

**COUNCIL ON LICENSURE,  
ENFORCEMENT AND REGULATION  
("CLEAR")**

**CONFERENCE PRESENTATION  
BY  
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The topic for this Roundtable discussion is:

*Trade Agreements Roundtable: NAFTA and Beyond: Implications for Regulation.*

The first questions that this topic raises is – what on earth is the NAFTA, and why should anyone involved in licensure, enforcement and regulation care about the NAFTA?

Well, the acronym “NAFTA” stands for the North American Free Trade Agreement. The NAFTA is trilateral international trade treaty that was signed by the governments of Canada, the United States and Mexico.

The NAFTA came into force a decade ago, in 1994.

Now, let’s turn to the more intriguing question of why anyone involved in licensure, enforcement and regulation should care about the NAFTA?

The quick answer to this question is that, as regulators of professional services, you should be interested in the NAFTA because licensing and certification are specifically covered under the NAFTA.

In other words, you can no longer assume that your regulatory framework is confined to the country or the province or state where you live. Like it or

not, Americans, Canadians and Mexicans are now part of the brave new world that is known as the global economy as a result of the NAFTA.

Page 10 of your Conference program has identified the following 4 issues:

- Framework and continuing developments with professional mobility under NAFTA
- Future implications for higher education accreditation
- Entry to practice requirements
- Immigration

For the next half-hour, I want to examine the NAFTA framework and how it affects you. I have distributed a 4-page excerpt from NAFTA's Chapter 12, which deals with Cross-Border Trade in Services. You will see that these pages drawn from NAFTA's Chapter 12 are numbered 1-4 at the bottom of the page.

The first thing I want to make sure you understand is that the NAFTA's obligations do not just apply to the governments that signed the treaty. Let's turn to the bottom of page 3, and look at the left-hand column at the very bottom of the page, under the heading: Article 1213: Definitions. The very first definition states, and I quote:

*For 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.*

So, in other words, if you are a licensing body that exercises authority that has been delegated to you by a government, you fall within the scope of this definition.

The NAFTA also includes a definition of professional services on page 3, in the right-hand column, about halfway down the page. This definition states, and again I quote:

*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.*

So here we see some concepts that are very familiar to all of us – post-secondary education, training, experience, and the all important right to practice which many of you regulate.

Now I mentioned earlier that NAFTA's Chapter 12 deals with Cross-Border Trade in Services. What does that mean, and where do you fit in? Again, let's look in the definitions section on page 3. In the right-hand column, at the top of the page, we see a definition that states, and again I quote:

*cross-border provision of a service or cross-border trade in services means the provision of a service:*

- (a) from the territory of a Party into the territory of another Party,*
- (b) in the territory of a Party by a person of that Party to a person of another Party, or*
- (c) by a national of a Party in the territory of another Party,*

*but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment - Definitions), in that territory;*

Well, what does this legal treaty language actually mean in plain language? Let me try to illustrate by using Canadian and American examples.

First,

- (a) from the territory of a Party into the territory of another Party,*

means, for example, the provision of medical services in Canada from the United States via telemedicine technology. In other words, the American providing the services in Canada does not actually come to Canada to provide the services. Instead, the services are exported from the United States to Canada, with the American service provider remaining in the United States.

Second,

- (b) *in the territory of a Party by a person of that Party to a person of another Party, or*

means, for example, occupational therapy services provided in the territory of the United States by an American to a Canadian. Again, we see the professional service provider remains in their home jurisdiction.

The third part of the definition is probably of the most interest to most of you:

- (c) *by a national of a Party in the territory of another Party,*

means, for example, physiotherapy services provided by an American physiotherapist in Canada. Here we see we are getting into professional mobility issues and the licensing and regulation of foreigners.

And that brings us to page 2, where we see in the right-hand column Article 1210's provisions regarding Licensing and Certification. The first paragraph of Article 1210 states:

*With a view to ensuring that any measure adopted or maintained by a Party relating to the licensing or certification of nationals of another Party does not constitute an unnecessary barrier to trade, each Party shall endeavor to ensure that any such measure:*

- (a) *is based on objective and transparent criteria, such as competence and the ability to provide a service;*
- (b) *is not more burdensome than necessary to ensure the quality of a service; and*
- (c) *does not constitute a disguised restriction on the cross-border provision of a service.*

There are a couple of key points here.

First of all, what does the term “measure” mean? In another section of the NAFTA which I have not produced, the term “measure” is broadly defined to include:

*Any law, regulation, procedure, requirement or practice.*

As you can see, the term “measure” captures the instruments that you use to license and certify people.

Second, the three obligations in a, b, and c are joined by the word “and”, so they all apply. These obligations include key concepts such as objectivity, transparency, and ability. In addition, measures cannot be unnecessarily burdensome, or act as disguised trade restrictions. You can see that the treaty is attempting to draw the distinction between protectionism and protecting the public.

