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COMMONALITY OF STANDARDS – IMPLICATIONS FOR SOVEREIGNTY – A CANADIAN PERSPECTIVE

*James McIlroy**

Since it is the primary focus of this year's conference, I thought it might be helpful to start off by exploring what I mean by the term "sovereignty." Every speaker has a different definition, but I have gleaned one out of Black's *Law Dictionary*, and I think it is as good as any. It states, "[t]he international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation"¹ I believe the key concepts in this definition are the international independence of a state and the state's power to regulate its domestic affairs.

Power is always a complex topic. The sovereign power of nation-states is becoming a hot issue as we prepare to enter the 21st century. One of the reasons it is so controversial is that, when you get right down to it, sovereignty is all about who has the power to do what in our increasingly interdependent, borderless world. I would like to focus on some of the implications for sovereignty that flow from attempts to develop common standards regarding professional services in the Canada/U.S. context. The three key points that I want to review today are: the relationship between professional services and international trade, the role that international trade treaties play in promoting the commonality of professional services standards, and how the commonality of professional services standards will affect national sovereignty.

Let us examine the relationship between professional services and international trade. First of all, I think it is very important that we all work from a common definition of what is encompassed by the term "professional services." Article 1213 of the North American Free Trade Agreement (NAFTA) defines professional services in the following terms: "Professional services means services, the provision of which requires specialized post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party"² In other words, what we are

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¹ BLACK'S LAW DICTIONARY 971 (6th ed. 1991).

² North American Free Trade Agreement, Dec. 8, 1992, Canada/Mexico/United States, 32 I.L.M. 289, at art. 1213(2).

talking about are services in which you must be licensed in order to practice. These services include accounting, architecture, medicine, engineering, and law. The fact that the right to provide professional services is granted or restricted by a Party is what makes them so interesting from an international trade and a national sovereignty perspective. Once again, we are dealing with the concept of who has the power to decide who does what, and where, in the 21st century.

Given the strategic role that they play in our knowledge economies, I believe that the way that we regulate professional services will be a key factor in determining where competitive advantages lie in the next century. It is no secret that professional, commercial, and other services now represent the largest part of the economy in most developed countries. In Canada and the United States, about three-quarters of all economic activity now falls within the services sector. In recent years, services have been the fastest growing sector of world trade. In today's rapidly emerging knowledge economy, professional services in particular are a key factor of production. Professional services also play a critical role in expanding international trade, both in their own right and as an adjunct to other goods and services.

The commonality of professional services standards in Canada and the United States is dealt with in two international treaties. The first treaty is the multilateral General Agreement on Trade in Services (GATS), and the second treaty is the NAFTA. I do not intend to spend a lot of time on the GATS, because it is not the primary treaty regarding professional services that governs the relationship between Canada and the United States. Article 7 of the GATS deals with recognition; it states, "[A] Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country."³

The use of the verb "may" clearly indicates that the provisions are permissive and that there is no hard obligation regarding common standards. Finally, keep in mind that the very architecture of the GATS does not affect national sovereignty as much as the NAFTA. This is because the GATS is a bottom-up treaty, whereas the NAFTA is a top-down treaty. By bottom-up, I mean that a service is not covered by the GATS unless the country decides to include it on its national schedule, which lists its specific commitments. On the other hand, a top-down treaty like the NAFTA covers all services unless the country specifically exempts the measure or sector in its list of national reservations. Another round of WTO multilateral services negotiations is scheduled to start in the year 2000. It is expected that further progress will be made on the GATS, with respect to professional services in particular.

³ General Agreement on Trade in Services, *reprinted in* 33 I.L.M. 1168 (1994), art. VII(1).

So much for the GATS. Let us turn to the more important international trade treaty which governs licensure for Canadian and American professionals, the NAFTA. Chapter 12 of the NAFTA is entitled "Cross-Border Trade and Services," and therefore, it is not solely confined to professional services. However, in addition to the standard nondiscrimination obligations regarding national treatment, most favored nation (MFN), and local presence, Chapter 12 includes some detailed provisions regarding licensing and certification, and a two-page annex governing professional services. Section A of Annex 1210.3 states, "The parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable professional standards and criteria for licensing and certification of professional service providers . . ."⁴

My next point is regarding international trade and the commonality of professional services standards. First, you can see that Annex 1210.5 of the NAFTA adopts a mutual recognition approach, which is one of the two basic techniques to achieve common standards of professional licensure. The other technique is usually referred to as harmonization. The mutual recognition approach does not require Canada and the United States to adopt the same standards. We must merely agree to recognize each other's standards, even if they are quite different. On the other hand, harmonization implies that both countries reconcile their differences and move to a common standard. As a result, mutual recognition agreements do not usually affect sovereignty as much as harmonization does.

