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## Conference Opening The Management and Resolution of Cross Border Disputes as Canada/U.S. Enter the 21st Century

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## CONFERENCE OPENING

*Henry T. King, Jr.*

Thank you very much, Sidney. It is always a pleasure to be here. I feel more secure and sleep better with Sidney at my side.

This is a historic conference. It is historic because it is timely and opportune as we move into the new century to examine the relationship between the two top trading partners in the world. Canada and the United States like and need each other, but we value our separateness. As long as that separateness exists we shall always have disputes. We can improve the handling of disputes, but we cannot eliminate them.

This is the sixteenth in this series of conferences dealing with the relationships between law and economics in the Canada/U.S. context. When we opened our first conference in this series in April 1985, which dealt with the legal aspects of sectoral integration between Canada and the United States, Donald Macdonald was our first speaker. He is here to my left. At that time the Canadian/U.S. relationship was heavy with long, frustrating economic disputes. With his recommendations to the Canadian government as set forth in the Macdonald Report, Donald Macdonald led the way to integration on the North American continent in the form of what was to become the Canada/U.S. Free Trade Agreement, and following that, NAFTA. In our first conference, there was talk of sectoral integration as a first step, but our two countries were not satisfied with that limited step. Our two countries wanted broad scope economic integration in the form of a tariff-free context.

So much for the backdrop of the conference. Now, to the conference plan. First of all, through the eyes of Jim Blanchard, former United States Ambassador to Canada, and Donald Macdonald, we shall take an overview of where we stand in Canadian/U.S. cross-border management and the settlement of disputes, and look at where we have succeeded and where we have failed. This will be an eagle's eye view from on high context as it stands today.

The next session will deal with the roles of law and diplomacy in Canadian/U.S. dispute resolution. Both law and diplomacy have roles to play. Diplomacy operates in a friendlier context where what happens is always within the control of the parties. But law, by comparison, frequently offers the potential bite, which enables matters to move along. Davis Robinson and Leonard Legault, both former top legal advisers of the United

States and Canada, will lead us in this discussion. Leonard Legault is currently the Canadian Chairman of the International Joint Commission. We will be looking at the International Joint Commission as a possible model for use in other contexts in addition to its current jurisdiction, which derives from the Boundary Waters Treaty of 1909.

The politics of cross border dispute resolution will be a focus at our luncheon session on the first day of the conference. Selling the public on proposed solutions to cross border problems is critical to the acceptance of such solutions and to their permanency. Bob Rae's observations on this critical topic are eagerly awaited by all of us.

Chapter 19 of NAFTA and its predecessor in the Canada/U.S. Free Trade Agreement are unique. There are no parallels to it anywhere in the world. Chapter 19 of NAFTA deals with private party appeals from government rulings that are heard by bi-national panels consisting of panelists from the countries of the disputing parties. We will be looking at how well the panels are working through the eyes of Richard Cunningham and Simon Potter, and discussing whether changes are needed.

Chapter 11 of NAFTA is unique. It gives private parties arbitral recourse against governments violating NAFTA's investment provisions. There is far more current interest in remedies available in this provision than ever was anticipated, and much potential litigation under this provision is underway. David Haigh and Dan Price will be our guides in leading us through this thicket.

A vital element affecting Canadian/U.S. dispute resolution is the role of the media. This will be our focus for this evening session of the first day of the conference. What we shall be looking at in this session is how the media views the handling of disputes between Canada and the United States. Is sufficient attention given to the handling of disputes early on before the name-calling ensues? How do both parties respond to the closing off or facilitation of possible solutions to cross-border controversies? Courtney Tower of the U.S. *Journal of Commerce* and Peter Morton of the Canadian *National Post* will be our speakers at this session.

On the second day of the conference, we will start with the role of states and provinces in cross-border international trade. This topic is of growing importance as states and provinces flex their muscles by conflicting with federal policies. Our speakers in this key session will be Matthew Schaefer of the United States, and Carl Grenier of Canada.

Canada and the United States continually conflict on the application of U.S. trade controls toward Canadian firms. There have also been conflicts in defense trade matters involving the application of U.S. security controls

toward Canadian bidders for U.S. defense contracts. Terry Murphy and Douglas Forsythe will be our speakers at this important session.

Our luncheon speaker will be Guillermo Aguilar Alvarez, who played a key role for Mexico in negotiating the establishment of dispute resolution provisions for NAFTA. He will give us the Mexican view on the operation of the NAFTA dispute resolution procedures. NAFTA has now been in operation for approximately seven years and this view will be of importance.

Food safety and international trade are important issues today, not only in the current Canadian/U.S. context, but also in the world context. The question is whether trade barriers are artificial, set up to protect domestic producers, or is in fact based on genuine safety concerns. This question is in growing importance in the world today. We are fortunate to have as our speakers for this session Shirley Coffield of the United States and Serge Frechette of Canada.

In a day of significant increases in merger activities and an activist U.S. anti-trust regime, cross-border Canadian/U.S. cooperation in anti-trust investigations and enforcement activity is important to private parties with establishments in both countries. To enlighten us on this subject we have key officials from Canada and the United States. Debra Valentine is from the U.S. Federal Trade Commission and Konrad von Finckenstein is the head of Canada's Competition Bureau. Both are top anti-trust officials in their respective governments and will be our speakers in this important subject area.

Cooperation between U.S. and Canadian officials is important, but what is the implication for U.S. and Canadian private parties? A continuing problem for Canada during this information age is Canada's desire to maintain its own cultural identity. Both countries support the free flow of information across their borders, but at what point does this free flow of information conflict with Canada's cultural identity objective? Hamilton Loeb and Kenneth Stein will lead us in our consideration of this persistent and potentially explosive issue.

Our Sunday morning session will focus on looking ahead. During this session we will address the question of whether additional institutions are needed to deal with the intensifying Canadian/U.S. relationship, or whether we can continue to move along more pragmatically and deal with issues as they arise. Brad Smith will be our leader in this discussion.

Our charter for this conference is clear. It is time for taking stock, to determine where we stand at this point in the management resolution of cross border disputes. We need to look at things as they currently are and determine whether there are gaps that need to be filled. If such gaps are found we need to discuss how to fill them. An obvious question is whether

further institutionalization of the Canada/U.S. dispute resolution process is required.