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NAFTA CROSS-BORDER PROVISION OF SERVICES

*James McIlroy**

LET ME, FIRST OF ALL, start off by saying how delighted I am to be here this morning to discuss the implications of the North American Free Trade Agreement, the NAFTA, for human resources development and utilization.

We have heard several speakers discuss the theme of developing human resources, and this morning John initiated our discussion of another theme, the implications of the NAFTA on human resources utilization and development. I would now like to pursue this theme and discuss how the NAFTA affects the cross-border provision of services in Canada and in the United States.

First of all, I would like to demonstrate that unlike past international trade treaties, the NAFTA really does matter to people like you who are interested in human resources utilization and development. The NAFTA has gone where no other international trade treaty has heretofore dared to go. Think of it as a sort of a Star Trek treaty.

This trilateral trade treaty is important because it goes beyond the primary focus of prior free trade agreements, which was trade in manufactured goods, and it attempts to deal with a new frontier, which is cross-border trade in services.

I would also like to touch upon Chapter 12's key obligations affecting services, particularly professional services. And last I would like to leave you with a few questions that I believe must be resolved if mobility of labor and trade in services are to flourish in North America because I believe that the NAFTA is only a start. The ultimate success or failure of the NAFTA's effect on labor mobility and human resources utilization and development will depend on how Chapter 12 is implemented by Washington, Ottawa, Mexico City, the Canadian provinces, the American states, the Mexican states, a cast of literally hundreds of different professional regulatory bodies, and many of you present in this room.

What on earth does a trilateral free trade agreement have to do with human resources utilization and development? As I mentioned in my introduction, past international trade treaties were primarily concerned with facilitating trade in manufactured or agricultural goods, things like cars, shoes, steel, or dairy products. Historically, most trade

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treaties focused on reducing tariff and non-tariff barriers, which national governments impose on goods as they cross international borders. So for the most part, bilateral, regional, and multilateral international trade treaties have spent the last fifty years worrying about reducing customs tariff rates, rules of origin, standards, customs procedures, and the like. However, the services sector now accounts for about seventy-five percent of employment activity in industrialized countries like Canada and the United States. That is too big to ignore, and, therefore, in order to remain relevant and credible, the NAFTA and other free trade treaties really had no choice. They had to start coming to grips with trade in services and related issues like labor mobility and licensing and certification; otherwise, it could be argued that they were dealing with a situation that existed after the second world war, but really were not preparing people for the 21st century.

This was easier said than done because to liberalize trade in services, you could not merely extrapolate from past treaties. Different tools were required because to export services, it is often necessary to move the service provider across a border. And moving human resources across a national boundary raises issues that go far beyond the issues that arise when you ship a widget to another country. For example, unlike trade in goods and tariff barriers imposed at the border, international trade in services cannot be liberalized by federal governments reducing customs tariffs, eliminating quotas, or changing their customs procedures. Much more is required, and different players are involved. Some of those different players are new to the game. They have not been involved before and they may not have the resources at their disposal, particularly certain provinces in Canada and certain states in the United States and Mexico. Merely coordinating the activities of this cast of thousands raises new challenges for trade liberalization.

The Canada-United States Free Trade Agreement, the FTA, started to deal with services. But Chapter 14 of the FTA consisted only of three pages, along with some annexes that covered several service sectors, including architects, tourism, computer services, and telecommunications network-based enhanced services. When the FTA came into force on January 1st, 1989, it only covered the services that were specified in an annex. In other words, if it was not listed, it was not covered. Those services listed included construction services, insurance, real estate services, and computer services. Only a few professional services were included in that list, and key sectors, such as health, education, and social services were notably absent. Five years later when the NAFTA came into force on January 1st, 1994, things changed.

Let us discuss some of the NAFTA's key obligations affecting services, particularly professional services. I think the NAFTA's provisions covering professional services are particularly important at this

conference because they affect the way human resources will henceforth be developed and utilized in the professions. There are a couple of key NAFTA definitions contained in Chapter 12. There is the definition of professional services that says, "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, but does not include services provided by trades-persons or vessel and aircraft crew members." Given the fact that the right to practice a profession is granted or restricted in the United States and Canada by bodies that are created by our states and provinces, the NAFTA could not restrict its obligations to Washington and Ottawa. To liberalize trade in professional services, the NAFTA had to cast a very broad net. To appreciate how broadly the NAFTA cast its net, consider the definition contained in Article 1213 which states, "For the purposes of this chapter, a reference to a Federal, state or provincial government includes any non-governmental body in the exercise of any regulatory, administrative or other governmental authority delegated to it by that government."

What does this mean? It simply means that the state or provincial licensing and certification bodies of professions such as engineers, accountants, architects, psychologists, dentists, and registered nurses are now subject to international treaty obligations for the first time in their history.

Let us look at these obligations. The NAFTA's three primary service obligations as set out in Chapter 12, are national treatment, most-favored nation treatment, and local presence. Article 1202, which focuses on national treatment, states, "Each Party shall accord to service providers of another party treatment no less favorable than that it accords, in like circumstances, to its own service providers."

