the spirit of the word "undertaking" and, I would suggest, is of not the same type. As a result, the "undertaking" part of s. 92(10) appears to pose no threat to valid provincial legislation in the trade secrets area; the "works" part may, especially in relation to s. 92(10)(c). (Sections 92(10(a) and (b) can be easily dismissed from this discussion as they clearly deal with the transportation and

communication modes which are validly destined to cross provincial and international boundaries such as the British Columbia ferry system which regularly sails to the United States and telegraphs, which are regularly sent to residents of other provinces or countries. Arguably, the trade secrets legislation is not aimed at behaviour of this type. The proposed legislation is not aimed at prohibiting travel or communication required to allow Canadian citizens access to one another's company. This fact, therefore, takes the proposed trade secrets legislation out of the realm of sections 92(10)(a) and (b).)

2.4.iv Section 92(10)(c), on the other hand, enables the federal Parliament to assume jurisdiction over a purely local work by the simple (and unilateral) device of declaring the work to be "for the general advantage of Canada or for the advantage of two or more of the provinces." This declaratory power is available over any local "works" and is not confined to works related to transportation or communication. (Jorgenson v. A.-G. Can. (1971), Chamney v. The Queen (1975)). Therefore, the implications for the proposed trade secrets legislation could be serious. For example, assume that an eccentric scientist has come up with a cure for the common cold, but decides not to release the formula until after his death. Assume too that another individual "misappropriates" the formula, and publishes it, believing it to be for the good of all citizens of Canada. Can the province impose liability on the "misappropriator" if the federal Parliament agrees and declares the formula for the

general advantage of Canada? Probably not. The effect of the declaration is to completely withdraw the power from provincial jurisdiction by virtue of s. 92(1Ø)(c) and place it within federal jurisdiction by virtue of s. 91(29).

> The declaratory power has been exercised no less than 47Ø times, the majority of which have been in respect of local railways. Other instances include tramways, canals, bridges, dams, tunnels, harbours, wharves, telegraphs, telephones, mines, mills, grain elevators, hotels, restaurants, theatres, oil refineries and factories of various kinds.
>
> Hogg (1977 at p. 33Ø)

2.5.iv The provinces, in respect to a declaration made by the federal parliament, may argue that even though the federal government has jurisdiction over the "work", the provinces can still impose liability for the "undertaking" (the misappropriation). This argument on the part of the provinces would not fly. According to R. v. Eastern Terminal Elevator Co. (1925), supra, the effect of a declaration over a work brings within federal authority not only the physical shell of the activity but also the integrated activity carried on therein. In other words, the declaration operates on the work in its functional character. Therefore, the argument for provincial authority in this area, on this basis, is shaky.

2.6.iv It is made shakier still, by the fact the language of s. 92(1Ø)(c) makes it clear that a declaraton may be made not only in respect of existing works but also in respect of works to be constructed in the future. Additionally, according to Jorgenson

(1971), supra, it is not necessary that each work be individually specified by name or other description in order to bring it into valid federal purview. It is sufficient if a declaration refers to a class of works. Also, although the definition of a "work" is subject to judicial interpretation, the courts have made no attempt to give content to the words "for the general advantage of Canada". The question of whether a particular work really is for the general advantage of Canada has been seen as an issue of policy for the Parliament, not subject to judicial review (Hogg (1977) p. 331). This latter statement may be somewhat threatened by the advent of the Charter in terms of the "new" function it purports to give the judiciary with respect to it now being able to question actual substance of the legislation without being restricted to only deciding whether or not it was properly passed. I have been unable to find any Charter cases on point, but it is an argument that may be advanced by the provinces. That is, if the federal government claims authority over trade secrets on the basis of the declaratory power, the provinces may be able to convince the court that the Charter requires the federal government to prove the "general advantage" for Canada.

2.7.iv In any event, if "trade secrets" seems to be moving into federal purview, there are two very persuasive arguments which bring the trade secrets legislation back to provincial jurisdiction. The first is that of the accepted definition of a "work". A perusal of the cases, and of the above quote by Hogg, seems to suggest that the federal Parliament can gain authority

over "works" which tend to be "more" tangible (if we wish to speak in degrees of tangiability) than those contemplated by the definition of "trade secret" in the draft legislation. That is, wharves, restaurants and so on can always be touched; have, for all intents and purposes, a fixed location. The same cannot be said of trade secrets. Therefore it is possible to bring trade secrets within provincial jurisdiction on the basis of distinguishing the "works" it is concerned with from those that have been held to be of federal purview. (In all likelihood, there may exist "trade secrets" which are not "of a general advantage to Canada" and therefore, would surely be out of federal jurisdiction.)

2.8.iv Secondly, s. 92(10)(c) has been on the provincial "hit list" for some time. There is no doubt that it stands in conflict with classical principles of federalism (discussed earlier) because it enables the federal Parliament, by its own unilateral act, to increase its own powers and diminish those of the provinces. Clearly, this power stands at odds with the spirit of the distribution of powers in the Constitution Act, 1867 which seeks to separate the powers; ensuring the stability of both levels of government. Currently, there exists in Canada, important and well publicized "power struggles" between federal and provincial authorities; for example, the struggle between Alberta and the federal government over energy. It could very well be a dangerous political move for the federal government to attempt to encroach on provincial jurisdiction in the trade

secrets area. Indeed, the federal government seems to be sensitive to the anomalous character of the power since it is argued by the federal government, now, only sparingly and not effectively since 1961 (Hogg (1977) p. 332). The courts, then, too, seem to realize the ultimate effect of s. 92(1Ø)(c) and have, as of late, chosen to resist federal claims to jurisdiction based on the declaratory power. (Re Windsor Airline Limousine Services Ltd. (198Ø) and Fulton v. Energy Resources Conversation Bd. (1981). Therefore, in terms of the constitutional debate over trade secrets legislation, it is doubtful that the federal government will even argue s. 92(1Ø)(c) and even if they do, the courts seem reluctant to grant them jurisdiction by it.

2.9.iv For the above two reasons, a distinction in terms of the definition of "works" and simple non-use on the basis of its anomalous character, it is my suggestion that s. 92(1Ø)(c) poses little, if any, threat to valid provincial jurisdiction over trade secrets. Of all the arguments canvassed in this paper, however, the declaratory power may be the most persuasive in light of the above discussion.

v) Summary

2.1.v After a canvassing of the relevant areas, I would conclude that the provinces have valid jurisdiction over the proposed legislation, in the drafted form, according to the division of powers provisions of the Constitution Act, 1967.

2.2.v The next question becomes one of the best methods of implementation. That is, what would be the best and most effective method of enacting this piece of legislation? There are five choices:

1) one province alone
2) some provinces
3) all provinces
4) a national law under the federal government
5) Federal/provincial co-operation.

2.3.v For reasons outlined above, a national law under the federal Parliament is not viable since the law is not within their purview. One province alone, or a few provinces together could enact it (as discussed earlier) but for reasons of uniformity, the ideal solution would be for all provinces to enact identical or similar legislation. Hopefully, this is possible. However, history and human nature have shown that it is very difficult to persuade a group of individuals to agree on much. Therefore, the possibility of federal-provincial co-operation will be canvassed. As mentioned earlier, it is not unusual for the federal and provincial governments to unofficially (without authorization under the Constitution Act, 1867) "get together" in order to put into operation various schemes or projects. In fact, the Federal-Provincial Relations Office (FPRO) was established in 1975 under "An Act Respecting the Office of the Secretary to the

Cabinet for Federal-Provincial Relations and Respecting the Clerk of the Privy Council" for just such a purpose. The FPRO functions to assist the Prime Minister in his overall responsibility for federal provincial relations, to provide the Cabinet with assistance in examining federal-provincial issues of current and long term concern and to promote and facilitate the development of federal-provincial consultation. To date, the FPRO has basically restricted its activity to areas where federal funding has been required for provincial schemes (see "A Descriptive Inventory of Federal-Provincial Programs and Activities in Operation during Fiscal Years 1980-81 and 1981-82" (1982)). The FPRO, has not, to my knowledge, dealt with the type of constitutional issue we have been dealing with here, but it may be an avenue open to review.

2.4.v Also, as suggested, the possibility of a Uniform Protection of Trade Secrets Act should be put to the Uniform Law Conference of Canada.

2.5.v For solutions based in existing constitutional law, an analysis of the "double aspect" doctrine is in order. Although the courts have not fully explained where the use of the doctrine is appropriate, the doctrine itself says that some kinds of laws are both a federal and a provincial "matter" and are therefore competent to both levels of government. (For example, the provincial provision for driving without due care and attention, upheld under s. 92(13) and the Criminal Code provision for dangerous driving, upheld under s. 91(27).) Therefore, the

implementation problem could be solved if the trade secrets legislation can be said to be an area in which both levels of government can validly legislate. There are two "snags" to this suggestion. The first is that, as the body of this essay suggests, and I think correctly, the Constitution Act, 1867 did not grant the federal government an enumerated head of power under which jurisdiction over the trade secrets legislation, as drafted, would fall. The second is in the operation of the doctrine itself. If there do exist two valid pieces of legislation, one federal and one provincial, in the same area, and there is some conflict between them; the paramountcy doctrine "kicks in" to dictate that the federal law prevails and the provincial law is rendered inoperative (<u>not</u> invalid). Should the federal law be repealed, the provincial one automatically becomes operational again. Even so, this is hardly a satisfactory solution from the standpoint of the provinces (to have their law circumvented in such a fashion). The double aspect doctrine does not, in any event however, provide a solution to the problem of enactment, because, as suggested, the federal Parliament could not get their foot in the door in the first place. That is, they could not enact valid legislation that would stand in opposition to the provincial legislation. Therefore, neither the double aspect, nor the paramountcy doctrine could come into operation.

