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Canada v. United States of America

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CANADA-UNITED STATES LAW INSTITUTE
40TH ANNIVERSARY CONFERENCE, APRIL 2016:
KEYNOTE ADDRESS

*Rosemary A. McCarney**

TABLE OF CONTENTS

I. Introduction.....	13
II. Borders Thick and Thin.....	14
A. The Bilateral-Multilateral Relationship	15
III. The Bilateral Relationship by the Numbers	15
IV. Translating the Bilateral Relationship Multilaterally.....	17
A. Human Rights	17
B. Human Displacement.....	17
C. How will we recover when the best among us behave no differently than the worse among us?.....	18
V. Advancing Our Common, Multilateral Objectives Together	19
A. On Defense and Disarmament	19
B. United Nations Peacekeeping Operations	19
C. Development	19
VI. 40 Years Later, What is Our Shared Multilateral Agenda?	20
A. Cyber	20
B. The Arctic	20
C. Space.....	20
D. Weapons and Technology.....	21

I. INTRODUCTION

In the 40 years since the Institute was birthed - the vision of a small handful of people led by Sidney Picker, Professor of International Law at Case Western Reserve University, the Institute has mirrored and captured the dynamics of the world’s most profound bilateral relationship. The Institute was birthed BEFORE the first Free Trade Agreement and when acid rain, softwood lumber and Canada’s Foreign Investment Review Act (“FIRA”) were the defining trans-border issues of the time.¹ Gerald Ford was in the White House and Pierre Elliot Trudeau was the Canadian Prime Minister.

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¹ See Foreign Investment Review Act, 1973-74 Can. Stat., c. 46, *as amended by* 1976-77 Can. Stat., c. 52 [hereinafter cited as FIRA]; Abby C Foster, *Summary and Explanation of the U.S.-Canada Lumber Dispute*, Summary for Penn State Dickinson School of Law (May 3, 2016), https://pennstatelaw.psu.edu/_file/aglaw/Lumber_Trade.pdf; Philip Shaebecoff,

Excellencies, Deans, Distinguished Colleagues, Ladies and Gentlemen:

It is a pleasure to be here and to see old classmates, professors, law firm colleagues, Members of the Advisory Board and friends - and - to remember and celebrate icons in the history of the Institute no longer with us, like Henry T. King. Many of you were here at the beginning and 40 years later remain committed to the vision of the Institute.

That vision is as important today, if not more so, well, certainly more so, than it was 40 years ago. To understand the workings of our respective nearest neighbor, to reduce or eliminate the inevitable friction from sharing a continent and the world's longest border, to enhance and leverage areas of common interest and to do so through student and faculty changes, comparative scholarly research and annual gatherings like this week - to look back on this one of a kind bilateral relationship and learn - and to look forward and do better.

Much has changed and much remains the same, we took care of things like the FIRA acid rainfall has been reduced, but of course, softwood lumber remains with us—although with perhaps renewed energy to resolve that long lived trade dispute in our life times.² The border hasn't shrunk in length but it has gone through cycles of thickening and thinning from a trade flow perspective, from a security perspective, from an environmental perspective - although the 40 year trend line would certainly suggest a strong propensity to thinning while respecting our two great and different systems of government and our robust democratic traditions.

II. BORDERS THICK AND THIN

The border is a defining part of our respective identities – most of the intellectual investment of our time has been to reflect on this border – how to protect it for some purposes, how to eliminate it for other purposes, or at least to make it firm but more efficient. I have always found political, geographic, and physical borders fascinating. Since I left the Institute as a young law student, I have worked in over 100 countries, so I have crossed a lot of borders! Some thick with child soldiers, militias, and bureaucracies, some thin and unguarded, some friendly, and others not so. I have crossed them in any number of strange vehicles including canoes. I have waded across a few carrying my pack on my head and sometimes a few children in my arms and have crossed in my share of animal pulled carts. The thing about borders is they are seldom visible or troublesome until there is a problem.

In contemplating the opportunity to speak to you, all students and experts on this rather magical border that divides the continent into Canada and the United States, I was forced to reflect on what could possibly be new to say. What has

Canada Sees Acid-Rain Talks, The New York Times, (May 3, 2016), <http://www.nytimes.com/1988/04/29/world/canada-sees-acid-rain-talks.html>.

