10-1-2001

Good Fences Make Bad Neighbors: Is The North American Free Trade Agreement a Lie for Lawyers?

Amy D. Ronner

Dennis J. O'Connor

ARTICLE

GOOD FENCES MAKE BAD NEIGHBORS: IS THE NORTH AMERICAN FREE TRADE AGREEMENT A LIE FOR LAWYERS?

AMY D. RONNER*AND DENNIS J. O'CONNOR**

* Professor of Law, St. Thomas University School of Law; J.D., 1985, University of Miami; Ph.D., 1980, University of Michigan; M.A., 1976, University of Michigan; B.A., 1975, Beloit College.

** LL.B., 1992, Universite de Moncton; B.A., 1989, McGill University. Mr. O'Connor practiced law in Canada for six years in the area of Wills and Estates. He is presently a J.D. Candidate, 2002, and law student at St. Thomas University School of Law. He would like to dedicate this article to his beloved parents, Walter and Joan O'Connor, for their unwavering support.

I. INTRODUCTION

Robert Frost describes the "old-stone savage" mending a wall:

> "He moves in darkness, as it seems to me,
> Not of woods only and the shade of trees.
> He will not go behind his father's saying,
> And he likes having thought of it so well
> He says again, Good fences make good
> neighbors."[1]

Frost and the North American Free Trade Agreement ("NAFTA")[2] have something in common.[3] Both associate the maintenance of walls between neighbors with aboriginal darkness.

Two good neighbors that have a lot in common are the United States and Canada.[4] Of course, both nations, once English colonies, are democratic, predominantly adhere to the English common law system and abide by constitutions as their supreme law.[5] The respective constitutions of both the United States and Canada are based on a system of separated powers[6] and "checks and balances"[7] among the executive, legislative and

---

1. Robert Frost, *Mending Wall, in* MODERN AMERICAN POETRY, MODERN BRITISH POETRY 170, 171 (1958).

2. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter "NAFTA"].

3. *See infra* Part II (discussion of NAFTA and its goals).

4. *See* Roger Gibbins, *The Impact of the American Constitution on Contemporary Canadian Constitutional Politics*, THE CANADIAN & AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 131, 145 (Marian C. McKenna ed., 1993) (discussing the commonalities between Canada and the United States).

5. Summary of Environmental Law in the United States, *at* http://www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication.html (Mar. 18, 2001); Canada Information Office - The Legal System, *at* http://www.infocan.gc.ca/facts/juri_e.html (Mar. 18, 2001). *See also,* The Honourable Madame Justice Claire L'Heureux-Dube, *Two Supreme Courts: A Study in Contrast*, THE CANADIAN & AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 149, 154 (Marian C. McKenna ed., 1993) (discussing the importance of the Constitution in both Canada and the United States as the supreme law).

6. L'Heureux-Dube, *supra* note 5, at 154.

7. Thomas L. Pangle, *The Accommodation of Religion: The Tocquevillian*

judicial branches.[8] Further, both constitutions set forth the power of the federalist systems: in the United States[9], the government and the states share law-making and governance while in Canada the same functions are enjoyed by the federal government in Ottawa and the ten provinces and three territories.[10] In addition, the Bill of Rights[11] in the United States Constitution and the Charter of Rights and Freedoms[12] in the Canadian Constitution protect the fundamental rights and freedoms of their citizens.

Within the constraints of their constitutions, both the United States and Canada can change their laws by means of written statutes, which the federal and state or provincial legislatures enact.[13] While in the United States, Congress, the legislative branch, consists of the House of Representatives and the Senate, in Canada, two similar legislative Houses of Parliament, the House of Commons and the Senate, must approve federal law.[14]

In the United States and Canada, the courts interpret and apply the law and the highest court in each country is the Supreme Court.[15] While Canada is different in the sense that it

---

Perspective, THE CANADIAN & AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 3, 10 (Marian C. McKenna ed., 1993).

