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## Closing Remarks and Discussion

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## CLOSING REMARKS AND DISCUSSION

*Professor Henry T. King, Jr.*

*COMMENT, Mr. O'Flaherty:* I have talked to a couple of people about some harmonization that is going to be required, particularly in the chemical industry, if there is going to be free-trade between the United States and Canada. It makes it very difficult for us when Canada goes one way and the U.S. goes another on a simple issue such as cyclamates versus saccharine. In one country you have to use one and in the other country you have to use the other. We have run into a lot of those problems and until those things are addressed, you really are not going to be free to move your goods back and forth across the border.

*COMMENT, Professor King:* That is a controversial and sensitive area on both sides of the border—one that must be focused on.

*COMMENT, Professor Knopf:* Professor King, what intrigues me about your idea of a Canada-U.S. commission on intellectual property is that it might speed up certain things.

There are some interesting trends that are just starting to take shape now and they aren't all necessarily working towards progress in intellectual property law. One of the things that we see happening under the worldwide regime, and even within Canada and the United States, is that the laws are changing or are not changing, as the case may be, to deal with technology.

We see, for example, a very interesting development in the last couple of years having to do with the semiconductor chip protection regime in the U.S. which, hopefully, Canada will follow up on soon. Canada got as far as obtaining an interim order for protection in the U.S., but the existing laws have been found not to serve new technologies.

Furthermore, we are finding in Canada that revision of the copyright law is very difficult because of the very diverging interests and the very high level of attention being paid to it by cultural groups which, of course, have nothing directly to do with technology. As a result, one piece of legislation is being asked to serve all of these interests.

*COMMENT, Professor King:* You are right on target. My feeling, after listening to Minister Côté, Mr. Keon, and others here, is that everybody is going to make things right and up-to-date, but there is no exact date set as to when all of this is going to happen. Meanwhile, the march of technology is moving into the future. Therefore, you have got to look ahead to these new developments and anticipate, rather than trying to update.

*COMMENT, Mr. Knopf:* I'd like to mention a sort of sleeper issue that I think has been emerging over the last two or three days, and that is the role of competition law. It relates very closely to intellectual property and trade, but we haven't talked about it as such and may need discussion.

*COMMENT, Professor King:* Competition law is sort of in a dormant stage during the current regime in the U.S., but it's there on the books and it's important that we keep that in mind in terms of our long-term view. The problem with putting together a program like this, Mr. Knopf, is that because there is so much, we had to cut out some areas. That was one sector that we had to cut out, but I agree that it requires attention.

*COMMENT, Mr. Bradley:* I think I have observed over the last two or three years an incredible reluctance on the part of the United States to allow a whole range of issues that relate to security, dual-use technology, and the role of the U.S. Department of Defense (DOD) to be dealt with in any discussions related to trade in either technology or high-tech goods.

While I have some sympathy for this, it strikes me that national security concerns in the U.S. have gone off the deep end, and that they are seriously impeding trade in technology, high-tech goods in knowledge and know-how; and if the U.S. is determined not to discuss it in a multilateral forum, I think it is imperative if there is going to be any Canada-U.S. free trade, that it will at least have to be in a bilateral forum. Some realistic appraisal of national security and the role of DOD, which, in Canadian terms, is both a major regional development institution as well as a major funder of research and development, has to be on the table.

*COMMENT, Professor King:* I think that is important. I think one of the problems you have in this trade issue is DOD. But you also have the problem of the U.S. foreign policy controls in the export area. If something goes wrong internationally, the U.S. may slap an embargo on trade with that country and punish its exporters.

We have our neighbors up north to consider, so I agree with you. I would say both the foreign policy and the DOD military security controls have to be on the table.

*COMMENT, Mr. Morrison:* I certainly agree with what Mr. Bradley says. This has not been much of a subject of international negotiation, either bilaterally or multilaterally. In many respects, it becomes difficult to engage in that kind of direct negotiation, but it certainly has been the subject of great controversy within the United States academic community. This community has its own interests in preserving openness regarding information, participation in meetings and so forth. Therefore, it has been a heated issue and I think those concerns which

are, in part, reflected from Mr. Bradley's perspective have to be taken into account and to some extent are being taken in account.

I think in terms of the commercial access to DOD funded technology, unclassifying R&D and exports controls, the U.S. business community has had a great deal of involvement. Certainly on the control issue, there has been a very open and continuous debate for as long as the Export Control Act has been in place on how far the U.S. should attempt to reasonably preserve effective control over various aspects of technology.

I think it will always be an important, controversial and interesting topic. I don't know to what extent it should be dealt with more than it is in the bilateral and multilateral context because of the difficulty of reaching specific agreements.

*COMMENT, Professor King:* I agree, but I don't want to turn this into a question of whether foreign policy controls are good or bad, because that's a matter of opinion. But we do see eye-to-eye in the sense that it has to be on the table and be examined as part of the context.