2.6.v The final constitutional doctrine affording a solution to the problem of enactment and effectiveness is that of inter-delegation. There are two types; the first, and most

popular is that of delegation of federal power from the federal Parliament to the provincial authority. Since trade secrets is a provincial power, we are concerned with the second, and less popular type of inter-delegation; from the provinces to the federal Parliament. Both are seen as a device by which the federal Parliament and the provinces would, in effect, agree, for specific purposes, to lend each other needed legislative powers. In other words Canadian legislative bodies can "co-operate" to produce effective measures. This was not always true.

2.7.v <u>Hodge</u> v. <u>The Queen</u> (1883) decided that both Parliament's and legislature's powers are plenary and that they can therefore delegate any power they wish, save that of their own function (<u>Initiative and Referendum Reference</u> (1919)), to a subordinate administrative body. In other words, each level of authority could delegate power below, but the question was, could the two levels of authority inter-delegate power <u>between</u> themselves? <u>A.-G. N.S.</u> v. <u>A.G. Can</u>. (Nova Scotia Interdelegation Case) (1950) said no. The Supreme Court of Canada felt that inter-delegation would disturb the scheme of distribution of powers in the Constitution Act, 1867. The various legislative bodies could not "agree" to lend each other powers in what the Court felt was express contradition to the Constitution Act, 1867. The first "dent" was made in the "armor" in <u>P.E.I. Potato Marketing Board</u> v. <u>Willis</u> (1952) where the court was faced with a different kind of "inter-delegation". <u>Nova Scotia Inter-delegation</u> had declared <u>legislative</u> inter-delegation to be

unconstitutional. Willis allowed administrative inter-delegation: where the delegate was not the provincial Legislature itself, but an administrative agency created by the provincial Legislature. The difference between the two is negligible and for all intents and purposes, academic. The result of Willis, A.-G. Ont. v. Scott (1956), Coughlin v. Ontario Highway Transport Board (1968), and R v. Smith (1972), all Supreme Court of Canada decisions, is that administrative inter-delegation has been reinstated as an important tool of co-operative federalism. Indeed the cases, and the methods for inter-delegation introduced by the cases, allow Canadian legislative bodies to do indirectly what they could not do directly under the Constitution Act, 1867. Although the Nova Scotia Inter-delegation case has not been expressly overruled, and therefore still stands as precedent, all drafters of inter-delegative legislation need do is ensure that they do not "inter-delegate" by the overt or direct legislative inter-delegation which would inevitably bring the Nova Scotia Inter-delegation case into play. They must ensure, rather, that they inter-delegate administratively. Therefore, should Alberta wish to give more strength to its trade secrets legislation by gaining federal Parliament, and therefore federal power, suppport (for example the criminal law), it may seek to try incorporation by reference (as in Scott), or even anticipatory incorporation by reference (as in Coughlin), or conditional reference. In other words, the state of the law at this point is that there are no obstacles to inter-delegation as long as it is done on an administrative basis.

> The only vestige of prohibition against inter-delegation which could now be argued to remain would be the rule (from Coughlin) that one legislative body cannot enlarge the powers of another by authorizing the latter to enact laws which would have no significance and validity independent of the delegation.
>
> Hogg (1977) p. 236

2.8.v In light of Smith and Lord's Day Alliance of Canada v. A.-G. B.C. (1959), even the above argument is tenuous, since in those cases, arguably, an inter-delegation of power from the federal Parliament did enlarge a province's legislative powers. In Lord's Day a federal statute prohibiting various activities on Sunday unless there was provincial legislation declaring otherwise was upheld. (Arguably, the federal Parliament gave the provinces the power to legislate in an area which the Privy Council decided was in federal purview.) In Smith, a federal statute allowed the provincial legislature to treat intraprovincial truckers differently from inter-provincial truckers. That is, although the federal government had delegated licensing powers to the province, it was assumed that the provine could only hope to legislate identically with respect to both types of truckers. To differentiate between inter-provincial and intra-provincial seemed beyond their scope. However, the legislation was held to be valid; thereby, arguably, broadening the scope of Alberta's legislative powers.

2.9.v Therefore, although inter-delegation looks promising in terms of a method of "beefing up" and filling gaps in a piece

of provincial legislation by "borrowing" federal powers (or vice versa), it must be remembered that a simple inter-delegation of a power from a province to the federal Parliament does <u>not</u> give it national effect. In other words, should the Alberta legislature pass the proposed trade secrets legislation, and then receive certain federal powers from the federal Parliament, Alberta's legislation may be strengthened and made more effective, but it would have <u>no</u> effect in a province that had not passed similar legislation and had not received a similar inter-delegation from the federal Parliament.

2.10.v Therefore, inter-delegation does not solve the problem of uniformity. The ideal solution comes back to enactment of trade secrets legislation by all the provinces (since it is within provincial purview by virtue of s. 92(3)). However, should the provinces wish, they may make their legislation more effective by gaining the support of federal powers through inter-delegation. The same option remains open for a single enacting province. Alberta, for instance, could pass the proposed legislation in co-operation with the federal government or it need not. The provincial legislation would stand valid in any event. Inter-delegation is only an option that is open to governmental authorities seeking to co-operate and "combine" their powers in order to produce more effective legislation or indeed, in order to "pass on" paper work. As many of the cases indicate, the reason for the inter-delegation is that one level of government has passed a law and set up the machinery required to enforce the law.

The law is at a subsequent time challenged, and the courts decide that the legislation is ultra vires the enacting level of government and actually within the purview of the other. The "other" does not necessarily want the power, especially in light of the expense it would have to go to in order to set up the operating machinery. Therefore, since the enacting authority has set up the machinery already; the governmental level with the authority but no machinery will inter-delegate the power to the governmental power with machinery but no authority. In other words, inter-delegation is often a mechanism of expediency and efficiency. It is a practical solution to practical problems. As stated, it could be used in terms of the proposed trade secrets legislation, but it need not be.

2.11.v In summary, then, it is preferable that all provinces pass trade secrets legislation similar to the one proposed here. Although it is preferable, it is not necessary since a single province may validly legislate in the area. Federal legislation is not a possibility, but there may be room for federal-provincial co-operation.

Chapter III - The Canadian Charter of Rights and Freedoms

3.1 The Canadian Charter of Rights and Freedoms (see Appendix B), hereinafter called the Charter, proclaimed on April 17, 1982, has had and will continue to have effect on Canadian

jurisprudence, particularly in the area of constitutional law.

3.2 The first impact that the Charter seems to be having is that of forming a new role for the judiciary; one that may approach the activist role of the judges in the United States. ("Activist Charter role for judges forecast". The National, a publication of the Canadian Bar Association, June, 1983--see Appendix E.) Prior to the Charter, the federal Parliament and the provincial legislatures enjoyed the support of the doctrine of Provincial Parliamentary sovereignty (otherwise known as parliamentary supremacy). In other words, there existed a presumption of constitutionality: the substance of the laws passed by the respective legislative bodies could not be questioned by the courts. The only thing the judiciary could question was whether or not the law had been validly passed in form. The usual mechanism for judicial attack in terms of the validity of a piece of legislation was to question the head of power under which the legislation had been passed and to strike it down on the ultra vires principle.

3.3 The Charter has, presumably, changed that by making the judiciary the bastions of the rights and freedoms guaranteed by the Charter. According to the Quebec Supreme Court in Quebec Association of Protestant School Boards v. A-.G. Que. (No. 2); where a law is challenged as a violation of the Charter, the presumption of constitutionality does not apply. In other words, no level of government is competent to pass laws which contravene

any of the rights and freedoms granted by the Charter (Re Southam Inc. and the Queen (No. 1) (1982)). Section 52 of the Constitution Act, 1981 replaces the Parliament and the Leislatures as the "supreme" law makers of Canada with the Constitution of Canada, of which the Charter is a part. Therefore, it would seem that the judiciary can now declare invalid legislation which, by its substance, contravenes the Charter. This statement, however, raises an issue which is fundamental to the Charter. That issue is contained in the use of the term "principles of fundamental justice" in s. 7 of the Charter. It is clear that the term includes procedural due process (a requirement that a law be proceeded with fairly but carrying with it no power on the part of the courts to strike down a piece of legislation on the basis that it is morally wrong). It is unclear, however, as to whether or not, and herein lies the issue, the term "principles of fundamental justice" includes substantive due process. Courts in the United States, based on their Constitution, enjoy the power to strike down legislation because it is substantively out of step with the moral traditions held by the general population. The Canadian Charter suggests that procedural due process is included, but that substantive due process is not, at least in terms of s. 7. The cases show that some judges feel that the restriction applies only to section 7; some feel it applies to the entire charter; some see no restrictions at all. The issue remains unresolved. Therefore, the court may have the power to strike down laws on a substantive basis, but they probably do not. In any event, our

Charter has "built in" mechanisms which operate to effectively circumvent any power the court may have to strike down legislation on a substantive basis.