8. Canada Information Office- The Legal System, *at* http://www.infocan.gc.ca/facts/juri_e.html (Mar. 18, 2001); *see also* Summary of Environmental Law in the United States, *at* http://www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication.html (Mar. 18, 2001).

9. Charles Kelso, *Constitutional Law*, THE U.S. LEGAL SYSTEM: A PRACTICE HANDBOOK 171, 171 (Dennis Campbell & Winifred Hepperle eds., 1983).

10. Canada Information Office- The Legal System, *at* http://www.infocan.gc.ca/facts/juri_e.html, (Mar. 18, 2001).

11. Summary of Environmental Law in the United States, *at* http://www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication.html (Mar. 18, 2001). *See also* Kelso, *supra* note 9, at 172 (discussing the purpose and scope of the Bill of Rights).

12. Canada Information Office - The Legal System, *at* http://www.infocan.gc.ca/facts/juri_e.html (Mar. 18, 2001). *See also,* L'Heureux-Dube, *supra* note 5, at 150 (referring to the Canadian Charter of Rights and Freedoms as Americanized).

13. Canada Information Office - The Legal System, *at* http://www.infocan.gc.ca/facts/juri_e.html (Mar. 18, 2001) (describing the Canadian legislative process). *See also* LAWRENCE M. FRIEDMAN, AMERICAN LAW: AN INTRODUCTION, 108 (1998) (describing the American legislative process).

14. Canada Information Office - The Legal System, *at* http://www.infocan.gc.ca/facts/juri_e.html (Mar. 18, 2001) (commenting on the Canadian legislative branch). *See also* FRIEDMAN, *supra* note 13, at 109 (commenting on the American legislative branch).

15. LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA, 46, 48 (F. L. Morton ed., 1992) (referring to Supreme Court of Canada); *See also* FRIEDMAN, *supra* note 13, at 81 (referring to the U.S. Supreme Court).

does not have a separate federal court system,[16] the courts of the various states and provinces are similar in their hierarchical division into trial and appellate tiers.[17] But beyond these broad common denominators, the substantive areas of the law of both nations are similar: for example, in both nations, statutes, commercial laws and the law of contracts, property and torts are essentially mirror images of one another.[18] It is thus not surprising that the American and Canadian law schools and bars are also quite compatible.

With such similar cultural, historical, geographical and legal backgrounds, it makes sense that these "good neighbors" entered into NAFTA to enhance the cooperative market for the trade of goods and services of both the United States and Canada. NAFTA's preamble is quite ambitious: it aspires, among other things, to "strengthen the bonds of friendship and cooperation among the nations," catalyze "broader international cooperation" and promote the "harmonious development and expansion of world trade" along with "trade in goods and services that are the subject of intellectual property rights" and "new employment opportunities."[19]

NAFTA, like so many other developments in the twenty-first century, is just a component of a larger theme: namely, one of global trade and international commercial cooperation. NAFTA embraces what is inherent in our century - - the perception of a shrinking and interdependent world, one with limitless Internet communication, international trade tribunals and a world court. The legal profession is, of course, part of this world vision. It is basic that law firms in various nations are merging and opening up local offices in outposts all over the world. Law firms are also expanding their international focus by emphasizing global finance and international banking, taxation and corporate law. Significantly, NAFTA does not exclude the legal profession from its spirit of cooperation.[20] It actually has provisions that aim to promote the trade of legal services between the neighbors, the

16. LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA, *supra* note 15, at 47.

17. *Id.* at 48 (describing the Canadian court system); *See also* FRIEDMAN, *supra* note 13, at 81 (describing the U.S. court system).

18. *See* Gibbins, *supra* note 4, at 132-133 (comparing the similarities between the economic, social, and legal systems of Canada and the United States).

19. NAFTA, *supra* note 2, 32 I.L.M. at 297.

20. *See infra* Part II (discussing NAFTA and its inclusion of legal services).

United States and Canada.[21]

The main thrust of this article is not to merely praise NAFTA and endorse its salutary objectives, but more narrowly to analyze its effect on lawyers who seek to cross the border and deliver legal services in a neighboring country. More specifically, it attempts to reveal reality: namely, the multiple impediments that conspire to undermine and nullify NAFTA. This article, which mainly focuses on a Canadian lawyer's attempts to relocate and practice law in the United States, proceeds in three steps.