*COMMENT, Ms. McCarney:* It seems to me two things have come out in the last couple of days that we may want to consider for future symposiums. First of all is Hans Smit's proposal for a dispute settlement mechanism in an enhanced trade agreement similar to the EEC. We may also want to resurrect the ABA/CBA joint committee report and take another look as trade liberalization moves forward. These topics can cover a host of areas concerning legal and judicial mechanisms. The second one comes from Mr. Roth's comments: if Canada is going to run to free-trade with Japan, they better be ready. Therefore, I was thinking, if we substituted Japan for the United States, would he say the same thing? Rather than deal with that as a chicken and egg argument of whether we have got the transitional things in place, let's assume that we have got a comprehensive trade agreement in North America. What we could do then is examine the whole issue of making North America more competitive. From that perspective, we could look at three things, one of which wasn't discussed this weekend.

First, there is the whole issue of labor management relations in North America, which are antiquated and significant to the fact of making life uncompetitive in world markets.

Secondly, we could look at banking and finance and the whole issue of Canadian banks being able to take equity positions in companies that they loan to and take a long-term stake in the future.

The third area would be competition policy. I think we have to address seriously the harmonization of competition policy in Canada and the U.S., both internally in the North American context and externally in a way we can put together a consortium arrangement for external trade. In that context, we would look at the U.S. Export Administration Act of 1983 or 1984, and maybe by then we will have done something with competition policy in Canada.

In summary, my point is to take those three issues and put them into the general theme of a symposium dedicated toward making North America competitive for the world market. This would get away from the whole issue of, "I'm a free-trader, I'm not a free-trader." Furthermore, by presupposing the existence of a North American enhanced trade agreement, this would allow a look at the world from that perspective.

*COMMENT, Mr. Gill:* If you get into talking about North American competition with the rest of the world, I think you still have to work on quality. You mentioned this morning the equipment for manufacturing chips in the chip industry. Now the Japanese are 60% preferred because of quality and somehow that is the issue that you have to address.

*COMMENT, Professor King:* Yes. I would say, with respect to what Mr. Roth said, that one of the problems on this whole issue of selling to the Japanese is the preferred supplier list—the Japanese company supplier list.

*COMMENT, Mr. Diggs:* There are two issues that have come up more tangentially in this Conference. One I think is a view of the service industry. For example, Stuart Smith talked about foreign ownership of Canadian industry accounting for 25% of the Canada's GNP. The services industry, which, by its nature is largely domestically owned, accounts for 75% of the GNP. I think Mr. Roth was pointing to it when he said that the services industry needs to become more high tech and more productive. I think that there is a view that the service industry is labor intensive with low productivity. I can say in the financial services industry it is certainly not true. A topic which I think would be very beneficial is telecommunications.

*QUESTION, Mr. Knopf:* I was intrigued by your idea of this joint commission. I just wondered if you could elaborate a bit on it and the precedent that you mentioned, also.

*ANSWER, Professor King:* In the United States you have commissioners on uniform state laws which develop laws that can be used uniformly in the United States to cover certain topics, such as the Uniform Commercial Code, and that type of thing.

In Canada you have the Uniform Law Conference. In connection with this, the American Bar Association and Canadian Bar Association project, we wanted to propose a regime of equal access and remedy on transfrontier pollution cases. This means that a pollutee in Michigan would have access to the courts of Ontario for relief from damage sustained from cross border pollution, and vice versa.

The Commissioner on Uniform State Law in the U.S. and the Uniform Law Conference of Canada developed a statute to cover this at our request, which was adopted both in Canada, by Ontario, and in the United States, by Colorado, Montana, New Jersey and others. They got together and worked on a uniform piece of legislation.

The spirit was very constructive. It may be that something like that could develop in the intellectual property law. I was concerned, basically, as I heard people from Canada and the United States discuss these issues, that things were not current. Maybe you need to have some central driving force in the intellectual property area to move things along.

Maybe this Conference and the pollution statute are a good example of what can happen. In other words, where is the area of focus? It would be a cooperative effort. We have a demonstration project in the international joint commission on water levels in the Great Lakes and other water problems. I think that's a good example, as well, and it is this sort of thing that is going to have to happen, in order to keep up with a changing technology about the law.

*COMMENT, Mr. Erickson:* I think an item of concern would be the impact of tax laws on the transfer of intellectual property, especially across the borders. I don't know that this should necessarily await a freer trade situation, but particular items of concern would be situations such as the royalty free exchange of rights, patent rights particularly, which can happen today very easily with high tech companies having very large portfolios of patents and wishing to exchange them. The fact that the tax authorities can sit there on either side and put some sort of imputed value on this and assume that there is a transfer here is a bit of a scary thing. It also gives rise to situations where a corporation has its feet on both sides of the border and is forced into constructing what I think are largely artificial situations to enable the transfer of technology between its various elements.

*COMMENT, Mr. Gill:* There is a lot of business in section 337 activities and it might be well to set that one aside completely and explain the mechanism of the International Trade Commission, the role of the staff attorney, the administrative law judge, the Commission, the U.S. trade representative and all of the things that go into it, because I think it's probably a big mystery to most of our friends in Canada, as well as it is to many people in the United States.

