

Canada – Law Firms

The Trans-Border Discussion: A Former Ambassador's Perspective

The Editor interviews the *Hon. Gordon D. Giffin*, Partner, McKenna Long & Aldridge LLP and former Ambassador of the United States to Canada.

Editor: Ambassador Giffin, since leaving Canada five years ago as U.S. Ambassador, you have been sought after by various corporations to serve as a director. Would you share with us how you go about determining whether to join a particular board of directors?

Giffin: I have been honored to be considered for board membership by several excellent Canadian companies. In part, my interest in serving on such boards is to help maintain my ties with Canada.

There are a number of criteria I use in determining whether to join a board, including whether the company has operations in the U.S. If so, I may be able to bring some unique trans-border expertise to bear. In addition, the quality of the company's management – and in particular the character of the CEO – is an important consideration. The composition of the existing board and its leadership is also relevant. The location of the company and the industry in which it operates are also things I consider.

Editor: You serve on the boards of a major railroad, a Canadian bank, a U.S. paper interest and at least two energy companies. Can you give us a sense of what makes for a good board of directors-CEO relationship?

Giffin: The key ingredients in the board-CEO relationship involve the interplay of personalities and the character of the most important individuals, namely the board chair and the CEO. There are also ethical and legal standards which play an important role in the relationship.

In a good relationship, the members of the board add value because the CEO is able to draw upon their expertise and experience for the benefit of the company. At the same time, a good relationship is one where the board members recognize that they are serving in a fiduciary capacity and have, in certain respects, an advisory role. They are not there to manage the company. In my experience, the dialogue that takes place between the board chair and the CEO is often determinative of where the line is drawn between strategic oversight, on the one hand, and day-to-day management on the other.

Every board that I sit on spends time "in camera" discussing the board's relationship with the CEO and senior management. In these private sessions, it is usually the board chair who reflects senior management's thoughts about the relationship, and he or she will take direction from the board as to its perception of what is working or, more importantly, what is not working. So long as an effective and strong board chair is managing that discussion, the relationship is usually on track.

Editor: What do you make of the current obsessive focus on "independent directors?"

Giffin: I do not believe that it is obsessive. I believe that the role of independent directors is important. Human nature being what it is, a meaningful affiliation



The Hon. Gordon D. Giffin

with the company is almost certainly going to affect the way a person approaches his or her role as a director, even if it does not rise to the level of a conflict of interest. That said, I know many directors who are not independent under current definitions and who perform their duties as conscientiously and objectively as those who are "independent." The point, of course, is that reliance on the rules will only get you so far. It is the character and integrity of the persons involved that matter the most. Nevertheless, there are rules. We are required to give assurances of accountability and independence to the shareholders, and that involves providing information as to the affiliations of the directors. Unfortunately, proxy statements cannot reflect their character and integrity.

Editor: As a director, you have considerable interaction with general counsel and with corporate secretaries. In your judgment, what are the attributes of the most successful ones?

Giffin: In the past, general counsel and the corporate secretary were usually the same person. Today that is often not the case. In light of the focus on corporate compliance, the position of corporate secretary has been upgraded, and I think it is helpful when the person holding the position has been legally trained.

The role of the general counsel continues to be very important. It is a job requiring good judgment, and the best general counsel, in my view, are people with considerable experience advising clients on difficult questions. The position also requires a sense of independence – much more so today than in the past – and an ability to stand up to a strong CEO and to convey the bad news as well as the good. It is not an easy role.

One particular challenge faced by general counsel of a Canadian company with interests in the U.S. has to do with the litigious nature of the American business environment. This has not been part of Canada's corporate culture, but as the economies of the two countries become more integrated, Canadian corporate counsel are having to become more familiar with the culture of litigation in the U.S.

Editor: Given the increase in responsibility that directors bear today, is it getting more difficult to recruit good

people for corporate boards?

Giffin: The responsibilities and the workload of directors – and their potential liability – have sharply increased since the recent round of corporate scandals and the enactment of Sarbanes-Oxley. One of the consequences, I think, is a smaller pool of qualified candidates willing to accept the position of director. At the same time, the enhanced recognition of legal responsibilities that have always been there is forcing those who do serve to learn more about the company and to work harder. That is a very positive step.