Second, the treaty includes the words "shall encourage" and thereby imposes a positive obligation on the NAFTA Parties, which are the federal governments of Canada, the United States, and Mexico. However, by including the words "shall encourage," the third thing that the NAFTA language does is recognize that Washington, Ottawa, and Mexico City do not have the power to develop mutually acceptable standards and criteria. Instead, they are only required to encourage development by the relevant bodies in their respective territories. So who are those relevant bodies who actually exercise the power to license professionals in Canada and in the United States? In general terms, the relevant bodies are the states and the provinces and the professional licensing bodies to whom they have delegated their licensing authority.

What exactly does the NAFTA mean when it speaks of professional standards and criteria? If you look at Paragraph 4 of Section A of Annex 1210, you will see that it lists eight matters, and that the first three items are education, examinations, and experience.⁵ When we talk about commonality of

⁴ NAFTA, *supra* note 2, at annex 1210.3.

⁵ *Id.* at annex 1210.4.

standards for professional services, education, examinations, and experience are usually three of the most important elements in the licensing process. I will refer to these as the "three Es."

Education standards usually deal with accreditation or the recognition of institutions of higher learning or academic programs; examinations are often concerned with a common test that may be set and administered across an entire nation by a national body; and experience requirements may stipulate that the experience must be supervised by someone licensed in a particular state or province, and that the experience must take place in that state or province, thereby establishing some kind of residency requirement. Notwithstanding the fact that we are now in our fifth year of the NAFTA, the commonality of professional services standards between Canada and the United States is still in its early stages. For example, there has been some progress in implementing the Foreign Legal Consultants provisions under Section B of the NAFTA, Annex 1210. But this does not mean that an American lawyer can come to Canada and advise Canadian clients on Canadian law. This only means that an American lawyer can come to Canada and advise Canadian clients on the law of the United States. Therefore it is very limited.

The accounting profession has also taken some steps towards mutual recognition. But when you really take a good, hard look at their 1991 agreement, all it really does is recommend certain principles, and I stress the word recommend, for reciprocity to Canada's thirteen provincial license-granting authorities and the fifty-four state boards of the United States. The bottom line is that the principles can either be taken or left by these sixty-seven decision-making bodies that jealously guard their sovereign authority.

I will conclude this part of my discussion by mentioning the engineering profession, for whom I have done some work. I have a bit of an inside track on what happened, and more importantly what did not happen. Almost three years ago, the national representatives of Canadian, American, and Mexican engineers signed a mutual recognition agreement in Washington on June 5, 1995. Mickey Kantor was there,⁶ and there was all kinds of media attention. This was going to be a great new frontier. What really has happened is that the Mexican states and the Canadian provinces signed the agreement, but in the United States, only Texas has approved it. Now why is that? It is simple. The American body responsible for administering engineering examinations in the United States, the National Council of Examiners for Engineering and Surveying (NCEES), withdrew its support for the trilateral agreement due to the agreement's philosophy of emphasizing experience rather than national exams. The way the NCEES makes their money is by administering exams.

⁶ Mickey Kantor was the United States Trade Representative at that time.

Then a treaty comes along that does not emphasize exams, but emphasizes experience. It makes sense for them to be opposed to that. I think this engineering example illustrates that, even though Canada and the United States share similar laws, traditions, and levels of economic development, there are differences in the emphasis that we place on the "three Es." The bottom line is that the American state licensing boards are reluctant to relax the exam requirement for Canadian engineers because it would have ramifications for the American domestic licensing process. For example, how does Ohio explain to a New York engineering graduate why they must take the NCEES exam, but an Ontario graduate does not have to take it? Notwithstanding considerable initial fanfare, I believe that the commonality of the professional services standards is still in its early stages of development in both Canada and the United States.

To try to understand why progress has been so slow, I would like to move on to my last point and discuss the implications of commonality of professional services for national sovereignty, and vice versa. If Canada and the United States move towards common professional services standards, what will this mean for the sovereignty of the entities that currently have the power to license the professionals? This raises issues of competition, investment, labor mobility, and public protection. Let us look at the competition issue first.

In Canada, as I have said, the provinces, and not the federal government, have the power to license professionals, and, for the most part, the provinces have delegated this power to self-governing regulatory bodies composed of the professionals themselves. These self-governing bodies raise some interesting issues. For example, one of their primary responsibilities is to ensure that the public interest is protected. However, it has been argued that self-governing bodies also tend to protect the private interests of their members. For example, by limiting the number of persons licensed to practice in a profession, a self-governing body can affect the laws of supply and demand and protect its members from cost-cutting competition. There are several ways to limit supply. A provincial or state licensing body can restrict the number of new admissions of graduates from its own local universities. You see that more and more. Or, it can restrict entry for out-of-province or out-of-state professionals. Likewise, and this is probably the easiest way to do it, you can impose barriers for American and other foreign professionals in Canada.