*COMMENT, Professor King:* One of the other areas that I thought was interesting was the cross border data flow. We heard from Hugh Donaghue of Control Data, and also Dr. Peter Robinson of Canada, about the problem of the barriers on cross border data flows. That might require some more attention.

I don't know if you could do a whole session on it, but in terms of the context in which we are operating, that would be an important one. I wanted to make sure that we got your comments on the Conference, what you thought of it, also suggestions for what you think we should be doing in the future.

We had some very good ones today. I suspect that the next one will shape up something like this in terms of concentration in depth over a period of time like this on a subject matter of vital importance. I think

many conferences are too short. There's not enough reflection given into the program. I think that here we're trying to do things differently.

We want these conferences to be participatory. That's very important and I think that we keep our numbers within bounds, but we have got some very good food for thought here. One possibility would be to combine a couple of subjects in the same context.

Canada and the United States are moving towards a free-trade area. Until the negotiations are consummated we don't know how free or how comprehensive it will be. We don't know what, if any, barriers will remain to the free flow of goods and services between our two countries. However, we are confident that some, and perhaps, considerable, progress will be made in eliminating trade barriers on the North American continent.

As we move towards a free-trade area, sourcing of the production of goods or services on either side of the border will be desirable. Also it may be desirable to establish joint research projects for the creation of new technology, with both Canadian and U.S. participation to facilitate both these developments. Technology transfers from either side of the border may be required. This means a necessary involvement of our intellectual property law to determine whether technology protections are equivalent in both countries.

The record of the Conference has shown that we are in a period of great technological change and that our intellectual property laws, particularly in Canada, have not been modified to cover this technological explosion. Technological progress has assumed new forms in the area of biotechnology, computer technology, and semiconductor chips. This technology requires equal protection on both sides of the border if we are to get the benefits of a truly free-trade area.

Nor is there any indication that the march of technology will stand still in the years to come. If anything, technological change will grow rather than diminish in the future. But to get the benefits of this change in a larger market area through the free transfer of technology, goods and services, we shall have to be vigilant in making sure that our intellectual property laws are updated to protect this new technology so that it is not pirated. In the very competitive international world in which we live, we all have a stake in the development of new technology and we need to motivate its creation through adequate intellectual property protection.

Some new form of cooperation across the border in the intellectual property area seems desirable to anticipate the technology context of the future. Perhaps it would be desirable to establish a joint U.S.-Canada intellectual property commission to monitor technology change and determine whether the statutory protections given new technology on either side of the border are adequate—and if not, what steps need to be taken to accommodate such laws to new technological developments.

Proposals for legislative changes might result from the work of this Commission. The work of the National Conference of Commissioners on Uniform State Laws in the U.S., and its counterpart in Canada, the Uniform Law Conference of Canada, could form a useful precedent for a joint U.S.-Canada intellectual property commission.

Finally, at some time in the future, a joint U.S.-Canada Patent Trademark and Copyright Office might be considered. Certainly each country, for its own reasons, would want to continue its own intellectual property offices; however, the eventual establishment of something on the order of the European Patent Office might be a realistic possibility in the future, depending, of course, on how the new free-trade area develops. It would be a cooperative office, but would not erase the identity of any of the existing institutions in each country for intellectual property protection. Certainly from the standpoint of applicants for intellectual property protection, it could simplify matters and might, in fact, result in some economies.

With respect to disputes, if any, involving intellectual property issues, they might be handled through the general disputes settlement procedure set up under the new free-trade area, or, perhaps, on a more specialized basis through a special panel designed to handle such disputes. Some further consideration might be given to the types of disputes which might arise and which might need to be handled internationally, rather than domestically, and the skills necessary to resolve and adjudicate such disputes.

What I would like to do now is open this up for general discussion and address areas where we should focus in the context of intellectual property and free-trade. I suspect changes need to be made and that now is the time to anticipate these changes. To get us started, I will point out a comment made by Robert Brown. He stated that if you are going to have a free-trade area, you may want to have some attempt at harmonization of the tax laws. We don't want to have a VAT tax as in Europe with the EEC, but an accomodation of these tax laws to adjust to this new North American context may be successful.

*CLOSING COMMENT, Professor King:* In closing, I want to first thank all of our speakers. Their contributions were superb and made this Conference very special, unique and in every way a great success. I want to thank the William H. Donner Foundation which made this Conference possible with its fine support. I thank Sydney Harris, Canadian Consul General, who supported us all of the way—from start to finish. Pat Molson of the Consulate has been a constant source of encouragement and help. Odyl Witman of the Consulate Staff has continued to be helpful on this Conference as she was on last year's. Patti Hujarski of my staff at the law school has been consistently helpful and her contribution has been a very special one. I want to thank David Meany, a student at Case Western Reserve Law School, who has been my right hand from



start to finish on this Conference. Without David's help, this Conference would not have been the success that it has been.

Finally I want to thank all of the participants for your attendance and participation in the Conference. We have indeed tried to break some new ground here which is important not only for all of us as participants, but for others who will be examining this subject for years to come. At the same time we have tried to make sure that you found the Conference interesting, practical and informative.

I declare this Conference adjourned!