FIRST CANADA-AUSTRALASIA LAW CONFERENCE

CANBERRA APRIL 1988

SHORT REPORT

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It is timely to note an important law conference which took place in Canberra, Australia in April 1988. The First Canada-Australasia Law Conference was held at the Australian National University in that city. Organised by the Canadian Institute for Advanced Legal Studies, the convenors of the conference were Chief Justice Nathan Nemetz of British Columbia and Justice Michael Kirby, President of the New South Wales Court of Appeal. The conference attracted a number of leading judges and practitioners from Canada, Australia, New Zealand and the Pacific region. It was opened on 5 April 1988 by the Governor General of Australia (Sir Ninian Stephen). During the conference, the Governor General hosted a dinner at Government House, Canberra, which was attended uniquely by all of the Chief Justices of Australia, who were meeting in Canberra at the same time, all of the Chief Justices of the Superior Courts of Canada (except for the Supreme Court of Ontario), the Chief Justices of New Zealand and Singapore and other distinguished guests.

In his opening remarks to the conference, the Chief Justice of Canada (the Rt Hon R G Brian Dickson PC) spoke of the need to further the links between Australian and Canadian

jurisprudence. The same theme was echoed by the Chief Justice of the High Court of Australia (Sir Anthony Mason). He paid tribute to the innovative use of satellite technology in Canada for the transmission of applications for leave to appeal. These developments were studied by the High Court of Australia and have now been successfully copied in Australia. In a speech at the closing banquet, Chief Justice Mason revealed that he had served in Canada for a short time at the close of the Second World War.

The conference was one in the annual series organised by the Canadian Institute for Advanced Legal Studies. The Institute arranges lectures in every second year at Cambridge, England. In alternate years, the conference series is continued elsewhere, outside Canada. Because of the Australian Bicentennial, it was decided that the 1988 series would be held in Canberra. The academic program of the conference was arranged by Dean Peter Burns, originally a New Zealander, now Dean of the Faculty of Law in the University of British Columbia. Professor Burns arranged a program which was divided according to the four days of the conference. The first day dealt with human rights and constitutional entrenchment. The second day covered transnational commercial arrangements. On the third day the participants reviewed the state of the judiciary. On the final day the topic was law, technology and the future.

It is beyond the purpose of this note to outline the detail of the various contributions or even to list them all. The papers will in due course be published. It may be expected

that they will, in turn, stimulate attention to the common features of common law developments in Canada, on the one hand, and in Australia and its neighbours, on the other. A few notable contributions should, however, be referred to.

Justice Mary Gaudron of the Australian High Court chaired the first session on human rights. In the course of discussion of that topic, the President of the Australian Human Rights and Equal Opportunity Commission (Justice Marcus Einfeld of the Federal Court of Australia) outlined the charter of that Commission and the work it is doing on human rights protection in Australia. Numerous Canadian speakers referred to the growing case load of the Canadian courts involving decisions under the Canadian Charter of Rights and Freedoms. Several speakers referred to the recent decision of the Canadian Supreme Court in Morganthaler v The Queen in which certain provisions of the Canadian Criminal Code dealing with abortion were held to be unconstitutional. One of the most interesting papers presented to this session was by Sir Robin Cooke (President of the Court of Appeal of New Zealand). Titled "Fundamentals", the paper raised extra curially a question posed in a number of Sir Robin's recent judgments. This is, whether, notwithstanding Dicey's thesis of Parliamentary sovereignty, there may be fundamental rights which "lie so deep" that the Courts would uphold them without an express constitutional charter and even in the face of legislation designed to infringe them.

In the sessions on transnational commercial arrangements, important papers were delivered by Yves Fortier QC of Montréal and Justice Andrew Rogers, Chief Judge of the Commercial Division of the Supreme Court of New South Wales. In a wide ranging review of the response of the law in Australia to the rapid growth of trade links and consequent commercial disputes, Justice Rogers referred to the problems of the interpretation of commercial agreements, the law on pre-estimates of damages and penalties and the operation of the doctrine of forum non conviens following the decision of the House of Lords in Spilada Maritime Corporation v Cansulex Limited [1987] AC 460. Another paper in this session was given by Justice Ian Barker of the High Court of New Zealand. It reviewed the alternatives available for the resolution of international disputes when "things go wrong". It contained a thorough examination of the options of litigation, arbitration and alternative dispute resolution with detailed references to the international agencies now available to assist in this regard.

The session on the state of the judiciary was chaired by Sir Harry Gibbs, former Chief Justice of the High Court of Australia. Chief Justice Nemetz of British Columbia outlined some of the problems faced by the judiciary in Canada, including in relation to the media reporting of court cases. Chief Judge Jerrold Cripps of the Land and Environment Court of New South Wales reviewed the recent developments in that State of Australia, including the establishment of the Judicial Commission, of which he is a member. The procedures of the Commission in handling complaints against judges was

explained. Dr Brian Galligan, author of a recent Australian book "The Politics of the High Court" reviewed, amongst other things, the theories adopted in Australia for the legitimacy and limits of judicial creativity in statutory construction and development of the common law. This session also heard papers by Los J (Papua New Guinea), Davison CJ (New Zealand), Feliciano J (the Philippines), Wee CJ (Singapore) and Shankar J (Malaysia) on the state of the judiciary in their countries. A common theme was the rapid growth of litigation with consequent delays and burdens on the judges.

On the final day, Sir Gerard Brennan of the High Court of Australia chaired a session on technology and the law. Justice Kirby led off with a paper reviewing the likely impact of technology on substantive and procedural law and the delivery of justice. He was followed by the Australian Minister for Science (Mr Barry Jones) who outlined the necessities facing the economies of Australia, New Zealand and Canada in adjusting to a time of rapid technological change. Perhaps the most sobering contribution to the conference was Mr Jones' long list of wrong decisions by federal inter-departmental committees concerning proposals for technological innovation later taken up in other countries, with great commercial success.

In the closing session, Justice Zuber of the Court of Appeal of Ontario outlined the proposals in his controversial report on the restructuring of the courts of that Province. The proposal has suggested the amalgamation of trial courts and is hotly contested because of the recommendation that some of the judges may not be reappointed to the new amalgamated

court. In this connection, Australian participants referred to a recent decision of the New South Wales Court of Appeal where a similar problem arose upon the establishment of the Local Courts in New South Wales in place of the old Courts of Petty Sessions.

The lectures of the conference were supplemented by a busy social program, including a reception at the High Court of Australia and by the Canadian High Commissioner (Mr Allan Kilpatrick). At the closing banquet, Chief Justice Dickson expressed the hope that the friendships made and links established in the conference would endure and help to enhance the use made in all of the countries represented of the jurisprudence of the others. The possibility of a second such conference, to be held in New Zealand, is now being explored. Enquiries concerning the papers of the conference may be addressed to Dean Peter Burns at the UBC Law School.