3.4 Parliamentary sovereignty, therefore, cannot unequivocally be said to be a thing of the past. As stated in Quebec Association (No. 2) (1982), supra, and numerous other cases considering the Charter, the declared "supremacy" of the Charter and therefore the revolutionary "new" function of the judiciary may be circumvented by both sections 1 and 33 of the Charter itself. Section 1 states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> emphasis added.

3.5 In other words, s. 1 acts as a "disclaimer clause". It recognizes that the rights and freedoms granted by the Charter are not absolute; that individual rights can be foregone for the betterment of the whole. If an individual challenges a piece of legislation on the basis that his rights and freedoms, as guaranteed by the Charter, have been infringed, the legislating body is free to argue, conceivably successfully, that the infringement or limitation to the right or freedom is one permitted by s. 1. In other words, after a prima facie case of infringement is presented by the plaintiff, the burden falls

on the Crown to prove that the limitation imposed by their legislation is a "reasonable" one that can be "demonstrably justified in a free and democratic society". Re Federal Republic of Germany and Rauca (1982) suggests that the Crown has a very wide choice in terms of the foundations upon which they can base their argument. Any aspect of "Canadian society", or indeed, any other "society" in which, as a matter of common law, freedoms and democratic rights similar to those referred to in the Charter are enjoyed, can be used as a reason for limiting the rights and freedoms of individuals. In other words, the question is not whether the court agrees with the limitation, but whether it considers there is a rational basis for the limitation, a basis that would be regarded as being within the bounds of reason by fair-minded people accustomed to the norms of free and democratic society. Even though the case (Rauca, supra) suggests that the evidence presented in support of the limitation be clear and unequivocal, it would not appear that the burden on the Crown is too great because the evidence in support of the unreasonableness of the legislation, according to the same case, must also be clear and unequivocal. "Courts should be extremely hesitant to strike down laws such as the Extradition Act (R.S.C. 1970, c. E-21) enacted by Parliament unless they clearly violate the constitutional rights and freedoms set out in the Charter, and should be equally reluctant to characterize the limitation as not justifiable in a free and democratic society unless it is obviously unreasonable." (Re Federal Republic of Germany and Rauca (1982), headnote).)

Therefore, it would seem that the much proclaimed "guarantee" of rights and freedoms carries with it a multitude of exceptions. Section 1 embodies as many as an active mind will concoct, providing of course that the court accept them, and the trend appears to be, as it has been in the past, that the court is quite willing to pay judicial deference to the Parliament and the Legislatures.

3.6 In addition to the limitations on rights and freedoms that may be considered acceptable under s. 1, s. 33 provides further circumvention to the "supremacy" of the Charter. Section 33(1) is the famous "opt out" clause. It allows the Parliament or a Legislature to expressly declare that an Act of the same will operate notwithstanding provisions included in s. 2 or sections 7 through 15 of the Charter. In other words, although the Charter is supposed to be entrenched, and reign as supreme, the Parliament or Legislatures can "rise above" the "supreme law" in order to pass legislation which contravenes it, as long as the offending legislation specifically states that it will operate in spite of the offence. If such is the case, the courts are, of course, powerless to do anything but give effect to the legislation unless it can be struck down on the ultra vires principle (Malarctic Hygrade Gold Mintes Ltd. v. The Queen in right of Quebec (1982)). The only limitation on the Crown's "opt out" power as granted by s. 33(1) is contained in s. 33(3) and that is that a declaration that "offending" legislation will operate in spite of the Charter will cease to have effect five

years after the legislation containing the declaration comes into force. The "limitation" is, however, a meager one, since s. 33(4) affords the enacting body the opportunity to re-enact the declaration. In summary, then, the Crown may "opt out" of certain provisions of the Charter as long as it does so expressly (initially) and then renews the declaration every five years. This places a burden on the Parliament and the Legislatures to review their legislation periodically and ensure that legislation claiming to be "above the Charter" remains so. Interesting complications may result if a "renew date" is overlooked, but essentially the effect of s. 33 is to breathe life into the Parliamentary sovereignty doctrine, and to again force the judiciary to assume a secondary role.

3.7 The question then becomes, what is the effect of the above discussion on the proposed trade secrets legislation? Firstly, is the pith and substance of the legislation aimed at a "right" or a "freedom"? Re Allman and Commissioner of the Northwest Territories (1983) suggests that where it uses the term "right", the Charter guarantees state intervention to protect the individual in the activity referred to, but where it uses the term "freedom", what it guarantees is non-interference by the state in the activity embraced by the freedom. Therefore, if a "misappropriator" were to challenge the proposed trade secrets legislation, he would be doing so on the basis that the Charter guarantees him the "freedom" to misappropriate trade secrets and that the provincial Legislature cannot deny

him that freedom. The argument is ridiculous. On a simple reading of the Charter, it does not appear to give anyone the "freedom to misappropriate trade secrets". The mere suggestion that it does is unfounded both in the Charter and in what I would term the present network of social values as held by the general Canadian populace. Indeed, it may be argued that s. 7 of the Charter guarantees the right of the "rightful owner" to have his trade secrets protected from misappropriators by way of provincial legislation. Section 7 grants the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Arguably, it is difficult to see where "trade secrets" may be considered analogous to "life liberty and security". The general population may be more inclined to define "trade secrets" as "property" and clearly, in spite of the arguments rallied against the suggestion: the right to property is not one that is protected by the Charter. The Queen in right of New Brunswick v. Fisherman's Wharf Ltd. (1982) concluded that although the Charter does not specifically refer to property rights, the words "right to ... security of the person", as used in s. 7, must be construed as including the right of enjoyment of property. The court said this in spite of the fact that amendments which would have changed the provision to read specifically, that "Everyone has the right to life, liberty, security of the person and enjoyment of property ..." were defeated in the Special Joint Committee on January 27, 1981 and in the House of Commons on April 23, 1981. Therefore, if a

provision specifically granting property rights was consciously excluded by those drafting and ultimately enacting the Charter, I would strenuously argue that it is not for the New Brunswick Court of Appeal to include the right, especially since the Charter was enacted during a period of indisputable Parliamentary sovereignty. That is, since Parliamentary sovereignty reigned when the Charter was enacted, the courts cannot question the substance of the legislation, merely the form in which it is passed. Arguably, the latter is not questionable, and the questioning of the former is not allowed. It is my suggestion that the New Brunswick Court of Appeal overstepped its bounds in coming to the conclusion that it did. The only way it could have is if the court argues that the Charter has retroactive effect to its own passing. This is not the case. Many Charter decisions have concluded that the effect of the Charter is prospective only. (Examples of cases which have come to this conclusion include R. v. Rolbin (1982), a case in which s. 7, itself [the section on which the court in Fisherman's Wharf (1982), supra based its conclusion that the Charter gave property rights] was in dispute and the court decided that it was not to be given retrospective effect; Re Potma and the Queen (1982) decided too, that s. 24 of the Charter can only be given prospective effect.)

3.8 One may wish to argue that a right to property exists in Canada on the basis of s. 26 of the Charter. The section states that rights and freedoms that existed in Canada at the

advent of the Charter are not abrogated simply as a result of not being included in the Charter. Therefore, in effect, one is accepting the fact that a right to property is not included in the Charter, but is arguing that the right did exist prior to the Charter and is therefore still existent. Again, the argument is unfounded in law. Expropriation, commercial and debtor-creditor cases show that no such property right has ever been enjoyed by Canadians. An individual's right to property has always taken second place to the betterment of the whole. Therefore, a right to property is not enshrined by the Charter and if "trade secrets" is to be labelled "property" s. 7 would not, as suggested, afford the "rightful owner" any "right" to have the provincial Legislature legislate to protect his trade secret. However, as argued in Mr. Hammond's paper (pp. 59-63), "trade secrets" does not quite fit the legal definition of "property". Therefore, if it is not "property", what is it? Arguably, it is something by which an individual protects the "security of his person". A "trade secret" may be something that he is setting aside in order to ensure his or his children's or his business's health and welfare in the future. That is, the "trade secret" and the commercial value that it may have is something he wishes to protect and keep "secret" so that it may benefit and, if you will, "secure his person" in the future.

3.9 In summary, then, the Charter does not give a misappropriator the freedom to misappropriate a trade secret

and, arguably, it does give the "rightful owner" the right to have it protected. That is, the Charter does not guarantee non-interference by the state with respect to an individual's misappropriation of a trade secret and, in fact, may even cry out for state intervention to protect the "rightful owner's" interest in his trade secret. Therefore, I would suggest that provincial legislation such as that proposed by the Trade Secrets Protection Draft Act could not be challenged on this particular aspect of the Charter.

