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Closing Remarks

Henry T. King, Jr.

This is the time when we discuss ideas for future programs of the Canada/U.S. Law Institute. Our programs have covered many topics, but a number of subjects remain unexplored and we live in a changing world. I would like your suggestions as to topics. One topic that interested me was referred to in the technology session yesterday, when we were discussing industrial property rights. The topic we could address is promoting and protecting the development and the flow of innovative technology.

You have heard what Charles Levy said in the discussion with Bill Hayhurst. He was talking about looking at a new technology context, new ideas, and innovation. This is where the world of the future lies; how do we protect this innovation? What are the continuing and new influences on the flow and protection of technology?

There are some technologies that will not be protected by the Uruguay Round of GATT, such as biotechnology. There is also the problem of counterfeiting in other areas of the world. The U.S. and Canada have lost an awful lot of royalty and sales revenue, because of this. But now there is a possibility of U.S. retaliation, where a country does not protect our technology.

We live in a world of changing ideas affecting trade in goods and services. Particularly in this new world this is a possible topic. It is an umbrella topic, because it can bring in trade law, tax law, dispute resolution rules, in fact all of the specialized legal and economic disciplines that we are concerned about. NAFTA has brought new possibilities in this area with its provisions on technology protection. We could also look at the result of revised GATT and what the effect of the accession of new countries to GATT will be on the protection of technology. There is also a Mexican angle to it, which could be covered at the conference.

I am going to just list some other possible topics. One possibility is law and policy in North America, that is, how we develop our policies and how we make our laws. We can review Canadian and U.S. legislative procedures and compare our respective systems.

The impact of lobbies, such as the National Association of Manufacturers, which was represented at this conference, is another possible topic. Whether it is too narrow or not, I am not sure, but it is one that is worth examining.

Another possible topic would be taxes. Here we could look at the

total tax context in the United States and Canada, and we could break it down into levels and varieties of taxes. One subject area, for example, would be the impact that taxes have on trade and investment between the two countries. Another aspect is how the tax structures in Canada and the U.S. compare with competitive countries, such as Germany and Japan. We can look at the impact of U.S. and Canadian taxes on income derived from overseas operations, and we can consider what legislative and regulatory changes could be made to make us more competitive with our primary competitors in Germany and Japan.

I also have considered doing a NAFTA update: the impact of NAFTA in operation and its effect on the trade of goods and services in the North American area, and the problem of investment protections, as reflected in the NAFTA investment provisions, protecting investments originating in NAFTA countries. We could also explore the ability of private parties to get recourse for violation of the NAFTA investment rules through arbitration. The main problem here would be to make it different from the garden variety of conferences that will be held on NAFTA.

But we can also look at the problem of accession of other countries to the NAFTA treaty, such as Chile, which has already applied for membership — and others which might at any time apply if encouraged to do so — such as, Venezuela and Columbia.

I want to get some reaction from you people as to these possibilities. We will make no decision on it right now but we will try to look ahead, and see what will be important to the world, and to our people in Canada and the United States in 1995. We try to discuss big picture issues which are mind expanding, together with some bread and butter informational topics.

Ron Brand had suggested a very intriguing topic, which would address the impact of international conventions on trade and investment in Canada and the United States. Here he is talking for example about the impact of the U.N. Convention on the International Sale of Goods. We would examine how that has changed the context in terms of the way in which we operate in terms of international sales contracts. Another convention would be the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and agreements to arbitrate. There are a number of other conventions, we could look at, such as, the International Convention for Settlement of Investment Disputes. We could perhaps update their impact in a time of an expanding world economy.

There are a number of other conventions that Ron mentioned to me conversationally. Our primary focus would of course be on how these conventions impact trade and investment in North America, and what does the future hold in this regard?

These are just some ideas to get the discussion going. We are cer-

tainly open to suggestions; we want to make the conference as responsive to the world in which we live as possible.

COMMENT: *Mr. Langmack*: The non-governmental organizations (NGOs) have been becoming increasingly important in international trade, and they have an impact and are very encompassing. They are extremely strong in this country, in Canada, and Mexico. Furthermore, they have an impact in a variety of areas, from labor to environmental, to legal, to tax.