² See Agreement Between the Government of Canada and the Government of the United States of America on Air Quality, *See* Investment Canada Act, 1985 Can. Stat., c. 28 (Investment Canada Act replaced FIRA).

not been said about the Canada-United States border and the relationship that grows out of it, after all?!

A. *The Bilateral-Multilateral Relationship*

There are two things that I thought I might be able to contribute from my current vantage point. Because, as Sidney Picker said in his kind introduction, that while I have moved from a bilateral lens to a multilateral lens in my career as I moved beyond the Canada-United States border, what has become clear to me as I worked around the world is that most things multilateral begin from a healthy bilateral or plurilateral foundation, in any event.

Because the Canada-United States Law Institute has rightfully had a strong focus on the bilateral aspects of Canada and the United States, I thought it might be interesting to first size up that bilateral relationship as it looks today and secondly, reflect on how that very mature, yet constantly changing bilateral relationship interacts with the world. Because, while I may have started as a student of bilateralism here at the Institute, over the years I became a decidedly strong advocate of plurilateralism and multilateralism. Some of it may have been birthed in the clear limitations of being the smaller partner in a two state marriage with the United States characterized by a former Canadian Prime Minister as “being in bed with an elephant.” But I think more of it came from an increasing acceptance that the major challenges facing both countries today are global, interconnected, and borderless. And most of those challenges are better addressed by us together than alone.

So, let me first set the context of our current bilateral relationship “by the numbers,” and then, from my current vantage point on how that translates in our often common face/posture to the world. I will conclude with a little of the forward facing challenges we are working on together right now.

III. THE BILATERAL RELATIONSHIP BY THE NUMBERS

It is big and growing. Here are a few of the 2015 numbers to pay attention to:

- Canada is the largest trading partner and largest customer of the United States – twenty-five years of free trade has had an impact;³
- In 2015, bilateral trade in goods and services was 880 billion U.S. dollars – that’s 2.4 billion U.S. dollars crossing the border every day;⁴
- Canadians buy more from the United States than Japan, China, and the UK combined, and more than the twenty-eight members of the EU combined;⁵
- Nine million American jobs depend on this trade with Canada;⁶

³ *Fact Sheet: Canada – United States: Neighbours, Partners, Allies*, PRIME MINISTER OF CANADA (March 10, 2016), <http://pm.gc.ca/eng/news/2016/03/10/fact-sheet-canada-united-states-neighbours-partners-allies>.

⁴ *Id.*

⁵ CANADA AND THE UNITED STATES, *Trade and Investment* (May 9, 2016), http://can-am.gc.ca/relation/commercial_relations_commerciales.aspx?lang=eng.

- Canada remains the largest supplier of U.S. energy needs;⁷
- Canada is the top export destination of thirty-five U.S. states;⁸
- Four hundred thousand people cross the Canada-United States border every day;⁹
- There are 150 federal, provincial, and state bilateral agreements on environmental protection alone;¹⁰
- The United States accounts for 51 percent of foreign direct investment in Canada representing 360 billion U.S. dollars.¹¹

These numbers, released last month tell us with certainty that we have the most integrated production and manufacturing relationship in the world. We produce and manufacture together and we compete together. We value economic interdependence because it has the greatest potential to make us all better off.

The numbers also tell us that whether it is visible and counted or dollarized, such as flows of goods and data or flows of people across the border, or less visible, such as our shared security and intelligence efforts, or the newly announced continental strategy on climate change, we are forever linked by what makes us similar and what makes us different. The numbers, however, mask the deeper relationship. The United States and Canada have a profound and multifaceted partnership and alliance that is grounded on our shared humanity both towards each other and to the rest of the world. We are neighbors, partners, and allies.

As President Truman said in a State visit to Canada 70 years ago: “[our relationship] did not develop spontaneously...[it] did not come about merely through the happy circumstance of geography. It is compounded of one part proximity and nine parts good will and common sense.”¹² I think he would have liked the Canada-United States Law Institute.

⁶ *Study Finds Nearly 9 Million U.S. Jobs Depend on Trade and Investment with Canada*, EMBASSY OF CANADA IN WASHINGTON (last visited May 9, 2016), http://www.can-am.gc.ca/washington/highlights-faits_sallants/2014/2014-12-Jobs_Study-Etudes_Emplois.aspx?lang=eng.