Part II explores the origins and objectives of NAFTA, beginning with its progenitor, the United States-Canada Free Trade Agreement, which failed to fully assist one of the authors, a Canadian lawyer, who sought to move to the United States permanently and practice law there.[22] Further, this part explains how NAFTA enhanced the progress that the FTA had already made with respect to the expansion of North American trade in services, examining those provisions in NAFTA that aim to facilitate the trade of legal services.[23]

Part III delves into what your authors call a "landscape of fences." It shows that what appeared to be the inauguration of unobstructed cross-border trade of legal services, turned out to be a nearly empty promise.[24] The local and American Bar Associations have set up various obstacles to Canadian lawyers who, seeking to avail themselves of the principles behind NAFTA, wish to practice their profession in the United States. In this context, we turn to the mechanism of narrative[25] to show

---

21. *Id.*

22. *See infra* Part II A (discussing how the FTA is the progenitor of NAFTA).

23. *See infra* Part II B (discussing how NAFTA built upon the FTA).

24. *See infra* Part III A (discussing the various rules and policies that undermine NAFTA).

25. The use of narrative in Part III stems from the authors' endorsement that stories can be a form of consciousness raising and inducing empathy. *See* Phyllis Gordfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1630 (1991) (discussing how narrative can empower women's groups overlooked by traditional feminist scholars). *See also* Peter Marguiles, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civil Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 697 (1994) (arguing that stories do not reduce to categories and assist in the learning process). *Cf.* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1983) (describing stories, parables, chronicles, and narratives are powerful means of destroying mindset). Most significantly, the authors believe that there are stories from

how one of the authors, a Canadian lawyer, tried to break down the wall between neighbors and qualify to practice his profession in the state of Florida.[26] While the article addresses bar rules and legal education in the state of Florida, the discussion is, of course, not limited to just this one state but can apply to a Canadian lawyer trying to relocate in almost any jurisdiction.[27]

Part IV is the conclusion, which returns to Robert Frost's "old-stone savage"[28] and suggests that the undermining of NAFTA is detrimental and conversely, that the true eradication of fences makes for good neighbors.

II. NORTH AMERICAN FREE TRADE AGREEMENT: ITS ORIGINS AND ITS OBJECTIVES

A. The Progenitor: The Free Trade Agreement

On January 1, 1989, the United States-Canada Free Trade Agreement[29] took effect. Its purposes were quite laudatory: it aimed to confirm the already cooperative market for the trade of goods and services of both Canada and the United States and to foster the development of greater international cooperation.[30]

Recognizing the enormous growth of the service sector in

---

the bottom that can address forms of oppression. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 819 (1993). What the O'Connor Saga in Part III seeks to portray is how bar rules and other forces conspire to eviscerate NAFTA and make one lawyer's attempt to move from Canada to the United States into a story from the bottom or an account of discouraging oppression.

26. *See infra* Part III.B (We call this the O'Connor saga; the section in which one of the authors, an experienced Canadian lawyer, trying to make NAFTA work for him, sought to cross the border and practice his profession in the United States).

27. The State of New York's licensing requirements for foreign lawyers moving there is far less onerous than that of all other U.S. states. *See* note 91 for discussion.

28. *See* Frost, *supra* note 1, at 171.

29. United States-Canada Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988) [hereinafter FTA].

30. More specifically, its objectives were to eliminate barriers to trade in goods and services between the territories of the parties. *See* Ronald D. Lunau, *¶420 Temporary Entry for Business Persons*, *in* THE CANADA-U.S. FREE TRADE AGREEMENT: FINAL TEXT AND ANALYSIS 47 (1988). In addition, the FTA sought to significantly liberalize conditions for investment within the free trade area. *See* George N. Addy, *¶ 430 Investment*, *in* THE CANADA-U.S. FREE TRADE AGREEMENT: FINAL TEXT AND ANALYSIS 50 (1988).

