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## Discussion after the Speeches of James McIlroy and Ellen G. Yost

Discussion

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DISCUSSION AFTER THE SPEECHES OF JAMES MCILROY AND  
ELLEN G. YOST

QUESTION, *Mr. Barrett*: Mr. McIlroy, in Chapter 12, Section 1211, foreign entities from Non-Party states can set up a subsidiary inside the NAFTA region and take advantage of the benefits of Chapter 12. So, in other words, a British corporation can set up a subsidiary, but there are some limitations on it. Generally, a British corporation could set up a subsidiary in the United States and take advantage of record keeping and nonresidency certification benefits in Canada and Mexico.

I can see how that might easily be transferred to, say, U.S. employees of that entity. How does this address or will it address, say, a British employee who is located in the U.S. subsidiary or that remains located abroad, but who is employed by the U.S. subsidiary?

ANSWER, *Mr. McIlroy*: I just want to make sure I understand. What do you mean by this? Is it a particular obligation?

QUESTION, *Mr. Barrett*: Could a British employee who, for instance, lived in Britain, but who was employed by the U.S. subsidiary be able to obtain recognition for his certification degree or her certification degree, a British degree? I know the recognition is more aspirational at this point with regard to citizenship, residency, and record keeping. Could a NAFTA Party turn you down if you were a U.S. citizen? Would that be different? But since you are over in Britain, is that where NAFTA draws the line?

ANSWER, *Mr. McIlroy*: If the engineers agreement is any precursor, I think what you are going to see is a lot of the agreements that will actually implement this labor mobility are going to hang onto citizenship and residency requirements within the professional agreement itself. And those have been grandfathered as of March 31st in many instances, and therefore, I think you will see North American professions integrate. And the price of entry into the club will be based on reciprocity, that is, if the British want to let us into the U.K. without a citizenship and residency requirement, we may get around to providing them with that kind of recognition through the GATT or the WTO. But I do not see the NAFTA being implemented by the professions themselves. I hear what you are saying, what the federal governments agree to. But I do not see it being implemented by the professions themselves in a way that would allow a British citizen to come in. Take for example the engineers agreement. In order for you to have rights under it, if you are an engineer from Ohio and I am an engineer from Ontario, our respective jurisdictions must have formally agreed to implement the agreement.

So it is based on reciprocity as opposed to most-favored nation. Article 1211 is more most-favored nation, but I think that these agreements are going to be implemented on a reciprocity basis.

QUESTION, *Ms. Lussenberg*: Does that mean that the requirement in Chapter 12 which says that we can no longer maintain citizenship and permanent residency is really, in effect, being undermined by the licensing bodies?

ANSWER, *Mr. McIlroy*: I would not say it is being undermined. But each province and each state had the right to grandfather citizenship and residency requirements. Let me give you an example. I was working with a profession, and their statute includes a requirement for citizenship and residency. I told them whatever you do, do not sign an agreement saying you are going to get rid of that unless you know that the body, which in Ontario is the Attorney General of Ontario, agrees with you.

I think citizenship and residency is a tough issue right now because it is everywhere. Everybody has got these requirements buried in their statutes and their regulations. But I think you will see that if you look at the wording of Article 1210, Subsection 3 and Subsection 4, they are basically saying, okay everybody, get rid of citizenship and permanent residency requirements. If you do not, other Parties can retaliate against you.

I think that it is in everybody's best interest to get rid of these requirements. If I am an Ontario engineer, for example, and I want to get into Ohio but it has a citizenship and residency requirement, I go to my professional regulatory body and tell them I want to get into Ohio. They may approach Ohio and say, why do you not get rid of your citizenship and residency requirement and we will do the same?

That is how I think that labor mobility is going to be driven as professions are trying to get into very specific jurisdictions and those jurisdictions begin working out agreements on a bilateral basis under this trilateral umbrella.

QUESTION, *Professor King*: If the professions want to change things, what is the procedure for changing them?

We are now going through the process of trying to agree on the legal aspects of guiding the profession of practicing lawyers in the various jurisdictions. But what happens when you get the agreement, and then somebody does not abide by it? Or if you want to change it, what happens?