⁷ CANADA AND THE UNITED STATES, *Energy Relations* (last visited May 9, 2016), <http://www.can-am.gc.ca/relations/energy-energie.aspx?lang=eng>.

⁸ CANADA AND THE UNITED STATES, *State Trade Fact Sheets* (last visited May 9, 2016), http://can-am.gc.ca/business-affaires/fact_sheets-fiches_documentaires/index.aspx?lang=eng.

⁹ CANADA AND THE UNITED STATES, *Canada-U.S. Shared Border: Key to Security and Prosperity* (last visited May 9, 2016), http://can-am.gc.ca/relations/border_frontiere.aspx?lang=eng.

¹⁰ INTERNATIONAL ENVIRONMENTAL AGREEMENTS (IEA) DATABASE PROJECT (last visited May 9, 2016), <http://iea.uoregon.edu/page.php?file=home.htm&query=static>.

¹¹ *2015 Investment Climate Statement – Canada*, U.S. DEPARTMENT OF STATE (May 2015) <http://www.state.gov/e/eb/rls/othr/ics/2015/241511.htm>.

¹² Harry Truman, *Address Before the Canadian Parliament in Ottawa*, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/publicpapers/index.php?pid=2134&st=&st1=>

IV. TRANSLATING THE BILATERAL RELATIONSHIP MULTILATERALLY

What I would like to move to is why this big and profound relationship is important to the world. Canada and the United States count on a rules based international world order. That world is under threat. Let me use just two non-trade examples from my multilateral world. I will leave the situation of the World Trade Organization (“WTO”) negotiations for others to debate in our sessions tomorrow. This is because, I think that the Canada-United States relationship is much more important than only the trade and investment issues which occupy us.

A. Human Rights

We are witnessing the erosion of 150 years of established and hard won international humanitarian law principles on a daily basis. We agreed decades ago that even wars have limits. I recall conversations with Henry King who began his career as a young American prosecutor at Nuremberg calling the Nuremberg trials the first act in the “civilization” of war, as it was the first time those who breached the boundaries of war were held accountable. This was revolutionary in the history of war.

Today, the most basic tenets of international humanitarian law and international human rights law are being violated every day in full view of the global public with impunity. Rape used as a weapon of war, chemical weapons and barrel bombs being used in urban areas, hospitals targeted in bombing raids, children recruited and trafficked as commodities. We see this evidenced every day by both state and non-state actors. When these cherished principles are not being respected in conflict zones—they are being eroded in the institutions of the United Nations by antagonistic Resolutions and painful compromises—where death by a thousand words can be equally destructive of our rights.

B. Human Displacement

Perhaps more apparent to the world in the last few months in particular, is the massive upheaval of millions of people through little to no choice of their own. We have sixty million people displaced today across the world from climate change, disasters and protracted conflicts – twenty million of whom are refugees fleeing persecution and a fear for their lives.¹³ The *1951 Refugee Convention* (“Convention”) and the *1967 Protocols* impose on us certain duties, the most important of which is the obligation to protect. We almost all signed the Convention and committed to this.¹⁴ Instead today, we are witnessing modern, democratic countries – the ones we count on and hold up as role models – breach

¹³ *Worldwide displacement hits all-time high as war and persecution increase*, U.N. High Commissioner for Refugees (June 18, 2015), <http://www.unhcr.org/558193896.html>; *244 million international migrants living abroad worldwide, new UN statistics reveal*, U.N. Department of Public Information (Jan 12, 2016), <http://www.un.org/sustainabledevelopment/blog/2016/01/244-million-international-migrants-living-abroad-worldwide-new-un-statistics-reveal/>.

¹⁴ U.N. High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/3b73b0d63.html>.

their commitments in their treatment of refugees. National security and national sovereignty are daily being placed above the legitimate claims of the most vulnerable people's right to our protection and assistance.

C. How will we recover when the best among us behave no differently than the worse among us?

We had a rules based international order that we had begun to take almost for granted in the early days of the Institute: trade negotiations were multilateral not bilateral or plurilateral, the Geneva Conventions were a source of pride, and the plight of Hungarians or Vietnamese Boat people or Uganda's Idi Amin's treatment of its Asian population brought forth generous and unquestioning open doors, without restrictive legal analysis of what were NOT our obligations under the Refugee Convention. We had a rules based international order that we respected.