North American business that had occurred in the seventies and eighties, and the competition stemming from cooperation in trade among European nations,[31] the FTA took the unprecedented step of reaching an agreement involving the subject of trade of services between the two countries. To eliminate barriers to the movement of goods, services and investments, the FTA "facilitate[d]. . . temporary entry"[32] into Canada and the United States by certain business persons based in the other country.

Schedule 2 to Annex 1502.1[33] of the FTA identified one designated group of business persons as "professionals".[34] Among that list of professionals were lawyers. Under the agreement, lawyers, like the other listed professionals, were permitted to enter the other party nation under a new visa category[35] and engage in temporary employment without the need of prior filing of a visa petition or labor certification test.[36] Despite the removal of these restrictions, the FTA provided no express authoirty to lawyers to practice law, locally, in their neighboring country. Moreover, to qualify for this advantageous immigration status, the FTA applicant had to expressly demonstrate an intention to remain a permanent resident of Canada.[37]

The major drawback of the FTA was its exclusive emphasis on temporary entry. In addition, despite having created new advantages for such temporary entrants, the FTA did not assist any Canadian lawyers who sought to move to the United States

---

31. The Treaty Of Rome establishing the European Community was initially signed by six founding members: Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands, on March 25, 1957, to liberalize trade and to create a free movement zone for labor among its member nations. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 483 (2d College ed. 1980).

32. Lunau, *supra* note 30, at 49.

33. FTA, *supra* note 29, 27 I.L.M. at 369.

34. The FTA originally listed 63 professions which qualified for reciprocal temporary and expedited entry into the United States and Canada. *See* Ellen Ginsberg Yost, *Temporary Entry for Business Persons A United States Perspective*, THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 248, 255 (Judith H. Bello, Alan F. Holmer and Joseph J. Norton eds., 1994).

35. Lawyers, like other professionals in this category were entitled to a TC status. TC status was granted to those individuals possessing a baccalaureate degree or appropriate credentials demonstrating professional status. Applications for TC status could be submitted at designated major ports-of-entry with proof of citizenship, educational credentials, and a professional job offer in the United States. *See id.* at 255, 256.

36. FTA, *supra* note 29, 27 I.L.M. at 370.

37. Ginsberg Yost, *supra* note 34, at 259.

permanently and hoped to practice law there.

B. The North American Free Trade Agreement

The North American Free Trade Agreement[38] ["NAFTA"] enhanced the progress that the FTA had already made with respect to the expansion of North American trade in services. NAFTA, signed between the United States, Canada and Mexico, became effective on January 1, 1994. Among the panoply of subjects covered, NAFTA had specific provisions affecting the trade of legal services.[39]

The provisions of NAFTA addressing legal services are contained primarily in Chapter Twelve entitled "Cross-Border Trade in Services"[40] and Chapter Sixteen entitled "Temporary Entry for Business Persons."[41] In addition, specific reserve exceptions of each party nation to the general NAFTA principles may be found in Annexes at the end of the NAFTA text.

C. Chapter Twelve

Chapter twelve sets out the two fundamental trade principles of NAFTA; national treatment[42] and most favored-nation treatment.[43] Although there is no specific reference to the applicability of these principles to legal services, as a result of their general applicability to the trade of services, they are deemed to apply to legal services.[44] Exceptions to these general principles pertaining to the practice of law are, however, set out later in the various annexes.[45]

---

38. NAFTA, *supra* note 2.

39. The only direct reference to the legal profession in NAFTA is the inclusion of lawyers as a category of professionals listed in Appendix 1603.D.1. *See* NAFTA, *supra* note 2, 32 I.L.M. at 669.

40. NAFTA, *supra* note 2, 32 I.L.M. at 649.

41. NAFTA, *supra* note 2, 32 I.L.M. at 664.

42. NAFTA, *supra* note 2, 32 I.L.M. at 649.

43. NAFTA, *supra* note 2, 32 I.L.M. at 649.

44. Rona R. Mears, *NAFTA's Impact on the Legal Profession, in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 397, 408 (Judith H. Bello, Alan F. Holmer and Joseph J. Norton eds., 1994).

