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Introduction and Conference Opening

by Professor Henry T. King, Jr.
Conference Chairman*

As your Conference Chairman, I am pleased to welcome you here today for what promises to be a very significant and special Conference. We'll be breaking some new ground here and it should be fulfilling for all of us to explore a context which has not been examined in depth before. This will be a participatory Conference. We have purposely limited the number of participants so that we get as full a participation from all of you as possible. I solicit your help in that regard so that the record of this Conference will be as meaningful as possible. Specifically, if there are questions or issues which you think need clarification you should not be reluctant to raise them. That will contribute significantly to the record of this Conference.

Now just a word about the Canada-U.S. Law Institute, which is the sponsor of the Conference:

The Canada-United States Law Institute was formed in 1976 by Case Western Reserve University School of Law in Cleveland, Ohio and the University of Western Ontario Faculty of Law in London, Ontario. The idea for the Institute originated with Professor Sidney Picker of Case Western Reserve School of Law. The theoretical underpinning of the Institute is its recognition of Canada and the United States as two neighboring common law originated countries each of which undertook a different but related historic path, developed its own unique federated structure, and established its own constitutional foundation, thus providing an ideal basis for maximizing the advantages of comparative legal studies. As each country is the most important trade, investment, and industrial partner of the other, careful examination and appreciation of the transnational impact of their legal regulation is warranted.

Accordingly, the Institute established the first formal continuing program in either country designed to use the legal systems and structure of the other for comparative and transnational law purposes as part of a process of legal education in both countries. This was done in a number of ways, one of which was the organization and sponsorship of conferences on subjects of interest to the legal communities in both countries

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(e.g., post-Tokyo Round, Tax, and Acid Rain conferences). During the initial years of operation, the primary focus of Institute activities was directed toward the use of comparative law for educational purposes within a five part setting. This included, in addition to the conferences: student exchanges, faculty exchanges, research grants and a scholarly journal—The *Canada-United States Law Journal*.

In 1984, the William H. Donner Foundation awarded the Institute a grant to underwrite three conferences which would focus on the relation between law and economics in the Canada-U.S. context. Given the level of economic interdependence of the two countries, the focus of the grant seems most appropriate.

The first Conference underwritten by the Donner Foundation grant dealt with the Legal Aspects of Sectoral Trade Integration between the United States and Canada and was held in Cleveland, Ohio in April, 1985. Proceedings of this well-attended Conference, which attracted considerable attention in both countries, have been published in the *Canada-United States Law Journal* (Volume 10) and will be useful to those negotiating the proposed free-trade arrangement between the United States and Canada. It is anticipated that Simon Reisman of Canada and William Merkin of the United States, who were speakers at this Conference, will play a key role in the forthcoming free-trade negotiations.

Technology is the name of the game in this ninth decade of the twentieth century. And the countries where its forward thrust is greatest are those which dominate the world. Technological progress is moving forward in both the United States and Canada and both are important participants in this increasingly technologically oriented world. They are close trading partners and technology plays an important role in that trading relationship. But they are also separate entities and their relationship is subject to change. This Conference will examine that changing technological interface.

Today, both Canada and the United States are facing increased competition from Japan in the world markets. A key element is Japan's success in competitive technology. Therefore, American and Canadian policies with respect to the creation and effective utilization of technology must be a key element in any North American response to the Japanese thrust. Here, the two countries have a commonality of interest.

However, while it is true that Canada and the United States have a common concern with technological competition from Japan, there are still differences between them in the area of technology. These center around the fact that the United States is a net exporter of technology and Canada is a net importer. This is a factor which is bound to shape the policies of the two countries vis-a-vis each other. It must be kept in mind at all times when considering the technological relationship which this conference will address.

A key to technological development is intellectual property protection. Intellectual property generally acts as an incentive for the creation of new technology. It defines the rules by which technology is sold and acquired. Also, intellectual property is important to the development of trading relationships. For example, the international patent system acts as an important means of securing export markets for new products.

The role which intellectual property plays in international trade relationships is currently receiving increased attention. Intellectual property is on the agenda for the bilateral trade talks between Canada and the United States. Furthermore, Canada and the United States have participated with the EEC and Japan in discussions concerning the possibility of placing intellectual property protection on the agenda for the next GATT round.

Now, to the substance of the program itself. First, we'll be drawing the broad strokes when we look at the relationship between intellectual property and trade from both the Canadian and United States perspectives. The Honourable Michel Côté of Canada and Harvey Bale, Assistant U.S. Trade Representative, will be our speakers at this opening session and their remarks will provide a backdrop for our succeeding sessions.

Then, at our next session, we will look at the Canadian and United States legislative infrastructure for the protection of intellectual property through the eyes of James Keon of Canada and Michael Keplinger of the United States.