3.1Ø Additionally, pursuant to s. 31 of the Charter, I would suggest that the legislation, in order to be valid, must be provincial. Section 31 states that nothing in the Charter extends the legislative powers of any body or authority. Therefore, in light of the discussion in Chapter 2 of this report, trade secrets legislation, as drafted, is within provincial purview and the Chrter does not change that. Federal legislation in the area would be challengable on the _ultra vires_ principle; provincial legislation would not. Section 36 of the Charter, however, poses an interesting query in terms of federal-provincial co-operation with respect to equalization and regional disparities. The section states that both levels of government are _committed_ to:

a) promoting equal opportunities for the well-being of Canadians;

b) furthering economic development to reduce disparity in opportunities; and

c) providing essential public services of reasonable quality to all Canadians.

3.11 Arguably, since I could find no case law on this section, the section is directing legislative authorities to ensure that Canadians everywhere enjoy the highest possible standard of living. Arguably, too, the public dissemination of "trade secrets" could aid in this cause by making knowledge or information (whether of commercial value or not) readily available to the general public in order that people may "put their heads together", so to speak, to come to quicker solutions for problems, decide on viable economic alternatives, or perhaps to decide on where a "plant" should be built in order to create jobs. Courts may find, on the basis of these arguments, that a piece of provincial legislation which seeks to suppress public dissemination of information which may lead to the public good, (as arguably, this proposed legislation may) to be in contravention of the Charter and therefore without effect. I suggest that this is a tenuous argument. The section states that legislative authorities are <u>committed</u> to those particular goals; not that they <u>shall</u> be met. That is, the section does not create a legal obligation on the part of the governmental levels to meet the goals. What this suggests, therefore, is not necessarily that the goals are secondary, but that they will be worked toward in light of a myriad of considerations. In other words, the goals will be met if they are at all viable considering the circumstances. I would suggest, therefore, if there were <u>overriding</u> circumstances, such as the law, particular social values or pure politics, for example, the achievement of

the goals of equalization of regional disparity would be postponed until a more viable opportunity presented itself. I would suggest that this would be the case in terms of the proposed trade secrets legislation. In weighing the conflicting factors, I would suggest that the courts would not venture so far as to take responsibility for the economic development of Canada and would, therefore, uphold the proposed legislation. Indeed, the section seems to be aimed at ensuring governmental co-operation in the area; perhaps informal associations between the governmental levels with respect to funding. It does not seem to require judicial intervention.

3.12 Therefore, in its pith and substance, I do not see the draft legislation as a contravention to the Charter on a substantive basis. Even if I am wrong, however, and the court finds that the proposed act does infringe one's "freedom to misappropriate", I would suggest that the limitations on the "freedom" proposed by the draft legislation are acceptable within the confines of s. 1. Surely, members of Canadian society, and any other society used to free and democratic ways, would not accept the fact that the fruits of their intellectual labour could not be protected from their competitors and, very often, their "friends" and employees. Indeed, the proposed legislation was drafted, initially, in response to an outcry from the public sector for these very reasons. There was little or no legal protection available; and they wanted it. We, as a society, do not generally condone the taking of something which

does not belong to one simply in order to "get ahead" or save some time. Surely, we have always frowned on one who takes credit for, or receives remuneration for, something he has not earned or for which he has not worked. The "passing off" laws are a good example. Therefore, I would suggest that, even if the validity were challenged, the proposed legislation would be upheld as a justifiable limit under s. 1.

3.13 Should the Alberta Legislature still feel unsure, it is always open to them to make a declaration, contained within the proposed legislation, under s. 33; that the Act will operate in spite of any contravention. The option is open to them only if the legislation contravenes s. 2 of sections 7 through 15 of the Charter, however. It is my feeling, though, that a declaration in this case is not necessary and indeed, is unwise. As stated, the proposed legislation does not contravene the statute, and even if it does, it is a justifiable limit within s. 1. Therefore, a declaration would be unnecessary overkill. It would also be unwise for political reasons. Although the "opt out" clause exists, and can be used, its use should be reserved for dire circumstances. A piece of legislation which operates pursuant to s. 33 is definitely not in contravention of the Charter, but it could very well be seen as a contravention of the "spirit of the Charter". The fact that the Charter is entrenched, that individuals in Canada finally have a "supreme" law that "guarantees" their rights and freedoms should not lightly be toyed with. Therefore, enacting a piece of

legislation which operates under s. 33 of the Charter could well be a dangerous political move and should only be undertaken when the necessity for the particular legislation is unequivocal. As stated, I do not feel that a declaration is necessary or warranted for the proposed legislation since it is valid for other reasons.

3.14 Although, in its pith and substance, the proposed trade secrets legislation is not challengable on the basis of the Charter, there remain a few procedural areas of concern.

3.15 The first is that of "standing" which involves a discussion of s. 24(1) in conjunction with s. 32 of the Charter and s. 52(1) of the Constitution Act, 1981. The "standing" issue merely answers the question of whether one has the right to bring his private dispute before the courts. There is no question that the once rigid requirements for standing are no longer in effect. The court once required, as in R. v. Manchester Corporation (1911) that, in order to have standing, the applicant, either as an individual or a member of a special class or group, show some "special interest" above and beyond that of the general public. That is, the law in question had to affect the particular complainant in some particular way. These rules have definitely been relaxed as A.-G. N.S. v. McNeil (1976), a decision of the Supreme Court of Canada, shows. In McNeil, supra, Mr. McNeil wanted to see "Last Tango in Paris", a movie which had been banned by the Nova Scotia Board of Censors.

Mr. McNeil wanted to challenge the banning on the basis that it was ultra vires the Censorship Board. The Supreme Court of Canada, in a decision written by Laskin C.J., held that Mr. McNeil had standing even though he was no further affected than other members of the public in general. Basically, as the law now stands, virtually any applicant can gain standing as long as he can show that the law in question somehow affects either him, or the general populace of which he is a member, in an adverse way. In Thorson v. A-.G. Can. (1975), an individual brought an action seeking a declaration that the Official Languages Act and certain appropriation acts providing money to implement the Official Languages Act were ultra vires the federal Parliament. The Supreme Court of Canada held that taxpayers' money would be used to pay for the implementation and since Mr. Thorson was a taxpayer, he had standing to challenge the legislation, even though he was no more personally affected than any other tax payer.

3.16 The issue of standing under the Charter would appear to be following the more relaxed rules set out by the constitutional cases. In Borowski v. Minister of Justice of Canada (1981), Mr. Borowski sought a declaration that abortion provisions of the Criminal Code were ultra vires the federal Parliament pursuant to s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1981. In its majority decision, per Martland J., the Supreme Court of Canada suggested an extention of the already liberal standing rules to the point where almost

anyone has locus standi. In the case, at p. 343, the Court held that an applicant has standing as long as he can raise a serious issue with respect to the validity of legislation pursuant to the Charter. That is, a person need only show that he is affected by the legislation, or that he, as a citizen, is genuinely interested in determining the validity of the legislation. Therefore,if an individual were to seek to challenge the proposed trade secrets legislation on the basis of the Charter, establishing standing, pursuant to s. 24(1) and s. 52(1), would not be difficult, especially in light of the Borowski, supra, decision. However, as suggested, even if challenged, the proposed legislation should stand as not contravening the Charter.

3.17 There are, however, a few interesting "twists" in terms of taking a Charter case to the Courts. The Charter is of a "different breed" than other legislation and must therefore be interpreted in and of itself. The first "twist" is that neither the federal nor provincial Interpretation Acts apply to the interpretation of the Charter (Re Skapinker and Law Society of Upper Canada (1983)). There is a second difference between Charter cases and those resolving "regular" constitutional issues (for example, a claim that a piece of legislation is ultra vires the enacting body under the Constitution Act, 1867). In "regular" constitutional cases, the risk of constitutional issues being resolved by the courts without argument from the interested government has been reduced by rules adopted in most

provinces requiring the party raising a constitutional issue to give notice to the Attorney-General of the government of the jurisdiction which enacted the statute, and allowing the Attorney-General to intervene in the proceedings. The rule which enforces this requirement in Alberta is s. 25 of the Judicature Act, R.S.A. 1980 c. J-1. However, R. v. Leggo (1982) a decision of the Alberta Provincial Court, concluded that where an accused seeks to obtain a remedy under s. 24(1) of the Charter, he is not required to give notice to the Attorney-General pursuant to s. 25 of the Judicature Act (Alta.). The Ontario Provincial Court decided similarly in R. v. Oakes (1982) and was affirmed in its decision by the Ontario Court of Appeal. The issue is not, however, resolved in Alberta in light of Re Broddy and Director of Vital Statistics (1982) which came to a conclusion contrary to that of Leggo (1982), supra. Since this latter decision is that of the Alberta Court of Appeal, it is probably safer to give notice to the Attorney-General should "anyone" choose to challenge a piece of legislation on the basis of the Charter.

3.18 Section 24(1) reads:

> Anyone whose rights and freedoms, as guaranteed by this Charter, has been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

3.19 In terms of the draft trade secrets legislation, "anyone" means just that. The interpretation given it by the

courts has not been restricted to "natural persons" but has been extended to include corporations. Therefore, in light of the constitutional validity of the proposed trade secret legislation, "anyone", probably after giving notice to the affected Attorney-General, can apply to have the legislation struck down, but he must apply to a "competent court". Regina v. M. (1982) states that the Charter does not give to any court any jurisdiction that it did not have prior to the enactment of the Constitution Act, 1981 (of which the Charter is a part). Re Regina and Brooks (1982) supports this decision. Since the Charter does not itself establish, express or designate a particular court of competent jurisdiction, one must have resort to other statutes and other laws giving courts jurisdiction. In terms of the remedies outlined in the proposed legislation then, a breach of the proposed legislation would be taken to the Court of Queen's Bench. That is not unusual in light of the remedies provided for by the proposed legislation, since the Court of Queen's Bench regularly deals with remedies of this type for breaches of tort law. In order to challenge the Act, since the Charter does not provide for a court, the designation of a competent court would be made by precedent and other statutes; perhaps the draft legislation itself, since it designates the Court of Queen's Bench and surely, if a validity argument were to be raised, it would initially be raised there. A detailed discussion of this issue is not within the scope of this paper.