Editor: What are some of the challenges that serving as a director entails today?

Giffin: The first challenge for a director is to learn something about the company, its business and the industry in which it operates. This is not to say that the directors are to engage in managing the company, but in order to make a contribution, they do have to understand the business.

The second challenge is to understand that you are there to fulfill a fiduciary responsibility, that you are required to hold management accountable for compliance and for performance, and that you are not serving as a member of a social club or fraternity.

Editor: As a lawyer in private practice, and as a corporate director, you spend substantial time helping the private sector deal with government on both sides of the border. Would you tell us something about the dynamics of working on both sides of the 49th parallel?

Giffin: Given my background, I tend to have insight into the public policy basis for many governmental actions. This perspective is relatively unique in the Board Room, particularly as it relates to trans-border dynamics.

Editor: We think of ourselves, Americans and Canadians, as being about as close as two people can be. There are differences. Do you find yourself acting as a cultural translator?

Giffin: I do that with regularity. There are substantial similarities – and people on both sides of the border assume that people on the other side are just like them as a result – but there are also important and noteworthy differences. My experience on both sides of the divide has enabled me to observe both Americans and Canadians and gauge why they may have a different perspective on a particular issue.

Editor: American mid-term elections are almost upon us. If the majority party in either the House or Senate changes, and the Democrats regain some power, do you think the Canada-U.S. relationship will experience a change?

Giffin: Nothing major. A change in control of the House or the Senate may result in some indirect impacts – immigration and border management in the context of Homeland Security, for example, may become a more contentious issue within the U.S. I do not think that the Democrats and Republicans have different views on

how this country relates to Canada. Indeed, with the passage of time I think an increasing number of members of Congress have become interested in the Canada-U.S. relationship, and I think there is a kind of bipartisan consensus on the main points of it, if not on all the details.

Editor: What about U.S. trade policy globally?

Giffin: There is some chance that a change in Congress will affect U.S. trade policy. One view is that Democrats are more inclined to question globalization and our participation in free trade arrangements. They may tend to be more protectionist. To the degree that the Congress becomes more insular, our free trade engagements become more complicated. I hope that we retain an outward focus, recognizing that we are involved in a global economy and society. American business cannot prosper in an environment where we attempt to put up economic walls around the country.

Editor: Do you see any security issues that need to be aired between Canada and the U.S.?

Giffin: We need to continue to strengthen our cooperation on physical security matters as they relate to our common interests. In the last five years a great deal of progress has been made in that regard, but the challenges continue. Both countries have worked hard to develop and harmonize policies that enhance the physical security of the continent and the efficient two-way flow of business and people across our common border. Every day about 2 billion dollars of commerce crosses the 49th parallel, and there are five or six crossings – mostly in southern Ontario – that bear the brunt of this exchange. They are extraordinarily congested. The challenge is to manage the legitimate flow of goods and people coming across the border without compromising our security, and it is an enormous one. We can only meet it through collaboration, not unilateral decisions.

On intelligence, we have worked with Canada for decades on intelligence sharing. The Canadians possess sophisticated intelligence services, and the collaboration between them and our agencies has been almost seamless. This is another resource that our friendship with Canada makes available.

Editor: Who do you see emerging as the front runner in 2008 for the Presidency?

Giffin: I think that Senator Clinton would be the odds on favorite to be the Democratic nominee. Senator McCain is the dominant figure on the Republican side.

The implications of either candidate would be positive for Canada. Both of those senators visited Canada while I was ambassador. Senator Clinton visited as First Lady. She has worked on many matters related to Canada since in her role as Senator from New York. She is knowledgeable and interested in Canada. Senator McCain was in Canada while I was there and evidenced a strong interest in Canada and background and knowledge about Canada. Those are two individuals who stand out as knowing a lot about the relationship, with a good perspective on it.

Please email the interviewee at giffin@mckennalong.com with questions about this interview.