ANSWER, *Mr. McIlroy*: The agreement is Chapter 12 of the NAFTA. Under that agreement, what the Parties have recognized is they do not have the power to push it another step. So in the annexes, they are encouraging people, such as engineers and other professional bodies, to push it one step farther.

Maybe I can answer your question by discussing the engineering

agreement. What they did is they signed a mutual recognition agreement. When I say they, I mean it was the engineers themselves, with some help from the federal bureaucrats. It was signed by the three countries. But what is interesting is that most professions do not have a national infrastructure to deal with this, and so they have to throw together these working groups that may or may not be in touch with the grass roots licensing bodies who will actually implement the deal.

Let me give you a specific example. In the United States, the body was called the United States Council for International Engineering Practice. It consisted of three bodies, the National Society of Professional Engineers, an accreditation body, and then a body called the NCEES. And I will not try to decipher that acronym for you, but they are in the business of administering exams. And do not ask me why, but the NCEES signed a document that said in order to get into the United States, you no longer have to write exams, which is our reason for existing. Not surprisingly, when they took it back to get it ratified, there was a revolt. And this agreement may never see the light of day simply because the whole thrust of it was to get rid of exams. By getting rid of exams, somebody who is on the national body may find themselves out of a job eventually because you cannot say to an American engineer, "we are going to let Canadians in and they do not have to write exams, but if you want to come into our state, you have to write an exam."

And as I said to you, I think that if labor mobility is going to proceed in the future, you have got to eliminate exams. That is just not the way to go, unless you have a national North American exam, and I do not think that the states and provinces would agree to that because there is a certain loss of sovereignty. You have got to get on to something that everybody can agree upon, such as how long you have been licensed, your twelve years of experience, your bill of health, and whether there has been any disciplinary problems. I think that is how they will go.

The lawyers I think are going to have to get into not only licensing, but discipline and enforcement and cross-border discipline enforcement, which, again, is a major issue. For example, if I come down here and practice in Ohio and you folks do not like the way I practice and somebody brings a complaint against me, but I just run back up to Ontario, you are going to go to Ontario and say, hey, wait a second. We have held a hearing on this individual's behavior. We do not think it measured up to our standards. We do not want people coming into our jurisdiction and leaving the minute we try to enforce our standards. You have to enforce our standards for us.

That is going to be a major issue. How are licensing bodies going to work more closely with other licensing bodies when they have been used to working within their own backyard? It is a very complicated

situation. I think the engineers have made a good stab at it. But, as I said, ninety different Parties have to sign this deal to make it fly, and I have my doubts as to whether that is going to happen.

COMMENT, *Professor King*: And lawyers have been known to have disputes with one another.

COMMENT, *Mr. McIlroy*: A lot of them seem to make a living doing that.

QUESTION, *Ms. Lussenberg*: Well, a related issue to that would, of course, be insurance. What kind of insurance coverage would you have to have?

QUESTION, *Ms. Houston*: From an immigration perspective, as we realign our corporations to operate on business functions globally, and it becomes increasingly less relevant in terms of who you are actually working for, is it really determinative of who pays you because you may, in fact, be working for the parent company in a substantive factor? What is determinative of who your employer is, particularly as you appear at the border and you profess to work for a Canadian resident sub? This is a very challenging issue for some of us because companies do not think borders are particularly relevant.

ANSWER, *Ms. Yost*: I would say it takes a little bit of planning. What you really want to do is have a person working for the company who will qualify to get the visa status they need. So you can have an agreement between the two companies, a consulting agreement or some kind of other contractual agreement between the Canadian and the U.S. company to account for the payment of the services.

We often sit with companies and say, all right, we are going to apply for one visa, which company is going to do the application? In some cases it does not matter, and in some cases it does, but they usually can take care of that internally. But it is an issue.

The question comes up oftentimes with rationalization in production. Usually Canadians do not need anything to come to the United States, except to be under visa status. And if the benefit of their activities accrues to a U.S. company, then they are not here on proper business visitor status. The immigration service has interpreted that to mean that if you are selling a product that was made in the United States, the benefit of your services accrues to the U.S. company, which becomes a disaster for multinationals that used to manufacture something in Canada and now manufacture it in the United States. All of a sudden the same person who has been selling it for twenty years in the United States cannot do it anymore.