Foreign policy has always been about squaring some difficult circles - we have been very good at it but - "we the people" today needs to be a global call to reaffirm these fundamental legal commitments to those whose rights are abused and who seek our protection. Canada and the United States have a unique role to play in providing this needed global leadership, based on our common humanity and in our firm belief in the inherent dignity and worth in every individual, as espoused in our two great constitutional histories and traditions. So, let me return to where we started. What are the lessons Canada and the United States have to bring to this new multilateral order of rapidly emerging and quickly evolving crises and challenges which present us with fewer, simple solutions? I am optimistic. Look at how these two countries have been able to move today on highly contentious bilateral issues:

- Country of origin labelling or COOL - we are "cool" again;
- Border pre-clearance expansion - land, rail, marine and air;
- Climate change cooperation - a big leap from acid rain;
- And, my personal favorite - The Detroit River International Crossing or as Canadians like to call it - The Gordie Howe Bridge!

Forty years ago a bridge across Lake Erie was the subject of a rancorous negotiation between the first Institute's Canadian and American law students, with the Canadian students in righteous indignation exercising their negotiation skills by walking out at a particular moment. We ultimately came back after some serious mediation by the Professors Sidney and Jane Picker. It took forty years, but that bridge looks like it is going to be built! Thanks to the hard work of many of the political, diplomatic, and business leaders of the two countries who have made the Institute their intellectual home over the decades. Across a range of contentious issues, we demonstrate hemispherically and further afield what is possible when engagement on divisive issues takes place.

V. ADVANCING OUR COMMON, MULTILATERAL OBJECTIVES TOGETHER

Let me cite just three examples where the bilateral relationship is advancing our common multilateral concerns and objectives:

A. On Defense and Disarmament

The North American Aerospace Defense Command remains the centerpiece of the Canada-United States military relationship where we conduct joint aerospace and maritime warning and control systems in the defense of North America. Further afield, together in the North Atlantic Treaty Organization and the Global Coalition to Counter the Islamic State of Iraq and the Levant, we are steadfast partners. I am working closely with my U.S. counterparts in Geneva and New York on multilateral disarmament and non proliferation to get negotiations started on a treaty dealing with fissile materials – a first step in moving to a world free of nuclear weapons. Together, with our like minded (and sometimes less like minded), we are using the tools of multilateralism and diplomacy to work towards this vision of a world free of nuclear weapons. In cyber, we are working closely together on a shared view to ensure an open, interoperable, reliable, and secure internet. There are those who oppose our common vision and position at the International Telecommunications Union (“ITU”) but together, the United States and Canada are working multilaterally to create the norms for state behaviour in cyber space.

B. United Nations Peacekeeping Operations

In United Nations (“UN”) peacekeeping operations and humanitarian response, we are often in lock step in our interface with the multilateral institutions – for example in peace operations with the UN Mission for Stabilization in Haiti, where together we contribute to police training and combine resources, in refugee resettlement with the United Nations High Commission for Refugees, as two of the largest resettlement countries, in demining operations in Columbia - that wonderful country in our neighborhood emerging from fifty years of civil war, and, whenever and wherever disaster strikes through the United Nations Office for the Coordination of Humanitarian Affairs and other UN humanitarian agencies to ensure our efforts are coordinated and leveraged to maximum effect.

C. Development

On development issues, we share a common agenda to advance the rights of adolescent girls to education and to bring an end to child and forced marriage. Laws and policies are needed and so is access to education. We collaborate closely on the Global Health Security agenda at the World Health Organization (“WHO”).

The ZIKA virus is just the most recent example where a strong North American partnership can protect not only us, but be part of a shared effort to

support our neighbors in Latin America and the Caribbean.¹⁵ We are raising the questions and finding the answers to how we will do better in the face of health threats to our populations. What are the norms and border rules needed in the face of a global pandemic that is air borne? What if Ebola had been air borne? And, what happens to global free trade and commerce when pandemics break out? It will take West Africa decades to recover economically from border closures just from the limited span of Ebola. The readiness for these scenarios are the things we work on together every week through the governance system of the WHO, so it is fit for purpose for the next, inevitable global health crisis.