On page 2, in the right-hand column, about half-way down the page, we see the second paragraph of Article 1210, which deals with a topic that is of growing importance to many of you – Mutual Recognition Agreements (“MRAs”). It states, and I quote,

*Where a Party recognizes, unilaterally or by agreement, education, experience, licenses or certifications obtained in the territory of another Party or of a non-Party:*

- (a) nothing in Article 1203 shall be construed to require the Party to accord such recognition to education, experience, licenses or certifications obtained in the territory of another Party; and*
- (b) the Party shall afford another Party an adequate opportunity to demonstrate that education, experience, licenses or certifications obtained in that other Party's territory should also be recognized or to conclude an agreement or arrangement of comparable effect.*

Point (a)’s reference back to Article 1203 is important because it exempts MRAs from the Most Favoured Nation (“MFN”) obligation. If you turn to page 1, in the right-hand column, about one-third down the page, you can see the MFN provisions of Article 1203, which state, and I quote:

*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.*

So, what does this mean? In general, it means that, if an American licensing body treats Canadian or British professionals a certain way, it must provide no less favourable treatment to Mexican professionals. However, Article 1210 states that this Article 1203 MFN obligation does not apply to the recognition of education, experience, licenses or certifications obtained in the territory of another Party.

Instead, Article 1210 replaces the Article 1203 MFN obligation with the lesser obligation of affording Mexico, in our example, with an adequate opportunity to demonstrate that education, experience, licenses or certifications obtained in Mexico should also be recognized, or to conclude an agreement or arrangement of comparable effect.

Turning the page to the bottom of page 2 in the right hand corner, we see paragraphs 3 and 4 of Article 1210 indicate that citizenship and permanent residency requirements should be removed.

At the top of page 3, in the left-hand column, we also see that paragraph 5 of Article 1210 refers to an Annex 1210.5, which applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service providers.

Before we turn to Annex 1210.5, please note that the words “adopted or maintained” refers to both existing and future measures. In other words, the treaty applies retroactively and your existing measures are not grandfathered.

Now, let’s turn to page 4, which includes part of Annex 1210.5’s provisions regarding Professional Services. I want to focus on Section A’s General Provisions, which deal with the following 4 topics:

- Processing of Applications for Licences and Certifications;
- Development of Professional Standards;
- Temporary Licensing; and

- Review.

Under the heading *Processing of Applications for Licences and Certifications*, Annex 1210.5 states, and I quote:

*Each Party shall ensure that its competent authorities, within a reasonable time after the submission by a national of another Party of an application for a license or certification:*

- (a) *where the application is complete, make a determination on the application and inform the applicant of that determination; or*
- (b) *where the application is not complete, inform the applicant without undue delay of the status of the application and the additional information that is required under the Party's law.*

As you can see, these obligations really focus on processing a foreign service provider's application for a licence or certification "within a reasonable time" and keeping the applicant informed.

I think the next heading should be of particular interest to everyone in this room -- Development of Professional Standards. Paragraph 2 of Section A of NAFTA's Annex 1210.5 states:

*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.*

Here we see that the Parties are supposed to encourage you to develop mutual recognition agreements and to make recommendations to the NAFTA Commission. The Commission refers to the NAFTA Free Trade Commission, which comprises cabinet-level representatives of the Parties or their designees. In other words, each country's Minister responsible for international trade.

Now, what does the NAFTA mean when it refers to standards and criteria for licensing and certification of professional service providers? We see that paragraph 3 of Section A of NAFTA's Annex 1210.5 states:

*The standards and criteria referred to in paragraph 2 may be developed with regard to the following matters:*

- (a) **education** - accreditation of schools or academic programs;
- (b) **examinations** - qualifying examinations for licensing, including alternative methods of assessment such as oral examinations and interviews;
- (c) **experience** - length and nature of experience required for licensing;
- (d) **conduct and ethics** - standards of professional conduct and the nature of disciplinary action for non-conformity with those standards;
- (e) **professional development and re-certification** - continuing education and ongoing requirements to maintain professional certification;
- (f) **scope of practice** - extent of, or limitations on, permissible activities;
- (g) **local knowledge** - requirements for knowledge of such matters as local laws, regulations, language, geography or climate; and
- (h) **consumer protection** - alternatives to residency requirements, including bonding, professional liability insurance and client restitution funds, to provide for the protection of consumers.

There are a few key points to keep in mind here. First, mutual recognition does not mean harmonization. Instead, Parties can maintain their own different standards because all they are agreeing to do is to grant mutual recognition to each other's differing standards.

Second, you will note that the Parties are required to encourage the relevant bodies to develop mutual recognition agreements. Who are these relevant bodies? Is it the national professional association that negotiates?

Not necessarily.

A few years ago, I worked with the engineering profession on a NAFTA MRA. Their national associations negotiated a deal. However, they did not have the power to implement the MRA. The power to implement lay with the state and provincial licensing bodies, many of whom ultimately refused to implement the MRA.