Please note that national treatment does not require Ohio to treat someone from Ontario the same way that Ontario treats someone from Ohio. That is called reciprocity. National treatment only requires that Ohio treat someone from Ontario the same way that Ohio treats someone from Ohio. The idea is nondiscrimination. You have to treat others the same way you treat your own.

The second key NAFTA obligation is the most-favored nation or MFN obligation, which is contained in Article 1203. It states, "Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party." Article 1204 commits each NAFTA country to provide the better of the treatment required by Articles 1202 and 1203. For example, if an Ontario licensing body treats an applicant from an American state more favorably than it treats an applicant from another Canadian province, which is very common in Canada where we treat our own less favorably than we

treat foreigners, the treatment provided to the American rather than the treatment provided to the Canadian must be accorded to a Mexican applicant, subject to a special rule that exists for licensing and certification requirements. In other words, in Canada, because of the way that our interprovincial trade barriers work, you could find a perverse situation where Ontario treats an American and a Mexican better than it treats somebody from Alberta. That is a typical Canadian solution to mobility of labor.

The third key NAFTA service obligation is contained in Article 1205. This is a very important measure because it prohibits Canada, the United States, or Mexico from imposing territorial residency or local presence requirements on cross-border service providers. It states, "No Party may require a service provider of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border provision of a service."

We know that means that you cannot force somebody to set up a head office to provide a service. But what happens if a licensing body requires a professional to maintain records in a province or a state? Could this be construed to be a local presence requirement?

For example, you are a psychologist and you are required to maintain your records in Ontario, but you only travel into Ontario three days a month from Detroit. Could you not argue to the licensing body that you will not rent an office in Ontario just to maintain records in Canada? These are issues that are going to affect licensing bodies and their jurisdiction, and a lot of them are very worried about it.

In addition to the foregoing three obligations that we just discussed; national treatment, MFN, and local presence, the NAFTA created another set of obligations specifically targeted at professional services. Professional services are very interesting because, unlike most service providers who wish to provide their services in another country, they need something more than permission to enter the jurisdiction from that country's immigration authorities.

The second piece of paper that a professional must have in order to provide services in another jurisdiction is a temporary or a permanent license from the relevant licensing authority.

For example, an engineer who wants to build a bridge in Ontario is going to need two pieces of paper; in addition to an immigration permit, they also need to be licensed by the Ontario Order of Engineers.

That brings me to Article 1210 and Annex 1210.5. What we are talking about here is licensing and certification, mutual recognition agreements, citizenship and permanent residency requirements, how an application for a license is processed, harmonization of professional standards, and temporary licensing.

I would like to focus on the harmonization of professional standards because I believe this factor is particularly relevant to how professional human resources will be developed and deployed in the future. Paragraph 2 of Section A of Annex 1210.5 says, "The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service providers and to provide recommendations on mutual recognition to the commission."

This language is very interesting because it recognizes that the NAFTA Parties, which are the federal governments of Canada, the United States, and Mexico cannot themselves develop mutually acceptable standards and criteria. All that Washington, Ottawa, and Mexico City can do is to encourage the relevant bodies in their respective territory. Does that mean give them money? Or does that mean you threaten to sue them if they do not do something? That is not clear. But what is clear is that if trade in professional services is to move beyond the framework contained in Chapter 12 of the NAFTA, the states and the provinces and their professional licensing bodies are going to have to carry the ball. We shall see that the separation of the power to negotiate and the power to implement creates some very interesting questions.

What exactly does NAFTA mean when it speaks of professional standards and criteria? Paragraph 3 of Section A of Annex 1210.5 lists a series of eight factors, including education. By education, they mean the accreditation of schools or academic programs; examinations, for instance, qualifying exams, including alternative methods of assessment, such as oral exams and interviews; experience, or how much and what kind of experience; conduct and ethics; professional development and recertification; scope of practice; local knowledge; and consumer protection. Keep in mind the first three factors, education, examinations, and experience because I want to come back to them a little bit later.

Article 1210, Paragraphs 3 and 4 talk about citizenship and residency requirements. As any trade lawyer can tell you, probably the best way to stop mobility of labor between jurisdictions is to require a licensed professional to be a citizen or a permanent resident. That is going to stop the movement of labor and it is going to prohibit companies from moving their assets around North America.

The obligation and the retaliation language in Article 1210, Sub 3, coupled with the ongoing consultation requirements in Article 1210, Sub 4, indicate that the NAFTA Parties intend that citizenship and permanent residency requirements are to be eliminated over time. Right now this is the big log jam. That is what is stopping a lot of professionals from moving around and it is stopping corporations from moving their assets where they think they can provide the most value.

Article 1206 permits a country to file reservations, which excludes certain measures or sectors, subsectors, or activities from some of the obligations contained in Chapter 12, the NAFTA's national treatment, MFN, and local presence obligations, but not the licensing and certification obligations of Article 1210.