I believe that international trade liberalization for professional services will not occur in isolation. It will also force internal trade liberalization, which is a hot topic in Canada. For example, at the present time, there are barriers to entry for Canadian lawyers from Ontario who wish to practice law in British Columbia, even if it is a federal law. These barriers go beyond the

knowledge requirements that you would expect with respect to local laws and regulations. If Canada and the United States move toward common professional services standards through harmonization or mutual recognition agreements, it is going to be very difficult to justify maintaining barriers within Canada between the provinces. As a result, market forces will intensify and the power to regulate supply will decline.

Let us turn to investment and labor mobility issues. These issues arise because international trade in professional services occurs in a variety of ways. Sometimes both the provider and the consumer of a professional service stay in their respective countries, and the services are provided by telephone, courier, mail, fax, or e-mail. For example, when an American lawyer provides telephone advice on American trade law to a Canadian company. Since there is no movement of people across geographic borders, national sovereignty is usually not a big issue in this scenario.

The second way that international trade in professional services occurs is when the foreign consumer enters the service provider's country to receive the service. An example would be when a Canadian goes to the Mayo Clinic for medical services. (Usually, it is a Canadian politician, because, although they say that we have a tremendous medical system, it seems when politicians get sick, they like to come down and use the American system.) This is the case with tourism, too. Most governments encourage people to come spend money in their countries, therefore national sovereignty usually is not a problem here either.

The third way international trade in professional services occurs is when a professional services provider establishes a permanent office to provide the service in the foreign jurisdiction. Local presence raises numerous investment issues, including those flowing from the traditional international trade treaty principles of nondiscrimination-national treatment, and MFN. Sensitive sovereignty issues can arise regarding foreign ownership rules or secondary boycott measures.

Finally, and this is very important, it is often necessary for the professional service provider to travel and gain entrance to the foreign jurisdiction to which their services are to be exported. We are talking about labor mobility, and one of the most sensitive issues in any sovereign country is the right to control entry to its territory through its immigration laws. Again, I want to stress that, unlike the European Union, the NAFTA does not create a common market between Canada and the United States in which there is labor mobility. As a result, there is currently very limited labor mobility between the two countries. However, in many situations, commonality of professional services standards would be meaningless without increased professional labor mobility.

Therefore, I believe that the movement towards common professional service standards will also lead to increased labor mobility between Canada and the United States. There will be two types of mobility, temporary entry and permanent residency. Temporary entry is interesting because it implies a right to nonestablishment. In other words, the professional is allowed to enter a jurisdiction, provide services, and then he can take off and leave again. This will create challenges for local boards and self-governing bodies that typically require that professionals maintain an address, files, and other forms of presence in their jurisdiction in order to monitor and discipline them, thereby protecting the public interest.

Historically, state boards and self-governing bodies operated on the assumption that, when individuals provide services to other individuals, the public must be protected with codes of standards and ethics as well as disciplinary mechanisms. Unlike many other areas of commerce, the maxim "buyer beware" has not been applicable. However, when services are exported, the provider and the consumer are not necessarily individuals. Often one or both of them are sophisticated corporations. The standards and mechanisms required to protect an individual consumer may not be the same as what is required to protect a sophisticated corporate consumer. As a result, the role of local boards and self-governing bodies may change and their licensing and disciplinary power may decline. This is already happening in Ontario. For example, if an engineer works for a corporation like General Motors, Dow, or Pfizer and does not provide services directly to the public, the engineer need not be licensed by the Ontario Engineering licensing authority. It is the multinational corporation that employs the professional service provider that polices the profession, rather than the local licensing authority. In theory, the public is protected by the civil liability of the corporation. The licensing body is not even involved.

Although national sovereignty is presently inhibiting common professional service standards and labor mobility, I believe that international trade in professional services will continue to grow. The professions will become increasingly mobile in the 21st century, both in their own right and as an adjunct to exports of other goods and services. I was intrigued by a statement contained in the recent submission prepared by the big six American accounting firms regarding China's accession to the WTO. It is noted that a thriving accounting profession employing modern accounting practices is an essential element of the financial infrastructure required by emerging economies. Accounting is the universal language of business. Modern practices help enterprise management evaluate and control operations. They ensure that investors receive essential information and facilitate the development and efficiency of capital markets. They help integrate national economies

into an increasingly global market place. In other words, you need mobility of professional services in order to provide the infrastructure required to integrate these developing countries into the global trading order. This is going to happen. National sovereignty may slow down this process, but I do not think that it can stop it. Because as long as the economic benefits of globalism and increased trade liberalization are perceived to outweigh the costs, I think that the process will proceed.