So, it is vitally important that you have all of the right people involved in the negotiations right from the beginning. Ask yourselves whether you need the involvement of both the professional association and the licensing body? If you are a federal state, do you need both national and state or provincial involvement? What about the involvement of international organizations or regional organizations involving your profession?

Let's look at the 8 matters listed in Annex 1210.5.

The first three matters I believe are the heart of most MRAs. I call them the "3 Es" – education, examinations, and experience.

With respect to education, should you require that applicants be educated in Canada, the United States and Mexico? If so, how comfortable are you with each other's accreditation standards?

With respect to examinations, we all know that many professions rely more on national examinations than accreditation to ensure minimum levels of education are met. However, examinations can be a hurdle for older service providers. For example, I doubt I could pass the Ontario bar admission examinations today without a lot of time and effort. Another issue regarding examinations is whether it makes sense to have a common continental examination that is applied in Canada, the United States and Mexico?

Experience is often a key criterion, particularly for older applicants, rather than for recent graduates.

As I said, I believe the heart of a MRA lies in the "3 Es", and that if you want to promote professional mobility, emphasis should be placed on the common denominator of experience rather than on the more idiosyncratic criteria of education and examinations.

With respect to conduct and ethics, how do you deal with the issue of disciplinary action? Do you want to recognize and apply another jurisdiction's sanctions to highly mobile individuals?

Allow me conclude our discussion of Annex 1210.5 by pointing out that paragraph 4 of Section A envisions the NAFTA Commission giving its seal

of approval to Mutual Recognition Agreements and Paragraph 6 creates ongoing Commission overview of this process.

I should also mention that paragraph 5 raises the issue of Temporary Licensing. This may be an area that you want to get some experience in before you take on the challenge of more permanent licensing arrangements.

I think it's fair to say that, as globalism progresses, more and more professional service providers will follow their multinational clients and travel to other jurisdictions to provide their services – either on a temporary or a permanent basis.

If a foreign service provider wishes to come into your jurisdiction, two issues will arise – immigration and licensing. Today I have focused on licensing because that is what most of you folks are involved in. I hope that our discussion of the NAFTA framework will allow you to leave this Roundtable with a better idea of what you need to be thinking about.

I would also like to leave you with some questions as food for thought.

Does it make sense for you to promote professional mobility and to negotiate Mutual Recognition Agreements? To answer this question, you must ask yourself whether your jurisdiction is a net importer or a net exporter of your particular profession. In other words, do you have a labour shortage, or a labour surplus?

If you have a labour shortage, you may wish to increase imports. If you have a labour surplus, you may want to try to increase your exports.

Also, as I mentioned earlier, you need to ask who must be involved in the negotiations. Who should take the lead – the professional association, the licensing body, or both? Keep in mind that regulators usually focus on processing imports, whereas professional associations like to try to increase exports.

The other thing that I think you have to recognize is that governments are getting out ahead of regulators on cross-border trade in services. Witness the “encouraging role” and the Commission oversight role that we just saw in the NAFTA’s Chapter 12.

Always keep in mind that this issue goes way beyond the trilateral NAFTA. Today, as we speak, the International Trade Ministers from 146 countries are meeting in Cancun Mexico so that they can try to move forward with the latest round of World Trade Organization (“WTO”) negotiations, which specifically includes trade in services and the General Agreement on Trade in Services, known as the “GATS”.

The GATS negotiations are well underway. For example, on July 10<sup>th</sup>, the European Community tabled a Proposal for Disciplines on Licensing Procedures to the GATS Working Party on Domestic Regulation. I urge you to read this document to get an idea of what the Europeans are thinking. Most of their proposal focuses on procedures and process rather than substance. However, you should be aware that some of these obligations may apply on a horizontal basis to all professions, whereas other disciplines may be developed on a sector-specific basis. For example, there are already disciplines on domestic regulation in the accounting sector.

In addition to the NAFTA and the WTO GATS, there are negotiations underway to expand the regional NAFTA to the entire western hemisphere and create a Free Trade Agreement of the Americas (the “FTAA”). You should also be aware that the Organization for Economic Cooperation and Development (the “OECD”) has been doing some interesting work on the Liberalization of Trade in Professional Services.

Export interests usually drive free trade negotiations. Governments often consult with national professional associations who are interested in promoting exports, rather than with you, the local provincial and state regulators, who must manage the import access. Governments may be more interested in promoting free trade than your grassroots membership, who may be more interested in protecting their local turf.

Let’s face it. There is something going on out there. You can either be reactive and get dragged along, or you can be proactive and get out ahead of the curve.

Are you talking to your international trade negotiators? If not, why not? The bottom line is that your regulatory framework is no longer confined to your local jurisdiction or your national capital. You cannot ignore the NAFTA, the FTAA or the WTO.

Thank you for your attention to this detailed discussion of the NAFTA framework.