There are differences between the two systems and we'll be looking at these differences with Bill Hayhurst of Canada and Roy Jackson of the U.S. in our afternoon session. Technology is fast changing in the modern world and new types of technology are emerging: computer programs, semiconductor chips and software, and biotechnology and genetic technology are just a few examples. Among other things, we'll be looking at the differences between how the two countries protect these new types of technology. We'll examine these differences and their current and possible future impact.

Canada and the United States seem to be moving to a closer trading relationship. Anticipated negotiations, if fruitful, will remove some of the current barriers to trade between the two nations. Discussion of the effect of intellectual property on trade will likely form part of these negotiations. And here, the EEC experience is relevant. At noon we'll be looking at the relationship of Intellectual Property Rights to cross border trade in the EEC. Our luncheon speaker will be Professor Hans Smit, a native of the Netherlands and a prolific and knowledgeable writer and speaker on the EEC.

In the evening of our first day we will consider the results, in terms of Canada's technological development, of the interventionist policy of the Canadian government in foreign investment. This policy was incor-

porated in the Foreign Investment Review Act, which called for the evaluation of prospective foreign investment in terms of whether it represented a significant benefit to Canada. One of the key criteria weighed in determining whether this test was met was whether the proposed investment would bring new technology to Canada. We will be looking at whether that policy did, in fact, contribute to Canada's technological development or hinder it. Gordon Dewhirst and James Spence will develop our frame of reference for evaluating the results of this policy. They will also be evaluating the results of the new and more friendly Investment Canada regime, which replaced FIRA in September, 1985.

We'll start our second day with a look at how U.S. export controls affect Canada-United States trade. These export controls, of course, apply to U.S. exports of technology as well as products. Although Canada occupies a special favored place in the U.S. export control context, these controls do affect Canada in a number of respects. We'll be looking at the specifics in this regard with Arthur Downey of Washington, D.C. and Jon Fried of Ottawa.

Technology transfers between the U.S. and Canada have tax impacts on both sides of the border. The dollars involved are very large because of the number and scope of the transfers. We'll examine technology transfers from both the U.S. and Canadian tax standpoints with George Goodrich and Robert Brown as our speakers.

At noon we'll be looking at what the U.S. can do to help Canada achieve her technological policy goals. Carl Beigie, who was born here in Cleveland and who is now an adopted Canadian, will look at the U.S. potential role in this regard. This will both be a stocktaking and a look at what the future might be for Canada if the U.S. potential in this interface becomes a reality.

In the afternoon we'll be back to particular aspects of the intellectual property regimes in both countries. Specifically, we'll be looking at challenges to patent and trademark validity in the U.S. and Canada. With the help of Roger Hughes of Toronto and Paul Plaia of Washington, we'll be examining the differences in this area between the U.S. and Canada. Of special interest in this regard is Section 337 of the Tariff Act of 1930 which finds no parallel in Canada and which is a very active statute at a time when the U.S. is in serious trade difficulties.

In an increasingly technically oriented world the free flow of technical data across borders becomes more and more important. We have already witnessed a number of restrictions on cross border data flow between certain countries and while we hope these restrictions do not increase, the fact of the matter is that they probably will. Dr. Peter Robinson and Hugh Donaghue will set our frame of reference in this area.

In the evening of our second day we'll be returning to the question of government intervention in the technology relationship. Various pro-

posals have seen far greater government intervention in technology transfer arrangements between Canadian and foreign firms. The wisdom of such intervention and the forms it might take will be considered by Professor Donald McFetridge and Dr. Stuart Smith.

On Sunday, our final speaker will be John Roth, President of Bell Northern Research, Ltd. He'll be speaking on a subject he's intimately familiar with: Managing with Technology the Future of North American Business. John Roth heads up Canada's largest privately owned research facility and he'll be taking us on another journey into the future. As an active leader in the field of research & development and high technology, his remarks will assume special significance.

Our final session will include discussion of the problems and issues raised by the Conference. I'll be leading this session and your input as knowledgeable participants will be critical.

The record of this Conference will indeed be important. That is why I will stress your active participation to the maximum extent possible. The *Canada-United States Law Journal* will publish these proceedings and they will be widely disseminated. The quality of this conference and publication will be very important in the Canada-United States context.

My thanks to all who helped in the preparation of this program: Ned Ellis of the Department of Consumer and Corporate Affairs Canada, Clive Allen of Northern Telecom, Paul Carmichael of IBM, Dan Hall of Firestone, and Jack Quinn of Osgoode Hall. Their help has been invaluable. Further, I want to thank David Meany, a law student at Case Western Reserve, who was my right hand from start to finish on this whole program. Above all, thanks are due to the William H. Donner Foundation which has funded the program.