Annex I reservations shelter existing nonconforming measures. They grandfather what was in place when the treaty came into effect, whereas Annex II reservations preserve the power to enact new nonconforming measures in specific sectors or professions. Annex II is a carve-out, whereas Annex I is merely a standstill or a grandfathering measure. Although the original deadline for concluding the Annex I exercises was December 31, 1995, it was necessary to extend the final date to March 31, 1996. One of the reasons for this delay was the inability of federal trade officials within Canada between different departments to agree between themselves and with their state and provincial counterparts on exactly what services the NAFTA covers and does not cover. This issue is still not finally resolved and could eventually end up before a NAFTA dispute resolution panel.

It is becoming an election issue in the Province of British Columbia. In Canada, motherhood is known as Medicare, and there is a dispute as to whether or not American health-providing corporations could come in and provide health care services. I think it is going to be a very politically charged issue. It was a fairly big issue in Oregon simply because Oregon, like Canada, has a little more public sector involvement in their health care system than many other states.

Let me conclude by posing a few more questions and identifying some issues that must be resolved before we can fully appreciate just how the NAFTA will affect human resources in the future. First and foremost, who is going to be responsible for going beyond the NAFTA services framework and further developing trade in services and mobility of labor in North America? As I stressed, the NAFTA is just a beginning and it has made some good progress, but it has got a long way to go.

Is it going to be the federal governments who usually negotiate international trade treaties, the state, or the provincial governments, or the professions themselves? Let me try to answer this question by telling you who I think will not play a major role in the process.

In my opinion, Washington, Ottawa, and Mexico City can oversee the process, but they cannot drive it. The states or provinces alone cannot make the changes required to facilitate temporary and permanent licensing of professionals. That means the professions themselves must take the next steps. But then that raises another critical question: Who represents the professions, their national associations or a myriad of state and provincial licensing bodies?

Let us look at a concrete example. One of the professions that has

tried to take the NAFTA one step further is the engineers. Last summer they negotiated a trilateral mutual recognition agreement. Imagine if you are a construction company located in Eastlake, Ohio and you want to be able to export one of your engineers to design and build bridges in the Canadian provinces of Ontario and Quebec, the American states of Vermont and Texas, and the Mexican states of Puebla and Chiapas. At the present time it is very difficult to allocate your human resources because of the various citizenship, permanent residency, accreditation, and examination requirements of each jurisdiction's licensing authority. Therefore, this trilateral mutual recognition agreement is very timely.

A couple of things are worth noting here. First of all, the trilateral engineers agreement was negotiated by three national organizations. However, it has become clear that national associations cannot always speak with one voice, and they do not have the ability to bind the persons on behalf of whom they negotiate. In order for this agreement to cover the entire North American engineering profession, twelve Canadian provinces and territories must ratify it, along with fifty-six American jurisdictions and thirty-two Mexican states. The fact that it takes one hundred separate jurisdictions to fully implement an agreement covering a single profession illustrates the challenges that must be faced if we are to go beyond the limited progress made by the NAFTA and allow companies to allocate their professional human resources rationally throughout North America.

The last question I would like to leave with you relates to how the professions should be developing and admitting their members in the future. As I mentioned earlier, mutual recognition agreements usually focus on three key factors: education, examinations, and experience. If you want to develop labor mobility, which factors are the most important?

Education should not be the primary factor in the decision to license a foreign professional because the process of accrediting schools or academic programs is a moving target. Schools and academic programs change over time; therefore, considerable resources must be devoted to monitoring these changes to ensure that the accreditation process remains reliable and credible.

Examinations are not the best factor to rely upon if you want to increase labor mobility unless it is possible to develop an exam or exams that are fully recognized throughout North America. I think I could argue quite persuasively that many exams are merely a disguised barrier to mobility, particularly exams that are theoretical rather than practical. How many people in this room today could pass the exams today that they were required to pass when they graduated? Probably not too many of us, and I include myself.

If you really want to increase mobility, I think the factor to em-

phasize is experience. That is what the engineers have done. Their agreement states that most Canadian engineers can obtain a temporary license to practice in the United States if they have a minimum of twelve years of acceptable engineering experience, with at least eight of those years following licensure. Again, by downgrading the importance of education and examinations, what the engineers have done is increase the threshold of experience.

In addition to this experience requirement, an engineer must demonstrate that he has the requisite knowledge of local regulations and the ability to communicate in the language of commerce at the host jurisdiction. However, they no longer have to sit for an exam to demonstrate professional competence. To require someone to sit for an exam similar to the one they sat for fifteen years ago is going to put a chill on labor mobility. However, if you require a clean bill of health, and twelve or more years of experience, you will encourage mobility. This is an important precedent that should be considered by anyone involved in the development of professional and human resources who wishes to maximize their ability to rationally utilize these resources throughout North America.

The NAFTA has only taken the first step in developing our ability to rationally utilize human resources in North America. It has often been said that liberalizing trade is like riding a bicycle. You either keep pedaling and move forward, or you lose momentum and you fall off. I have no doubt that many of you here today will play an important role in making sure that labor mobility keeps moving forward on this continent. I hope that my remarks today will help you grapple with some of the challenging issues that you may encounter as this odyssey unfolds.