45. *See* NAFTA, *supra* note 2, 32 I.L.M. at 718-60. (The United States, Mexico and Canada each listed express limitations regarding the applicability of "national treatment" and "most-favored nation treatment"to the trade of services).

The principle of national treatment states that each NAFTA party shall treat service providers of another NAFTA party no less favorably than it treats its own service providers under similar circumstances.[46] In theory, the principle of national treatment should mean, for instance, that Canadian lawyers could provide their services in the United States in the same manner and capacity, and subject to the same requirements, restrictions or controls, as American lawyers.

The second basic principle, "most favored-nation treatment," provides that each party will treat service providers of another NAFTA party no less favorably than service providers of any other NAFTA party or a non-party, in similar circumstances.[47] In this sense, Canadian lawyers could expect treatment no less favorable than their Mexican counterparts or lawyers from any other nation. If a conflict arises between the two fundamental principles of NAFTA, Article 1204[48] provides that the *better* of the national or most-favored-nation treatment will be given the party nation.

Chapter twelve provides some other significant general provisions which would effectively further reduce the barriers to trade in the legal sector. Article 1205[49] provides that a service provider from another NAFTA party will not be required to establish or maintain a representative office or any form of enterprise or to be a resident as a pre-condition to provide cross-border services. Article 1210[50] then sets out certain criteria for ensuring that licensing and certification of professional services are not used to create unnecessary trade barriers. Licensing and certification procedures of the relevant professions in each NAFTA party should be objective and transparent, not be "more burdensome than necessary to ensure the quality of a service," and not be a disguised barrier to cross-border service.[51] Annex 1210.5[52] more clearly describes the practical application of these general provisions.

---

46. *See* NAFTA, *supra* note 2, 32 I.L.M. at 649.
47. *See* NAFTA, *supra* note 2, 32 I.L.M. at 649.
48. *See* NAFTA, *supra* note 2, 32 I.L.M. at 649.
49. *See* NAFTA, *supra* note 2, 32 I.L.M. at 649.
50. *See* NAFTA, *supra* note 2, 32 I.L.M. at 650.
51. NAFTA, *supra* note 2, 32 I.L.M. at 360. *See also* Harry Broadman, *International Trade and Investment in Services: A Comparative Analysis of the NAFTA*, 27 INT'L LAWYER 623, 636 (1993).
52. NAFTA, *supra* note 2, 32 I.L.M. at 651-53.

Annex 1210.5 provides that standards and criteria may be developed with regard to a number of matters related to professional licensing, including "education,"[53] "examinations,"[54] "experience,"[55] "conduct and ethics,"[56] "professional development and re-certification,"[57] "scope and practice,"[58] "local knowledge,"[59] and "consumer protection."[60] In this section, NAFTA encourages prompt processing of applications for licensing, encourages development of "mutually acceptable" standards and criteria for licensing and seeks recommendations for mutual recognition of licensing standards.[61]

Perhaps the most significant provision of NAFTA as it relates to the legal profession is found in Section B of Annex 1210.5[62] that creates assurances in one party nation for the practice of foreign legal consultants originating from another party nation.[63] This section provides that a national of another NAFTA party be allowed to practice the law of any country in which that national is authorized to practice.[64] Pursuant to this provision, a Canadian lawyer could give advice regarding the laws of his or her own province while temporarily residing in, for example, the State of Florida. This section, does not, however,

---

53. NAFTA, *supra* note 2, 32 I.L.M. at 652 (defining education as "accreditation of schools or academic programs").

54. NAFTA, *supra* note 2, 32 I.L.M. at 652 (defining examinations as "qualifying examinations for licensing, including alternative methods of assessment such as oral examinations and interviews").

55. NAFTA, *supra* note 2, 32 I.L.M. at 652 (defining experience as the "length and nature of experience required for licensing").