They have an overall broad effect on international business, and also on the relations not only between Canada, the U.S. and Mexico, but throughout the world.

We have seen what NGOs do to GATT; we have seen what they have done to NAFTA; we see what they do all around the world. The NGOs are becoming more and more a force in the international community. I would think maybe this is the kind of umbrella you are talking about, which would be of interest, and provide a real forum.

COMMENT: *Professor King*: Well that is worth looking at, and certainly Dorinda Dallmeyer would be interested in that.

NGOs are a topic where you are looking at the constituencies, because we find that constituencies affect very strongly the flow of events, as they did in the NAFTA negotiations on the environment and labor. That is a possibility which we certainly would examine.

COMMENT: *Mr. Harvey*: One of the things that has occurred to me during this Conference, is the subject of a need for reform and harmonization of laws. That could be approached from multi-faceted point of view, including NGOs, which are very active in that area.

You need only look at U.S. corporate law and what is happening to the board of directors role. I do not know what is happening on the Canadian side, and I do not know what is happening on the Mexican side when looking at this from the point of NAFTA.

The reform and harmonization of laws provides an umbrella topic which could help us be fairly reactive in terms of individual speakers and subject matter.

COMMENT: *Professor King*: That topic also identifies mostly differences between the countries as they try to harmonize. For instance, our intellectual property laws have been traditionally different from Canada's, because of the difference in Canadian treatment of pharmaceuticals. That is a very good possibility.

I did want to ask Bill Hayhurst if he has any comment on the idea of the conference on promoting and protecting the flow of innovation in the Canada/U.S. context? Do you have any thoughts on that?

COMMENT: *Mr. Hayhurst*: Lawyers talk about it regularly in the ABA, and various organizations run by Americans and attended by Canadians and NAFTA are bringing us closer together. The Canadian and the U.S. interests are converging very much. They are forced to

converge in fact by the NAFTA and by the GATT arrangement.

I think that if you were to bring this up in this organization, you would probably find, if you got any of us intellectual property guys together, that we are all talking about the same thing. You might, however, be able to draw in some people who are not from our intellectual property clan and who might challenge us on competition law. I am much more attracted to the NGO type of approach, than to the sort of thing we intellectual property lawyers have been working on within our own groups.

Now, that is of course subject to views that others may have here. That is just a personal opinion, taking it more or less off the top.

COMMENT: *Mr. Shanker*: I would like to amend perhaps what was said. Innovation means much more than patents and trademarks. They make product liability studies in terms of what it does to innovation. It seems to me it would be an excellent topic. But this conference wants a broader base than what a particular institution or treaty says. It should go beyond technicalities.

COMMENT: *Professor King*: What you are talking about is that if it was an innovation conference, it would be just the technicalities. You would want a broader sweep, including product liability. You would want to discuss the promotion of innovation, and changing patterns of innovation.

COMMENT: *Mr. Ryans*: Let me add to that, because I think the sort of issues that you could bring up are those related to the fact that technology development has far outstripped just the ability to manufacture many sorts of things. We could cover areas like software. Then we would be getting into issues of privacy. This is one of the issues that is becoming very important in Europe, and I think it is going to become a concern here. I do, however, like the topic on the need of reformation of laws, as well. So we have two good topics.

COMMENT: *Mr. Brand*: As a conclusion here, this concept of innovation, in a broad sense, does encompass the kind of thing I was talking about. The concept I had envisioned involved looking at what the forces were and where they originated. There is a great deal of innovation in the trade and investment area, not only in conventions, but also in some of the longer lasting NGOs. There is the opportunity then to put changing rules governing the trade and investment under the heading of innovation. We could explore the innovative ways in which we are developing the kinds of rules we use to govern even basic transactions these days.

COMMENT: *Mr. Yosowitz*: I just wanted to make a suggestion for a conference for two or three years from now. I think NAFTA would be a good topic in two or three years, but I think it is still too early to talk about it.

COMMENT: *Professor King*: I do too. We need to have enough

experience base.

