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Discussion after the Speeches of Charles Levy and W.L. Hayhurst

Discussion

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Discussion After the Speeches of Charles Levy and W.L. Hayhurst, Q.C.

QUESTION: *Professor King*: I have a question in connection with the enforcement of the NAFTA provisions on intellectual property and also the GATT provisions. These provide sanctions. There is an element of time that you are concerned with if the violation goes on. The private party is presumably losing money at this time because the intellectual property right is violated. Also, I assume that the government is the one that takes action. How do these NAFTA and GATT provisions compare with the sanctions of 301, which permits U.S. retaliation against countries that violate our intellectual property rights?

I am concerned with the enforcement of intellectual property rights. I think that this is an important step in NAFTA and the GATT. But although some countries have laws on their books preserving the intellectual property rights, traditionally they have not been as effective in enforcing them. Does either one of you want to comment on that?

ANSWER: *Mr. Levy*: I think that your question actually is great because this is something businesses are constantly talking about. There was some discussion on this issue that I mentioned at the end about private parties having standing. There has even been some discussion about whether you could build a damages provision into dispute settlement. I think that is a long time away, but interestingly, enough, at least when I worked with a lot of multinationals in the United States on the concept of a GATT agreement, they were less interested in the 301 process on intellectual property and the possibility of trade sanctions under the GATT. They were more interested in the GATT, ultimately the specter of having possible trade sanctions would raise the level of enforcement in individual countries.

That is the interesting part of both the NAFTA and the GATT agreement. Not only does it have a section on standards of intellectual property protection, but it has almost an equally long section on standards of enforcement. And that is something unique in an international agreement where you are not only saying your laws have to look like this, but once you have those laws, you must do certain things to enforce them. I think what companies were looking at in that context was the damages question. The most effective way to protect your intellectual property is not a border control where you have to chase somebody around the world and get a 337 case, or some sort of injunction in Europe or Japan. The most effective way is to go into the country where the pirate exists and shut it down permanently. You can do that if the country has a good intellectual property law and enforces it. So it

is actually a more direct way to get at damages, hoping you would not have to use the dispute settlement process.

Having said that, I think there is always going to be the case where a country is not enforcing its law or living up to its obligation to impose standards. And I think the issue of damages in the international agreement context is going to be one of these things that people are going to start thinking about in the next decade.

QUESTION: *Mr. Doh*: My question is directed to the moral versus economic issue in terms of what motivates us to be defending our intellectual property regime in a way that may be inconsistent with international trade obligations. My question refers to two specific U.S./Canadian disputes; the first is the long-standing U.S. complaint regarding the Canadian policy of compulsory licensing of pharmaceuticals. I think Canada was unique among these types of countries for having such a policy. We had a place for Canada on our special 301 list. We complained about the Canadian policy, and we included provisions in NAFTA and GATT that would have prohibited it. Canada went ahead on its own and got rid of the policy. I am curious in that regard, whether Canada did so for moral purposes, or whether Canada is primarily in a moral rebound; moral reasons, because of the distribution of low-priced pharmaceuticals. I perceive it to be integral to the Canadians in terms of their health care but also because Canada wanted to crack pharmaceutical investment. And it seems to me that they were killing the fact that we changed that policy. So I would like to know what you think was motivating the Canadian decision there?

Secondly, Canada has earned its way back on the 301 list, after having been off it a year under intervention regarding proposals in the magazine industry, policies on the votes that restrict distribution of U.S./foreign bureaucracies of the country, as well as a proposed set of policies with the results of the task force. Now that Canada is back on the list, how do you anticipate the way in which that may play out?