Has the NAFTA taken us a step forward? I do not think so. I think it is actually made it much more difficult. I spoke with the head of the Canadian visa section of the INS and asked whether this has made it easier. He just smiled and said it had actually been made more difficult.

QUESTION, *Mr. Robinson*: A short comment and a question accompanied by an instructional anecdote for lawyers. The comment is in answer to John Barrett's specific question. I think your answer is in the definition Section, 1213 (2) (c), which says you have to be a national of a Party. So the Brit could not do it. He is not a U.S. national.

The question is for Jim. And I always have to think this through and I probably get it wrong all the time. But I think, and I would ask you to agree with me or tell me where I am wrong, that the reason one does not have to worry that the scope of Article 12 in 1201 is because it extends only to a Party and not to the states or provinces. This is because of the general provision back in the section in front of NAFTA involving NAFTA disputes. It says that the federal governments must agree to impose the obligations that they have accepted on the provinces or states because if that does not work, every key section of Article 12, other than the sort of precatory ones do not work. I think that is right, is it not?

COMMENT, *Mr. McIlroy*: That is Article 105; extent of obligations.

COMMENT, *Mr. Robinson*: Right.

ANSWER, *Mr. McIlroy*: The Parties shall ensure that all necessary measures are given in order to give effect to the provisions of this agreement, including their observance, except as otherwise provided in this agreement of state and provincial governments. What does "take all necessary measures" mean, sue them? I do not know. It is not clear.

COMMENT, *Mr. Robinson*: But at least when we read Article 12, it is very important to recognize that licensing is usually at the provincial and state level. It is important to recognize that you have to have some way to interpret the term Party to mean more than the federal government. It is the federal government, and it has an obligation to do its best to make the provincial governments cooperate. I think you and I have agreed.

QUESTION, *Ms. Lussenberg*: But are we not flushing that out by our nonconforming measures, which we have not seen yet? I think we may have seen a few of them. I certainly have not seen them yet. And we run the serious risk of just undermining all of Chapter 12 by, in fact, grandfathering everything on the provincial level, certainly in Canada. I understand there is a large list coming out of the States as well. But notwithstanding the obligations which are imposed upon the Parties, the capacity to disclose in an annex first at the federal level at the time that we signed NAFTA, and now effective March 31st at the provincial and state level, we are disclosing far more exceptions. We may, in fact, find at the time of a reassessment, once we have had a chance to look at these nonconforming measures, that really we have not agreed to much at all.

ANSWER, *Mr. Robinson*: I can elaborate a bit on a comment

made yesterday. I had a further discussion with our office and the Canadian representative faxed down to us the three general provisions. Apparently the way the exceptions have gone is there is a little one-pager by each country saying we reserve everything that was in effect on January 1st, 1994. Then there are 1,500 pages, which state for greater certainty and by way of transparency, what was reserved. But, by the way, if we left anything out, it is still reserved because of the general reservation.

So, in fact, all those citizenship and residency and licensing and other requirements at the provincial level, as I understand the effect of that reservation, have all been preserved. And you really cannot read Chapter 12 anymore and make any sense out of it without knowing everything that all of those ninety jurisdictions had in effect by way of restrictions on provision of services, professional business, and others on January 1, 1994.

COMMENT, *Mr. McIlroy*: If I can just jump in, what happened was that Annex I reservations were supposed to do two things. One was to formally grandfather what was in existence on December 31, 1993 just before the treaty came into effect, and, therefore, those measures cannot be made more restrictive. Secondly, it was supposed to provide transparency.

So it has only provided the first of it; it has grandfathered it. How do you know whether you can challenge something if you cannot see it? That is what has happened here. The provinces and the states were listing everything in sight. For instance, I heard Oregon at one point said to grandfather every single statute and regulation that we have in this area. The U.S. trade representative said no, you cannot be too transparent and throw in everything you have on the books. Let us get a little more detailed.