COMMENT: *Mr. Yosowitz*: Yes, but I do not think we have had enough experience yet.

COMMENT: *Professor King*: So, in other words, for next year, innovation would be a big umbrella topic. Then we could do some mind expansion together with some bread and butter issues.

We could do it in a unique way, as it impacts the Canada/U.S. contacts. Our friend Chuck Levy made some very important points; that there is an awful lot of change taking place in the way we live, in the way we conduct our transactions, and also the types of technology that we are concerned with.

It would be a conference with sweep and scope, and we could discuss a variety of alternatives. We could also include the NGOs as one of the issues to consider.

COMMENT: *Mr. McCormack*: In his speech, Chuck Levy mentioned venues for individuals bringing suits against governments. I talked to him about it afterwards, and he seemed to think it was just fine to bring suit in whatever country the injury occurred. That strikes me as sort of a typical American approach, but it probably will not be the case as the NAFTA organization continues to grow as it encompasses countries further south, such as Central America and Latin America.

We might want to explore issues of establishing an institution not unlike the European Court of Justice to hear some of these debates and developing codes of procedure. This gets into some interesting comparative law points. For example, right now we seem to be leaning towards the common law system, but you do have distinct code elements in the Mexican code and the Quebec code, and as the Latin American countries start joining, the balance of power will tilt towards the civil codes countries.

That is something very foreign to America and American lawyers, and it might be very interesting and far reaching, far forward looking, to examine establishing some sort of a compromise between common law and code law.

COMMENT: *Professor King*: I think that is a big topic. What I am wondering about, following Sandy's suggestion, is whether that issue is another year down the pike. No decision has been made on this, but one point would be to recognize that the American Bar Association/Canadian Bar Association/Barra Mexicana working group, of which I was U.S. Chairman, recommended a North American trade tribunal.

I think that is a valuable suggestion, but maybe we have to have a greater experience base before we tackle that. NAFTA is an issue we have to discuss sometime, and it is a big question of whether a treaty that will have been in effect a little over a year, would have enough in

it, so that we would not be just reading treaty provisions. We want an experience base under which to develop our ideas.

I am intrigued by the tax thing. The main problem there is to make it interesting, and I think our tax people yesterday did a remarkable job of making taxes very exciting. Bob Brown's charts were fantastic and David Rosenbloom did an excellent job, but I wonder if we could do taxes for a couple of days and not lose any of our audience.

Tax intrigues me; I am always sort of in favor of addressing tax issues, but my hand has been stayed a couple of times when I tested people like our directors on doing a conference on something like tax.

Anyway, I wanted to publicly thank the speakers for doing a remarkable job in communicating some very complex topics. We looked over the hill and into the future. We looked forward, we tried to anticipate problems, and I think that we got plenty of meat into our discussions here. I want to thank some of those who were helpful.

First of all I want to thank my good friend and colleague, Sidney Picker, who stepped in when I had the bypass surgery. It was indeed a pleasure to sit in the audience and just ask questions, and to have Sidney on the platform.

I also want to thank Adria Sankovic for her tremendous work on the logistics of the conference. It was wonderful knowing that Adria was prepared to step in and organize this conference so extremely well. She was ably assisted by Sarah Moore and the help that was given and the work that was done was quite unique under the circumstances.

Saleh Awadallah, the outgoing editor of the *Canada/U.S. Law Journal*, was with us from start to finish. He not only is solid in terms of his understanding of the arrangements for the conference, which he also helped tremendously on, but he also, together with Afsaneh Azar, the incoming editor of the *Canada/U.S. Law Journal*, put together a marvelous book of materials. We owe Saleh a debt of gratitude.

I think our business for the day is concluded.

COMMENT: *Mr. Shanker*: You did not mention the person who is the key man in putting this together. We should thank our chairman, the first chairman and the one to be chairman for many years, Henry King.

COMMENT: *Professor King*: I had the pleasure of participating as a speaker in this Conference. I was fortunate to speak on a topic that I very much love and enjoy, but about which we also want to do something. And so it was my pleasure.

I think that we have had a successful Conference; the comments that I heard were laudatory. What you do when you are winning is you adjourn.