3.2Ø There is no question that "anyone" can, by virtue of

s. 32 of the Charter, challenge the validity of Parliamentary or Legislative legislation. (There remains an issue of whether or not a private individual in a civil dispute with another private individual may argue "rights" under the Charter, but that again, is not within the scope of this paper, which is to discuss constitutional objections to the validity of the proposed legislation if enacted.) Section 32 expressly states that the Charter applies to both the federal Parliament and the provincial Legislatures. The courts have not only agreed, but have expanded the scope of the Charter to include its operation against administrative tribunals (a police disciplinary panel in Re Nash and the Queen (1982) on the basis that the word "tribunal" in the French version of s. 24(1) has a much broader meaning than the word "Court" as used in the English version) and the court itself (in Re Southam Inc. and the Queen (No. 1) (1983), supra, where it was held that an application under s. 24(1) of the Charter would not seem to be limited to a case where the applicants' rights were infringed by the government but rather would include the case where the allegation is that the applicant's rights were infringed by another court.) In other words, an applicant can quite clearly claim that the government, or a court, or a tribunal has infringed his rights or freedoms to an extent that is not allowed by the Charter, and thereby render their actions with respect to him ineffective. As argued, however, I feel that in its pith and substance, the proposed legislation cannot be challenged on the basis of sections 24(1), 52, and 32. Firstly, the proposed legislation

does not infringe or deny any rights or freedoms guaranteed by the Charter and, secondly, even if it does, the court will find the limitation one that is "demonstrably justified in a free and democratic society" within s. 1.

3.21 There do, however, remain two procedural problems with the proposed trade secrets legislation in light of the Charter. The first is that the draft Act, in s. 8(2)(a) allows the court to hold in camera hearings. The second is that the proposed legislation calls for the automatic imposition of liability upon the finding of a misappropriation of a trade secret. Both provisions may act in contravention of the Charter.

3.22 The provision granting the court the discretion to hold in camera hearings may contravene s. 2(b) of the Charter, specifically, the freedom of the press and other media communication, and s. 11(d) of the Charter, granting an individual the right to a fair and public hearing. The impact of these two sections on the proposed trade secrets legislation will be discussed by way of analogy to Charter decisions with respect to s. 12(1) of the Juvenile Delinquents Act, R.S.C. 197Ø, c. J-3, a section which requires that the trial of all juveniles be held in camera.

3.23 Section 11(d) will be considered first. Ultimately, members of Canadian society value the fact that, should they

become involved in a legal dispute, they will receive a "fair" hearing by the courts. Initially, in order that a trial be "fair", it was thought that it must be "public". In other words,

> the principle that trials should be open to the public is a basic one which has been in existence for centuries and is fundamental to the Anglo-Canadian legal system. That the courts always be open and in full view of the public has been considered necessary to the proper and fair administration of justice.
>
> C. Beckton, "Freedom of Expression--Access to the Courts, p. 113.

3.24 However, it is argued that in certain circumstances, the individual would be denied a fair trial should the information divulged in a trial be made public. Certainly, the Court of Equity gave credence to this argument when it gave effect to its paternalistic concern for the protection of children by establishing special juvenile courts, specific offences that could be committed by minors and requiring _in camera_ hearings for their trials. In other words, it was felt that the future of a child must be protected by keeping "secret" the mistakes of its youth. Therefore, s. 12(1) of the Juvenile Delinquents Act was passed to ensure that the trials took place without publicity. The same argument, that certain types of trials would _not_ be fair if they were public, can be advanced for the protection of a trade secret. The initial existence of a "trade secret" is based on the foundation that it is just that--a secret, something not within the knowledge of the

public. If a trade secret was misappropriated, and the trial concerning the "misappropriator" and the "rightful owner" was held in public, and the information disseminated, the entire value of the secret, and the whole purpose for the litigation would be lost. If trials were not held _in camera_, the value of the secret, and the value of the proposed legislation would be circumvented. Therefore, the arguments for both juvenile and trade secrets hearings being held _in camera_, in order to be "fair", are strong. However, both are likely to be challenged on the basis that the Charter grants extensions to the once accepted parameters of "freedom of the press".

3.25 In terms of s. 12(1) of the Juvenile Delinquents Act,

> members of the press [are] most adamant in their demands that the principle of open trials should extend to juvenile trials, their argument being that an absolute bar against publicity in juvenile cases was an unjustifiable limitation on freedom of expression and the press.
>
> Beckton, p. 114.

In _Edmonton Journal_ v. _A.-G. Alta_. (1983), a decision of the Alberta Queen's Bench, it was held that a newspaper publisher was a concerned citizen with standing to bring an application for a declaration that s. 12(1) of the Juvenile Delinquents Act was inconsistent with the provisions of s. 2(b) and s. 11(d) of the Charter. (The court, here, applied the judgment in _Borowski_, _supra_.) In _R_. v. _R.J_. (1982), a decision of the Ontario Provincial court, the presiding judge held that the London Free

Press could attend the proceedings of a juvenile hearing on the basis of s. 11(d) stating that even if a person is a juvenile, he or she has the right to a fair and public hearing.

3.26 It is my feeling that such a conclusion would not be reached should the validity of the proposed trade secrets legislation be challenged on the basis of s. 11(d) of the Charter. Firstly, on a simple reading of the Charter, s. 11(d) pertains to criminal and not civil proceedings. Since juvenile trials may be held to decide "criminal" matters, the court in _R. v. R.J._, _supra_, may have been justified in its interpretation of s. 11(d) as it pertains to juvenile criminal matters. The proposed trade secrets legislation, as drafted, however, has nothing whatever to do with criminal law. Its interest is entirely directed toward civil law matters; disputes between "individuals" and not disputes between individuals and the state. Therefore, I would suggest that s. 11(d) would have no application to the draft Trade Secrets Protection Act.

3.27 Secondly, as argued previously, there will exist some "trade secrets disputes" wherein a "fair" trial could not be had if it were held in "public". Again, due to the very nature of a "trade secret", it becomes necessary to protect the "shroud of secrecy" that surrounds the trade secret. Not to do so would work to extinguish the "secret". Therefore, on a balancing of the competing factors--those surrounding the principle of an open trial as opposed to those surrounding a trade secret--it is

my suggestion that the former would have to give way to the latter. That is, if the proposed legislation does limit the right contained in section 11(d), it does so with justification, as allowed by s. 1.

3.28 The press's major success, to date, however, in terms of expanding the freedom of the press, has been on the basis of challenging legislation pursuant to s. 2(b) of the Charter. In Re Southam Inc. and the Queen (No. 1) (1983), a decision of the Ont. C.A.,

> Smith J made it clear that he accepted that the Charter had imposed limits on parliamentary sovereignty and that the courts now have a constitutional responsibility to deny effect to legislation which contravenes the Charter. The premise of his decision to strike down s. 12(1) was that a blanket prohibition against access was contrary to freedom of expression and the press guaranteed in s. 2(b) of the Charter.
>
> C. Beckton, p. 115.

Smith J. did, however, comment that a discretionary exclusion would not unduly infringe on freedom of the press since the assessment of access would be made on the basis of each case. In his judgment, Smith J. was referring to s. 39 of the Young Offenders Act, Bill C-61, which creates a presumption that the trial of a young person will be open unless the court before whom a proceeding occurs is of the opinion that any evidence presented would seriously injure or prejudice the accused, witness or victim. Section 39 of the Young Offenders Act is meant to replace s. 12(1) of the Juvenile Delinquents Act. Therefore, there would no longer exist a blanket prohibition

against public trials in juvenile cases. Rather, the court has the discretionary power to hold an _in camera_ hearing where it deems that the circumstances warrant it.