VI. 40 YEARS LATER, WHAT IS OUR SHARED MULTILATERAL AGENDA?

Let me conclude, if we look ahead to our shared global agenda, here are four things I know we will be working on in the coming months and years with American colleagues in the multilateral institutions:

A. Cyber

We will be working on the applicability of existing international law and identifying gaps to advance state behavior in cyber space and cyber crime through the UN, through trade agreements, and bilaterally. We will need the help of the expert community represented by the Institute.

B. The Arctic

It is our planetary new frontier. Canada and the United States are close Arctic neighbors joined by coastlines and history (who did find the North West passage?!). But so is Russia, who is Canada's closest northern neighbor. After twenty years, the Arctic Council remains a critical institution addressing the rapidly changing northern environment.¹⁶ We must ensure it remains fit for purpose. There are newcomers who believe they too have a stake in the Arctic. The sustainable development of the Arctic relies on the development of the highest standards and rules to manage and steward its economic and political development and the critical involvement of the people who make it their home. As Chair of the Arctic Council until 2017, the United States will play a pivotal role with Canada and others in setting the tone and the conditions for the Arctic.

C. Space

Outer space is also a key part of our future and shared cooperation. With twenty-two thousand manmade objects and hundreds of thousands of debris objects in space, more states with capacity and space assets and now over fifty state and private actors in space¹⁷, together, we are working to determine how the

¹⁵ See, generally WORLD HEALTH ORG., ZIKA STRATEGIC RESPONSE FRAMEWORK & JOINT OPERATIONS PLAN (2016).

¹⁶ James F Collins et al., Arctic Council Initiatives to Sustain Arctic Cooperation, <http://carnegieendowment.org/2015/04/20/arctic-council-initiatives-to-sustain-arctic-cooperation>.

¹⁷ Steven A. Hildreth and Allison Arnold, Threats to U.S. National Security Interests in Space: Orbital Debris Mitigation and Removal (January 8, 2014).

terrestrial norms and rules of law and engagement apply in this increasingly crowded, competitive extraterrestrial world. I can say that at this moment in time, the views of the state actors are far from aligned but can we not envisage a day when Treaties, Conventions and norms will provide the underlying foundation for opportunities as well as limitations in space? This too is the work of the Institute's scholars.

D. Weapons and Technology

Let me end with weapons. When I was a law student, I did not really contemplate a time when so much of my waking hours would be taken up with weapons systems – both small and big weapons. Working around the world in conflict areas for many years meant I have had too many pointed at me not to respect them, but now I live in a world where we are working hard to limit the proliferation of the existing ones and to get out ahead of the new ones coming our way. With my U.S. colleagues and other like minded, we are working together to develop new frameworks for weapons like LAWS (“Lethal Autonomous Weapon Systems”) that bring together International Humanitarian Law, International Human Rights Laws, ethics, philosophy, and just plain old weapons discussions.

What can we apply from current precedents on nuclear, biological, or small arms weapons and what if any legal gaps and norms need to be anticipated? If we are unsure yet what these autonomous weapons may do, do we need to wait for them to come out of the research and development facilities or can we already say whether there are no-go areas? These are the debates that are taking place among governments, among civil society actors, and quite certainly among non-state actors everywhere.

Suffice it to say that the work of the Institute must continue another forty years. I would encourage you to continue to look not only at the bilateral relationship as it evolves, but going forward also at how that bilateral relationship is shaping and in turn being shaped from a multilateral perspective and multilateral engagement.

I started with a quote from a U.S. president – let me end with a quote from our Canadian Prime Minister Justin Trudeau recently in Washington: “Fear is easy. Friendship? That takes work. But Canada and the United States have proven, time and again, that finding common ground is worth the effort. On our own, we make progress. But together, ... we make history.”¹⁸

Thank you very much for your attention and for bringing me back to this important place that most decidedly shaped my world-view.

¹⁸ Megan Fitzpatrick, Trudeau to U.S. ‘Fear is easy, friendship takes work,’ CBC News (March 11, 2016), *available at* <http://www.cbc.ca/news/politics/trudeau-washington-friday-arlington-canada2020-departure-1.3486651>.