ANSWER: *Mr. Hayhurst*: On the compulsory licensing of pharmaceuticals, the motivations of the Canadian Government were very well concealed, as Charles has pointed out. They were very well concealed from the opposition parties who were fighting against the lifting of the provisions for compulsory licensing under generics. It was all part of a political battle, of course. The administration at the time was the conservative administration under Prime Minister Brian Mulroney, who some people characterize as a pet of the President of the United States, as against Jean Chretien, a liberal who was then trying to fight everything that came up, regardless of what he might do ultimately to be elected. But motivations were very difficult to perceive. This came up after the so-called Dunkel Text had been published, which was really the forerunner of the ultimate GATT agreement, and the forerunner of the ultimate NAFTA agreement on intellectual prop-

erty. And the government said, "Look, this is in the works now and we are going to have to comply with this eventually." That was the government's justification, and they said, in fact, "We are going to stop any compulsory licensing on applications filed after the publication of the Dunkel Text, which was a long time before GATT or NAFTA were signed. That raised the ire of a lot of people.

But pharmaceutical prices, of course, are at the root of the problem. Early on, before we got our legislation, there was some muscle against the pharmaceutical companies. There had been analyses by economists about the comparative prices of pharmaceuticals in Canada as against the prices in other jurisdictions, and they were found to be too high by comparison. And so we set up a patented medicines appeal board to regulate the price of pharmaceuticals. And concurrently with abolishing the compulsory licensing available to generics, the powers of this board to control prices were strengthened. It is possible, if analysis shows that prices are out of line, that the board may take action against the pharmaceutical companies and affect their patent rights and so on.

I cannot get into all the details of that, but it was a very mixed bag of things that motivated the government. But I think it was really a pharmaceutical price argument, in addition to the employment opportunities that the generic companies had now managed to establish in Canada. They have brought forward some very persuasive arguments that they are now employing a lot of people. This has benefitted the Canadian economy a lot. Against that, however, were undertakings by the multinational pharmaceutical companies to increase investment in Canada. It is a very long and complicated problem.

Finally, if I could turn to the book problem, as I mentioned to Joe Bauer during informal conversation yesterday, when we were negotiating CFTA and Canada kept complaining about cultural integrity and so on, the American negotiator did not seem to understand what we were talking about. And the best explanation I have is that every time we talked about cultural policy, we were meeting generally in Ottawa, and of course, Americans could not understand what is cultural about Ottawa.

QUESTION: *Mr. Robinson:* Just a small technical question for Bill. Do you think that in order to comply with NAFTA, it is going to be necessary for Canada to do anything in the nature of a trade secrets statute, or will Canada just continue with our rather "hit-and-miss" common law protection?

ANSWER: *Mr. Hayhurst:* We had a federal provincial group that worked on a draft of a trade secrets statute, but under our Constitution, this would have to be done province by province. And we have seen the experience in the United States with that, where although you have a so-called *Uniform Trade Secrets Act*, nevertheless, the acts that

are brought from state to state are not necessarily the same.

Then there was the federal jurisdiction over criminal law proposal and it was proposed not only to have a proposed provincial statute for the civil side, but also a criminal provision under the federal jurisdiction for that. But the proposal was so flawed in many respects, that it is been dropped and disappeared.

Personally, I think our common law and equitable approach is perfectly satisfactory. And although we have problems with Quebec where common law does not apply, it is surprising how the same principles are applied in Quebec as well. So for me, that is a dead issue.

QUESTION: *Mr. Robinson*: Is it for Mr. Kantor?

ANSWER: *Mr. Hayhurst*: Oh, I cannot speak for Mr. Kantor. I do not know. I should think that reasoned argument with Mr. Kantor might persuade him, but I do not know the man, so I cannot tell you.

QUESTION: *Mr. Robinson*: Does this not lead right into what Canada agreed to do — namely, to enforce the provinces to comply with NAFTA? We will see if Ontario's actions will overrule the labor provisions of the case. But I think that on a straight black letter reading of NAFTA, if somebody says, "I found my protection inadequate," we are obligated to cooperate as necessary so that we can meet our NAFTA obligations and have statutory protection; that would be the argument. I am just curious to know whether Washington is pushing that, or whether they are content with what they have.

Mr. Hayhurst: I do not know whether Washington is pushing it. If they are, I think it is misguided, and I do not think that they have a persuasive argument at all that Canada's law related to trade secrets and confidential information is inadequate. It is developing. It is an area which needs to develop. To freeze it by statute, I think would be a great mistake. At least if you have a statute, I think you would want to have the common law and equity also available.