I was just looking at an article from *Inside U.S. Trade*, and it said that the reasons the Americans agreed to it is that there was very uneven reporting from the fifty states, the District of Columbia, and the Commonwealth of Puerto Rico. They said that they were getting some people reporting things that had nothing to do with NAFTA, whereas others were reporting very little. And seeing the low quality of the data they were getting from the provinces and the states, I think the feds and the states were very reluctant to go into a situation based on list it or lose it.

So what they did was add this very broad umbrella clause saying we hereby grandfather anything that was alive on December 31st. And then for transparency purposes, but with no legal effect whatsoever, they agree to show their hand. I think a lot of the provinces and the states will not show their full hand. I do not think that you are going to see everything that is out there.

COMMENT, *Mr. Robinson*: So the really bad news is that 1,500

pages may not even be the whole story.

COMMENT, *Mr. McIlroy*: That is right. That is half the story. But the other thing that I think is important is that it demonstrates the total systemic breakdown that happens when you try to move trade negotiations from the federal level down to the provinces and the states, and even further down into the professions. It just collapses. They had to extend the deadline. They had two years to get this list. They then extended it another three months. That did not work, and this is where we ended up.

Whether that means you have to put more trade expertise in the state and provincial capitals, I do not know. But right now the feds are pushing on a lever, and nothing is coming back. That is a real problem, I think, for both Canada and the United States as trade treaties move into provincial areas of jurisdiction, we are quickly discovering we do not have the sources at that level to effectively implement.

COMMENT, *Mr. Robinson*: As promised, my instructional anecdote for lawyers: When crossing the U.S. border for a conference like this or to work in New York or Chicago or L.A. or whatever, which I do frequently, do not tell them you are a lawyer. The usual response of those nice young men at the INS is, oh, so that is why you are a smart ass. Then they start hassling you. Are you being paid, et cetera, et cetera? The next mistake you can make is to cite them the item in the Annex of NAFTA that says you are allowed to come into the country. The last time I did that I spent a fascinating hour sitting in one of the little rooms at the Toronto airport where they deliberately left me sitting, knowing what flight I was on. They had taken my boarding pass to make sure I missed my flight. Then they came out and said, okay, you can go, but do not be a smart ass again. So do not tell them you are a lawyer.

COMMENT, *Mr. McIlroy*: Can I just add on to that, Michael? Do not carry a big briefcase either.

COMMENT, *Mr. Robinson*: Yes, that is right.

COMMENT, *Ms. Yost*: May I suggest another answer? Tell them you are a lawyer, you are coming down just to meet with some clients, you are not doing any work in the United States, and you are not billing anybody. That should work.

QUESTION, *Mr. von Koschembahr*: I would like to ask a question about American companies going on a temporary basis to provide service to equipment they have sold. Do you have experience with how easy or difficult that is and what it takes for them to do it without major hassle?

ANSWER, *Ms. Yost*: Yes. If the equipment was manufactured in the United States and there is an agreement to sell between the U.S. and Canadian people, and there are U.S. service people who are going up, they may go up for the length of the warranty or the service



provisions.

For other people it is one year for after-sales service. For Canadians and Mexican citizens under the NAFTA, it is for as long as the terms of the agreement. So my advice to the U.S. company is to write a contract saying we will provide service for the length of life of the machine, if you want, ten years or five years, and that is the length of time after-sales service.

QUESTION, *Mr. von Koschembahr*: I just want to amplify and clarify. If you do not have such an agreement at the time of the sale, and you do not have a copy of that agreement with you when you get there, you are likely to run into some difficulty. Would this be true in both directions?

ANSWER, *Ms. Yost*: I definitely know it is true coming into the United States because that is the way they care for problems. And it is reciprocal, so it should be the same problem in Canada. We tell people to bring the agreement with them. And it gets tricky with third parties.

QUESTION, *Mr. von Koschembahr*: What happens to this area of general services under Chapter 16?

ANSWER, *Ms. Yost*: Well, it goes to the problem of skilled and unskilled workers and our not wanting to let in people who are unskilled. And you have to prove for general services that it is one year, and then there are special provisions under the NAFTA. But we really are not encouraging it, and are not making it easy. That is why companies are struggling.