3.29 In light of the above decision, then, it would be easy to say that the proposed Trade Secrets Protection Act contravenes the Charter on the basis of s. 2(b), if it did in fact, require that all hearings be held _in camera_. In does not. Rather, s. 8(2)(a) of the proposed legislation gives the Court the _discretionary_ power to hold _in camera_ hearings in an effort to "preserve the secrecy of an alleged trade secret" (s. 8(1)(a)). In other words, the test as vaguely enunciated by Smith J. has been met by the proposed legislation. It does not contain a blanket denial to the press in terms of being allowed in the courtroom during a trade secrets trial. Due to the nature of the content of the trial, it is my contention that if the court decided to hold a trade secret case _in camera_, the press could not say that the freedom of press provision of the Charter had been denied them. Firstly, as stated, the very existence of a trade secret depends on it not becoming "of the public knowledge." Secondly, in terms of the nature of a "trade secret", the limitation on the freedom of press in the trade secrets area would be one "demonstrably justified and therefore, allowed by s. 1 as suggested by the court in _Southam (No. 1)_, _supra_. It is my contention, as well, that the press could not claim that the legislation was "coloured" in that although it _says_ it gives the courts the _discretionary_ power to hold _in_

camera hearings, what it effectively does is to _require in camera_ hearings because of the nature of "the beast" it sets out to protect. In other words, such a claim, if made by the press could not be a conclusive argument because the discretionary power given the courts is a real discretionary power. For example, if a trade secret is misappropriated, and the misappropriation is discovered and action is taken before the "misappropriator" has a chance to publicly disseminate the information, the trade secret is still a trade secret and the court would be well within its rights to declare an _in camera_ hearing. However, if the trade secret becomes public knowledge before legal action is taken, the court may decide that an _in camera_ hearing would preserve nothing and therefore conclude that a public trial is the proper route. In other words, the court has true discretion. The power to hold an _in camera_ hearing is merely an option that is open to the court to use under circumstances that warrant it. Certainly, in terms of the necessity, in some cases, to preserve the secrecy of a trade secret, the courts' discretionary power to declare an _in camera_ hearing cannot be a contravention of the Charter, s. 2(b). Even if it is, I suggest that it is a limitation allowed by s. 1. I am supported in this suggestion by _Southam (No. 1)_, _supra_ and by _R._ v. _Banville_ (1982), a decision of the New Brunswick Provincial Court. In other words, due to the "disclaimer" contained in s. 1, the freedom of the press is not an absolute freedom. There is no doubt, therefore, that the freedoms "guaranteed" by s. 2(b) will, under certain circumstances, have

to give way to overriding factors. I suggest that the trade secrets area is one that imposes a justifiable limitation on the freedom of the press. After a balancing of the values of freedom of the press against the values of preserving the secrecy of a trade secret; the latter must surely take priority.

3.30 As discussed earlier, the rights guaranteed by s. 2 are subject to the "opt out" clause contained in s. 33. that is, the Alberta Legislature may declare that s. 8(2)(a) of the draft legislation will operate in spite of any contravention of s. 2(b) of the Charter. Again, I suggest that this move is unnecessary and perhaps unwise for the same reasons canvassed above.

3.31 In terms of the balance of s. 8 of the proposed legislation, I would argue that _if_ they contravene the Charter in any fashion, the limitation that they impose on any right or freedom is one that is demonstrably justified within s. 1 for the same reasons that s. 8(2)(a) is. An analogy, again, can be drawn to the Young Offenders Act. Even though the bill removes the total prohibition against the public (and therefore the press) being allowed to attend juvenile trials, it retains an absolute ban on the publication of the identity, or of information that would lead to the disclosure of the identity, of young offenders. In other words even if the court decides that the case should not be heard _in camera_, the press cannot disclose the young offender's identity in any case. It has been

argued by C. Beckton, at p. 116, that this is a reasonable limit under s. 1 of the Charter.

3.32 As stated, the same argument may be made to uphold the balance of s. 8 of the proposed legislation. It would be ludicrous to legislate a blanket prohibition against the publication of a trade secret, especially in the case of a trial being held to assess damages for the misappropriation of a trade secret which can no longer be labelled a trade secret due to the "misappropriator's" dissemination of the knowledge into the public realm. However, the proposed trade secrets legislation does not purport to grant such a blanket prohibition. Rather, it gives the court a discretionary power to deny publication by ordering that the records of proceedings be sealed (s. 8(2)(b)), by ordering that persons involved in the trial not disclose an alleged trade secret without prior court approval (s. 8(2)(c)) and by restricting disclosure of a trade secret to a party's counsel (s. 8(2)(d)). I suggest that these discretionary powers are required by the courts in order to preserve the secrecy of the trade secret. For example, the court may initially decide that an in camera hearing with respect to a particular trade secret is not required. However, if, during the course of the public trial, the court finds that certain information disclosed may form the basis for the disclosure of a trade secret not in issue--a trade secret that remains genuinely a trade secret because it has not, as yet, reached the public realm, the Court requires the power to protect those genuine trade secrets.

Sections 8(b) through (d) may then be utilized by the courts to such an end.

3.33 In terms of the wording of the proposed trade secrets legislation, I am not sure that it grants discretionary power to the courts to prohibit "spectators" from disclosing alleged trade secrets without prior court approval. In other words, I am concerned about the wording of s. 8(2)(c) of the draft legislation. It would seem to me that based on the blanket prohibition contained in the Young Offenders Act and the nature of a "trade secret", the court should have the discretionary power to order spectators, including the press, not to publish an alleged trade secret. Section 8(2)(c) says that the court may order "any person involved in the proceedings not to disclose an alleged trade secret without prior court approval" (emphasis added). Would the term "any person involved in the proceedings" include "spectators", some of whom may be members of the press? If "spectators" are not included, I would suggest that the wording of the draft legislation be altered to specifically include them. (This would keep it in tune with the Young Offender's Act which contains an absolute ban on publication of identity). Whether "spectators" are included or not, I would suggest that the legislation be altered to read "order any person involved in the proceedings not to disclose an alleged trade secret, or any information leading to the disclosure of an alleged trade secret, without prior court approval." It would seem to me that it is just as important to

protect information surrounding the trade secret as it is to protect the alleged trade secret. That is, it does no good to prohibit the disclosure of an alleged trade secret if the disclosure of information from which the trade secret can be deduced is also not prohibited. Therefore, as stated, I would recommend such a change to the proposed legislation.

3.34 The argument surrounding s. 2(b) of the Charter, canvassed above, may, however, be academic. Although the Ontario Court of Appeal in Southam (No. 1), supra, affirming the decision of the Ontario High Court, concluded that s. 12(1) of the Juvenile Delinquents Act was unconstitutional on the basis of the Charter, there does exist a decided Alberta case to the contrary. Edmonton Journal v. A.G. Alta. (1983), supra, a decision of Dea J., sitting on the Alberta Queen's Bench, held that s. 12(1) of the federal statute did not infringe the freedoms guaranteed by s. 2(b) of the Charter at all. Dea J. reasoned that, unlike the American Bill of Rights which guarantees freedom of the press as a separate head from freedom of expression, the Charter guarantees freedom of the press only as an aspect of freedom of expression. He concluded that freedom of expression is the right to express orally, in writing or in whatever manner, and by the media, thoughts, beliefs, and opinions, but it does not include a right of access. Therefore, he upheld s. 12(1) of the Juvenile Delinquents Act, which, again, requires that all proceedings against juveniles be held in camera, as not infringing the freedoms guaranteed by s. 2(b).

3.35 Arguably, if Dea J. could uphold legislation calling for a blanket prohibition of the public's access into certain types of trials, he would have no trouble in reaching the conclusion that legislation (such as the draft Trade Secrets Protection Act) which gave only a discretionary prohibition was also valid in terms of the Charter. That is, if the stricter of the two is valid under the Charter, the lesser of the two must necessarily be so. Therefore, should Dea J.'s decision be accepted by the higher courts as the proper interpretation of the law, the proposed trade secrets legislation would no doubt be found to be valid.

3.36 Since few Charter cases have reached the Supreme Court of Canada, lawyers can scarce predict what its definitive statement of the law concerning these areas will be. Therefore, all the different angles must be canvassed. Considering the above discussion, it is my recommendation that the proposed legislation will stand as valid law under the Charter. To reiterate, s. 11(d) ultimately has no application to a piece of legislation dealing with civil proceedings. If it does, the closed trials proposed by the draft Act will not result in an "unfair" trial and is therefore a justifiable limit. If the Ontario Court's decision in Southam (No. 1) is accepted, the proposed legislation will stand as valid because the power granted to hold in camera hearings is a discretionary one, and therefore, again, is a justifiable limit. If the Alberta

Courts' conclusion, per Dea J., is accepted, the proposed legislation will stand because the Charter does not grant any freedom of access. I recommend that the term "any person involved in the proceedings" be examined to ensure that "spectators" are included and that "or any information leading to the disclosure of an alleged trade secret" be added to s. 8(2)(c) of the proposed legislation.

3.37 The final procedural problem to be solved is whether the proposed legislation contravenes the Charter by calling for the "automatic" imposition of liability upon the finding of a misappropriation of a trade secret by improper means. That is, sections 3 and 4 of the draft Act combine to make any misappropriation of a trade secret actionable and if the court actually finds a misappropriation, some form of liability will be imposed. This draft Act differs in this respect from its "sister"--the English Law Commission's draft Breach of Confidence Act (Law Com. No. 110). Section 11(1) (see Appendix F) of the latter draft Act provides that,

> if, in proceedings for breach of confidence the defendant raises the issue of public interest in relation to the relevant disclosure or use of the information in question, the plaintiff's claim must fail unless he establishes that the public interest in preserving the confidentiality of the information outweighs the public interest in such disclosure or use.
>
> "Emplanatory notes" Law Com. No. 110, p. 209

In other words, the English draft Act stipulates that

information should only enjoy the protection of the action for breach of confidence if, after balancing the respective public interests in confidentiality on one hand and in disclosure or use of the information on the other, the information is found to merit some protection.