COMMENT, *Ms. Lussenberg*: Is that restricted to goods manufactured in the United States? Increasingly we see that Canadian or American companies have got the mandate for North America to distribute products and to service them. Do you have any of the risk context of a Canadian company that has the right to distribute a product in Canada and the United States that may not be a Canadian manufactured product, per se, but it does have the obligation to service on behalf of the tie-in with manufacturers? Does that sale or that service representative have a right to cross the border if there is a genuine servicing contract between the Canadian distributor who has the North American rights and the purchaser in the United States, or because the product was not of NAFTA or Canadian origin, there is no facilitated entry?

COMMENT, *Ms. Yost*: You are talking about third-party service provisions.

COMMENT, *Ms. Lussenberg*: I see them a lot.

COMMENT, *Ms. Yost*: Right.

COMMENT, *Ms. Lussenberg*: But there are North American mandates to sell and distribute products, even though you do not manufacture it yourself.

COMMENT, *Ms. Yost*: It just has to be a product made outside

the United States.

QUESTION, *Ms. Lussenberg*: Then they do not qualify?

ANSWER, *Ms. Yost*: No, they do qualify.

COMMENT, *Mr. Chiasson*: I have in my passport a TN visa that I almost did not get because I went to the border with all of the forms that a lawyer is required to have to come down to the United States. I was asked what I was doing here. I said I was coming down here to be an arbitrator. And so the very clever chap of a porter looked in the schedule, and it did not list arbitrator. So an hour-and-a-half later we made a concession, and I got my visa. So it is not just if you are a lawyer.

QUESTION, *Mr. O'Grady*: You may have answered this, but I am still a little confused. It sounds as though the national governments having negotiated this treaty have then done nothing of their own volition to bring all the state and provincial jurisdictions on side. I am just wondering in Ottawa and Washington, say, is there a working theory as to whether it is necessary to do this; or whether they can safely let it drift; or are they planning to have a federal provincial conference to sort it out? It sounds very confusing.

ANSWER, *Mr. McIlroy*: It is confusing. To answer your question, they have lots of meetings and conference calls and all kinds of things like that. They did that for over two years. But the fundamental problem, I think, is that the federal government of Canada and the federal government of the United States have not agreed on what the scope of Chapter 12 is and what services it covers and does not cover, particularly in the motherhood area of health services.

Therefore, what I think happened, reading between the lines, is that during the negotiation of the agreement, the provinces asked the feds if health services is in or out? And the feds gave them a blanket assurance not to worry, health services are not in there. After the negotiations were over and the fine print was there, the feds started saying something very different to the provinces. They started saying that some services are covered, some are not. They were not quite sure.

We worked with clients over a period of two years getting to the stage where we actually had to write the prime minister asking what this meant because our position was simple. How do we know what to put in Annex I if we do not know what is covered by Chapter 12 and what is carved out by Annex II? We have to know what is covered by Chapter 12 before we can figure out whether we need to file Annex I. And I think a lot of the provinces thought they did not have to file any Annex I reservations, and, therefore, they were not giving it a high priority. The feds changed their position late in the game. All of a sudden, the provinces started to scramble. And there is a mechanism in place for federal and provincial coordination of trade. I think you have hit the nail on the head. I think it was set up when trade treaties were

dealing with federal jurisdiction, customs, things like that. Now that it is dealing with provincial jurisdiction, the existing machinery is not sufficient to carry the load, and you are seeing systemic breakdown all over the place. Whether they are going to fix it or not, who knows? It may take awhile. But right now I do not think the system works very well. Just take a look at the situation that Michael just described and the fact that nobody seems to know what is going on with these reservation processes. I rest my case on that example.

COMMENT, *Ms. Yost*: We have several very similar provisions between the NAFTA and the regulations. Under the NAFTA installers, repair, and maintenance personnel and supervisors possessing specialized knowledge essential to the seller's contractual obligation who are performing services or training others to do that pursuant to a warranty or other service contract incidental to the sale of the equipment, if these people are located outside the United States for the purposes of this provision, the commercial or industrial equipment and machinery, including computer software, must have been manufactured outside the United States. So as long as it is manufactured outside the United States, people from outside can come in and service it, if any specialized knowledge is required and if it is pursuant to a contract.

COMMENT, *Ms. Lussenberg*: So get that contract.