3.38 The English draft Act, therefore, may allow a breach of confidence to go "unpunished" if the defendant claims that his breach was in some way for the public benefit and the plaintiff cannot disprove this claim. The draft Trade Secrets Protection Act allows for no such loophole; every act or mode of behaviour which qualifies as a "misappropriation of a trade secret by improper means" is "punishable" by the imposition of liability. The issue that arises here, therefore, is which method of approach; absolute or qualified imposition of liability; would most likely be upheld by the provisions of the Charter. In other words, is one of the approaches more likely than the other to be found unconstitutional under the Charter? My answer is no; both are valid.

3.39 The drafters of the English "legislation" were very much concerned that the free flow of information, so highly valued in our society, not be curtailed by their decision to legislate in the "confidence" area. The result of this concern was s. 11. The drafter of the proposed trade secret legislation shared their concern. Although the draft trade secrets legislation does not contain a provision similar to the one

contained in the English draft Act, it does not demand that the courts impose "heavy" liability in every case. That is, although the draft trade secrets legislation does not allow complete absolution for the misappropriation, it is always open to the courts to award nominal damages in a case which, in its opinion, is of the type that warrants it. The draft legislation does not deny this discretionary power to the courts. Therefore, I suggest that the draft trade secrets legislation accommodates the situation whereby a defendant may claim that his misappropriation was for the public benefit without specifically spelling it out in detail. The result, then, is the same--a defendant will either escape liability completely (under the English draft Act) or be faced with the responsibility of paying nominal damages under the proposed Trade Secrets Act. In practical terms, there is no difference, under the Charter there may be, but I suggest that there would not.

3.40 The reason for this suggestion comes out of a comparison of the scopes of the two draft acts. The proposed trade secrets legislation concentrates its efforts on the "misappropriation" of a "trade secret" by "improper means". The English draft Act, on the other hand, has a much broader scope; "breaches of confidence". It not only deals with misappropriation of trade secrets, but also with the divulging of secrets gained through employment, marriage, contract; to name only a few. Therefore, a provision such as s. 11 makes more sense

appearing, as it does, in the English legislation than it would if it were contained in the trade secrets legislation. The drafters of the English bill were concerned with a far greater number of different scenarios than was the drafter of the trade secrets legislation. For practical reasons, if nothing else, they had to ensure that the courts would not be spending all of its time deciding "breach of confidence" cases and therefore, necessarily, created greater "obstacles" for bringing the matters to court. Surely, council for plaintiffs in such matters would advise their clients that a court battle would not be worth the time and expense if it were the case that a plaintiff could not show that the "confidence" was more properly left in a private realm.

3.41 The broad scope of the English draft Act is the reason for another comparison which, I believe, shows that the effect of the two draft Acts is the same. Since the English Act does cover so many areas, the drafters of it felt the need to include in s. 11 many provisions that would make it applicable to more specific situations. It is s. 11(4)(b) of the draft Act (English) that, I believe, brings it directly in tune with the proposed Trade Secrets Act. This section reads:

> (4) When balancing the public interests involved for the purposes of subsection (1) the court shall have regard to all the circumstances of the case, including--
>
> (b) The manner in which the information was acquired by the defendant and (in the case of an obligation of confidence under section 6) the manner in which it was acquired by the original and any

subsequent acquirer of it; and

emphasis added.

The explanatory notes go on to explain that they feel that the court should be given the discretion to decide that even if the breach of confidence was to the public benefit, the manner in which it was obtained would operate to deny the defendant the protection of s. 11(1). That is, even though the defendant "took" and divulged the information for the public benefit, the fact that he "took" the information by improper means (the drafters of the English Act suggest "violence") would be enough to allow the court to impose liability. Therefore, the English Act does not advocate <u>complete</u> protection from liability in the case where the misappropriation is seen as being for the public benefit. Protection will be denied, in all likelihood, where the defendant's possession of the "confidence" arose out of coloured circumstances. The result, then, of the English draft Act and that of the draft Trade Secrets Protection Act is the same. The latter does not, by any stretch of the imagination, suggest that liability should follow the simple "misappropriation of a trade secret". The fact that it was done by "improper means" is a necessary ingredient and must exist before liability can flow.

3.42 Therefore I would suggest that neither is more liable than the other to be struck down as unconstitutional by the Charter. In fact, in light of the argument that the Charter

does not grant the freedom to misappropriate trade secrets, it is my suggestion that both pieces of legislation would stand up to its scrutiny. I would suggest, however, that the draft trade secrets legislation is the preferred one in terms of enactment by the Alberta Legislature. It is more precise in terms of the area that it covers and the area that it covers is one that requires immediate attention. Other breaches of confidence areas, such as marriage and contract are already adequately covered by other areas of the law and any legislation at this time may be redundant. Therefore, concentration on the trade secrets area is necessary in order to give legal aid to persons who are faced with a trade secrets problem and have virtually no other area of the law to turn to. Since the effects of the two draft legislations in terms of trade secrets problems is the same, I suggest that the more specific of the two, the proposed trade secrets legislation, is preferable.

3.43 I suggest too, that the draft secrets legislation is preferable in light of the Charter. In a clear case, it would be easy for the court to refuse to impose liability as the English Act suggests, if the misappropriation were undeniably "in the public benefit". However, in unclear cases, it would be difficult for the court to justify the imposition of liability on one defendant and the non-imposition on another. That is, the "spirit" of the Charter is that laws be "fair". Some defendants may truly feel that their misappropriations were to the public benefit. Should the court find to the contrary, and

impose liability, the "law" may not be seen as being within the "spirit" of the Charter. Ironic though it may seem, the proposed trade secrets legislation may be seen as 'better" than the English legislation in light of this analysis. It imposes liability in every case of a misappropriation of a trade secret by improper means and therefore dispells any thoughts of inconsistent application. However, at the same time, it "softens" whatever blow there may be by giving discretion to the courts in terms of applying the proper remedy to the proper case.

3.44 There are some Charter cases, however, which have denounced "absolute liability offences" as being contrary to the Charter, s. 7. The cases have been restricted to the area of criminal law, however, and the use, by some legislation, of the "reverse onus clause". A reverse onus clause is one which has the effect of placing the accused in the position of having to prove his innocence rather than the Crown prove his guilt. For example, in R. v. Campagna, (1982), s. 94.1(3) of the Motor Vehicles Act (B.C.) was in issue. The section provides that the offence of driving a motor vehicle while the person's driver's licence is suspended is an absolute liability offence in which guilt is established by proof of driving whether or not the accused knew of the suspension. The British Columbia Provincial Court held that the section was contrary to the principles of fundamental justice guaranteed by s. 7 and therefore of no force and effect, especially since the section carries with it a

minimum punishment of seven days' imprisonment. R v. Demelco (1982), again a decision of the British Columbia Provincial Court, agreed with Campagna, supra on the same issue. However, when the British Columbia Provincial Court was faced with, again, the same issue in R v. Duff (1982), it came to a contrary decision; s. 94.1(3) of the Motor Vehicles Act (B.C.) did not, in any way, offend s. 7 of the Charter. Presumably, the difference in the results of the two sets of decisions can be based on the fact that the judges presiding in the first two cases felt that the Charter gave them the power to question the substantive contents of the law in issue. The judge in the third case, Duff, supra, felt that if the Charter did not grant him this power, he could proceed on a procedural basis only.

3.45 Whatever the ultimate decision in this area will be, I suggest that it will have no bearing on the proposed trade secrets legislation. Firstly, as argued, it cannot be considered criminal law. It deals with civil matters and civil procedures only. Secondly, the draft legislation does not contain a reverse onus clause. Therefore, the defendant is never called upon, by the legislation, to prove that he did not misappropriate the trade secret by improper means simply because the "facts" say that he did. The primary burden of proof does not rest on the defendant, but on the plaintiff as it does in all tort cases. The lesser burden, that of the evidentiary burden may shift; such as where the plaintiff presents evidence that the defendant should refute, in order to win his case, but

then, that occurs in every trial as well. In other words, the liability imposed on the defendant under the proposed trade secrets legislation is "automatic" <u>only after</u> the court has seen sufficient evidence to come to a conclusion that a "misappropriation of a trade secret by improper means" has taken place. The liability is not "automatic" anywhere before that point in time, as it is with reverse onus clauses. Therefore, we are basically talking about two different kinds of "absolute liability". The kind with which the trade secrets legislation is dealing is of the type which cannot possibly contravene the Charter in any fashion.

3.46 I conclude, therefore, that the Alberta Legislature should enact the proposed Trade Secrets Protection Act. Not only is it timely, it is also within their constitutional power, both under the Constitution Act, 1867, and under the Charter, to do so.

CASE LIST

A.-G. B.C. V. A.-G. Can. (Natural Products Marketing) [1937] A.C. 377.

A.-G. Can. v. A.-G. Alta. (Insurance) [1916] 1 A.C. 588.

A.-G. Man. v. A.-G. Can. (Manitoba Securities) [1929] A.C. 260.

A.-G. Man. v. Manitoba Egg and Poultry Association [1971] S.C.R. 689.

A.-G. N.S. v. A.-G. Can. (Nova Scotia Interdelegation Case) [1951] S.C.R. 31.

A.-G. N.S. v. McNeil (1976) 14 N.S.R. (2d) 225 (S.C.C.).

A.-G. Ont. v. A.-G Can. (Local Prohibition) [1896] A.C. 348.

A.-G Ont. v. Canada Temperance Federation [1946] A.C. 193.

A.-G. Ont v. Reciprocal Insurers [1924] A.C. 328.

A.G. Ont. v. Scott [1956] S.C.R. 137.

Anti-Inflation Reference [1976] 2 S.C.R. 373.

Bank of Toronto v. Lamb (1887) 12 App. Cas. 575.

Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission [1937] O.R. 796 (Ont. C.A.).

Borowski v. Minister of Justice of Canada (1982) 39 N.R. 331 (S.C.C.).

Burnaby Machine & Mill Equipment Ltd. v. Berglund Industrial Supply Co. 64 C.P.R. (2d) 206 (Fed. Ct. T.D.).

Burns Foods v. A.G. Man. [1975] 1 S.C.R. 494.

Caloil v. A.G. Can. [1917] S.C.R. 543.

Canadian Federation of Agriculture v.A.-G. Que. (The Margarine Reference) [1915] A.C. 179.

Canadian Indenmnity Co. v. A.-G. B.C. (1976) 73 D.L.R. (3d) 111 (S.C.C.).

Canadian National Transportation Ltd. and Canadian National Railway Co. v. Alberta Provincial Court and A.-G. Can. [1982] 2 W.W.R. 673 (Alta. C.A.).

Carnation Co. v. Quebec Agricultural Marketing Board [1968] S.C.R. 238.

Chamney v. The Queen [1975] 2 S.C.R. 151.

Citizen' Insurance Co. v. Parsons (1881) 7 App. Cas. 96.

Coughlin v. Ontario Highway Transport Board [1968] S.C.R. 569.

Credit Foncier Franco-Canadien v. Ross [1937] 3 D.L.R. 365.

Croft v. Dunphy [1933] A.C. 156.

Dominion Stores Ltd. v. The Queen (1979) 106 D.L.R. (3d) 581.

Edmonton Journal v. A.-G. Alta. (1983) 9 W.C.B. 179 (Alta. Q.B.).

Fulton v. Energy Resources Conservation Board [1981] 4 W.W.R. 236 affirming [1980] 3 W.W.R. 176.

Hodge v. The Queen (1883) 9 App. Cas. 117.

Initiative and Referendum Reference [1919] A.C. 935.

Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd. v. Her Majesty The Queen in right of the Province of Manitoba [1976] 1 S.C.R. 447.

Johannesson v. West St. Paul [1952] 1 S.C.R. 292.

John Deere Plow Company v. Wharton (1915) A.C. 300.

Jones v. A.-G. N.B. [1975] 2 S.C.R. 182.

Jorgenson v. A.G. Can. [1971] S.C.R. 725.

Labatt Breweries of Canada v. A.-G. Can. (1979) 110 D.L.R. (ed) 594/

Lord's Day Alliance of Canada v. A.G. B.C. [1959] S.C.R. 497.

Lymburn v. Mayland (1932) A.C. 318.

McDonald v. Vapour Canada [1977] 2 S.C.R. 134.

McKay v. The Queen [1965] S.C.R. 798.

Malarctic Hygrade Gold Mines Ltd. v. The Queen in right of Quebec (1982) 142 D.L.R. (3d) 512 (Que. S.C.).

Montreal v. Montreal St. Ry. [1912] A.C. 333.

Morgentaler v. The Queen [1976] 1 S.C.R. 616.

Motel 6 Inc. v. No. 6 Motel Ltd. (1981) 56 C.P.R. (2d) 44 (Fed. Ct. T.D.).

Oil, Chemical and Atomic Workers v. Imperial Oil [1963] S.C.R. 585.

P.A.T.A. [1913] A.C. 179.

P.E.I. Potato Marketing Board v. Willis [1952] 2 S.C.R. 392.

Quebec Association of Protestant School Boards v. A.-G. Que. (No. 2) (1982) 140 D.L.R. (3d) 33 (Que. S.C.).

Quebec North Shore Paper Co. v. Canadian Pacific (1976) 71 D.L.R. (3d) 111 (S.C.C.).

R. v. *Banville* (1982) 69 C.C.C. (2d) 520 (N.B. Prov. Ct.).

R. v. *Campagna* (1983) 70 C.C.C. (2d) 236 (B.C. Prov. Ct.).

R. v. *Demelo* (1982) 9 W.C.B. 43 (B.C. Prov. Ct.).

R. v. *Duff* (1982) 17 M.V.R. 285 (B.C. Prov. Ct.).

R. v. *Eastern Terminal Elevator Co*. [1925] S.C.R. 434.

R. v. *Hauser* (1979) 98 D.L.R. (3d) 193.

R. v. *Hoffman-Laroche Ltd*. (1980) 109 D.L.R. (3d) 5 (Ont. S.C.).

R. v. *Klassen* (1959) 20 D.L.R. (2d) 406 (Man. C.A.).

R. v. *Kripps Pharmacy Ltd*. (1980) 54 C.C.C. (2d) 195 (B.C. Co. Ct.).

R. v. *Leggo* (1982) 69 C.C.C. (2d) 443 (Alta. Prov. Ct.).

R. v. *Manchester Corporation* [1911] 1 K.B. 560.

R. v. *Oakes* (1983) 98 W.C.B. 151 (Ont. C.A.) affirming (1982) 38 O.R. (2d) 598 (Ont. Prov. Ct.)

R. v. *Pugsley* (1982) 9 W.C.B. 73 (N.S.C.A.).

R. v. *R.J*. (1982) 68 C.C.C. (2d) 285.

R. v. *Rolbin* (1982) 8 W.C.B. 78 (Que. Ct. Sess.).

R. v. *Smith* [1972] S.C.R. 359.

R. v. *Thomas Equipment Ltd*. [1979] 2 S.C.R. 529.

Re Allman and Commissioner of the Northwest Territories unreported January 26, 1983, (N.W.T.S.C.).

Re Board of Commerce Act, 1919 and Combines and Fair Prices Act [1922] 1 A.C. 191.

Re Broddy and Director of Vital Statistics (1982) 142 D.L.R. (3d) 151 (Alta. C.A.).

Re C.F.R.B. [1973] 3 O.R. 819.

Re Federal Republic of Germany and Rauca (1983) 70 C.C.C. (2d) 416 (Ont. H.C.)).

Re Jamieson and the Queen (1983) 70 C.C.C. (2d) 430 (Que. S.C.).

Re Nash and the Queen (1983) 70 C.C.C. (2d) 490 (Nfld. Prov. Ct.).

Re Potma and the Queen (1982) 67 C.C.C. (2d) 19 (Ont. H.C.).

Re Regina and Brooks (1982) 1 C.C.C. (3d) 506 (Que. S.C.).

Re Regulation and Control of Radio Communications in Canada (The Radio Reference) [1932] A.C. 304.

Re Skapinker and Law Society of Upper Canada (1983) 9 W.C.B. 150 (Ont. C.A.).

Re Southam Inc. and the Queen (No. 1) (1983) 70 C.C.C. (2d) 257 (Ont. H.C.).

Re Validity of s. 5(a) of the Dairy Industry Act (The Margarine Reference) [1949] 1 D.L.R. 433.

Re Windsor Airline Limousine Services Ltd. (1980) 30 O.R. (2d) 732 (Div. Ct.).

Reference Re Dominion Trade and Industrial Commn. Act [1936] S.C.R. 397.

Regina v. M. (1983) 70 C.C.C. (2d) 123 (Ont. Prov. Ct.).

Rocois Construction Inc. v. Quebec Ready Mix Inc. 105 D.L.R. (3d) 15 (Fed. Ct. T.D.).

Royal Bank of Canada v. The King [1913] A.C. 283.

Russell v. The Queen (1882) 7 App. Cas. 829.

Seiko Time Canada Ltd. v. Consumers Distributing Co. Ltd. (1980) 112 D.L.R. (3d) 500 (Ont. S.C.).

The Queen in right of New Brunswick v. Fisherman's Wharf Ltd. (1982) 135 D.L.R. (3d) 307 (N.B.Q.B.).

Thorson v. A.-G. Can. [1976] S.C.R. 138.

Toronto Electric Commissioners v. Snider [1925] A.C. 396.

Workmen's Compensation Board v. C.P.R. [1920] A.C. 184.

BIBLIOGRAPHY

C. Beckton, "Freedom of Expression--Access to the Courts", 1983, Vol. 61; I, The Canadian Bar Review, p. 1Ø1.

The Federal-Provincial Relations Office, A Descriptive Inventory of Federal-Provincial Programs and Activities In Operation During Fiscal Years 198Ø-1981 and 1981-1982 (March 1982).

P.W. Hogg, Constitutional Law of Canada, The Carswell Co. Ltd., Toronto, Canada, 1977.

The Law Commission, Report on Breach of Confidence, Law Com. No. 11Ø, (October, 1981).

J.C. MacPherson, "Economic Regulation and the British North America Act", [Vol. 5, 198Ø-81] Canadian Business Law Journal, 172.

W. Monopoli, "Activist Charter role for judges forecast" (June 1983), The National (A publication of the Canadian Bar Review).

Ontario law Reform Commission, Report on Products Liability, 1979.