56. NAFTA, *supra* note 2, 32 I.L.M. at 652 (defining conduct and ethics as "standards of professional conduct and the nature of disciplinary action for non-conformity with those standards").

57. NAFTA, *supra* note 2, 32 I.L.M. at 652 (defining professional development and re-certification as "continuing education and ongoing requirements to maintain professional certification").

58. NAFTA, *supra* note 2, 32 I.L.M. at 652 (defining scope and practice as the "extent of, or limitations on, permissible activities").

59. NAFTA, *supra* note 2, 32 I.L.M. at 652 (defining local knowledge as "requirements for knowledge of such matters as local laws, regulations, language, geography or climate").

60. NAFTA, *supra* note 2, 32 I.L.M. at 652 (defining consumer protection as "alternatives to residency requirements, including bonding, professional liability insurance and client restitution funds, to provide for the protection of consumers").

61. NAFTA, *supra* note 2, 32 I.L.M. at 652.

62. NAFTA, *supra* note 2, 32 I.L.M. at 652-53.

63. NAFTA, *supra* note 2, 32 I.L.M. at 652-53.

64. NAFTA, *supra* note 2, 32 I.L.M. at 652-53. *See also* DAVIT ETHERINGTON & DONNA LEA HAWLEY, HIRING PROFESSIONALS UNDER NAFTA, 61-62 (1998).

permit the practice of local law or make any reference to facilitating a foreign lawyer's access to the practice of local law.

Further cooperation among the party nation is provided in this portion of NAFTA, particularly, regarding ongoing consultation with the bars or equivalent lawyers professional groups, matters such as association or partnership of local lawyers and foreign legal consultants in addition to other related issues. The Annex ends with a general statement of principles regarding the future liberalization of these policies and a requirement that the countries meet periodically and report on progress.[65]

Finally, the last notable provision of chapter twelve as it applies to legal services, is found in Article 1210.3.[66] Article 1210.3 provides that within two years of NAFTA's effective date, the parties shall eliminate any citizenship or permanent residence requirements for professional service providers that are set out in the schedule of exceptions contained in various annexes.

D. Chapter Sixteen

Chapter sixteen of NAFTA generally regulates the entry of business persons on a temporary basis. Appendix 1603.D.1[67] to this chapter lists lawyers as one of the categories of professionals eligible for preferential entry. NAFTA would require only "proof of citizenship" and "documentation demonstrating that the business person will be so engaged and describing the purpose of entry," for temporary entry.[68] For those seeking to enter the United States on a temporary basis, the benefits of these NAFTA provisions in terms of reduced inconvenience, delay and paperwork, are substantial. Once again, however, the provisions in this portion of NAFTA, make no substantive or procedural changes relating to those entering other party nations to establish or stay on a more permanent basis.

The other annexes regarding legal services are express reservations made by the three countries, allowing them to retain

65. NAFTA, *supra* note 2, 32 I.L.M. at 653.
66. NAFTA, *supra* note 2, 32 I.L.M. at 650-51.
67. NAFTA, *supra* note 2, 32 I.L.M. at 668-70.
68. NAFTA, *supra* note 2, 32 I.L.M. at 665-66.

certain existing non-conforming measures that run counter to the basic principles of chapter twelve.[69] For the most part, the reservations of the United States pertain to foreign legal consultants and patent attorneys.[70] These reservations allow foreign legal consultants to provide services and to establish firms only in states that so permit and lists the states that do so, including Florida.[71] The United States also reserves the right to adopt or maintain measures regarding legal services or consultants from Mexico.[72] Finally, the United States agrees to phase out nationality requirements for practice before the patent office over the next two years.[73]

Canada's one and only reservation authorizes legal consultants from the United States and Mexico to establish, in only three permitting provinces[74] allowing foreign legal consultants, after January 1, 1994.

III. THE TRADE OF LEGAL SERVICES IN THE UNITED STATES AFTER NAFTA: A LANDSCAPE OF FENCES

What appeared to be the inception of unobstructed cross-border trade of legal services turned out to be a practical illusion: in truth there were few progressive developments after NAFTA. In fact, as we demonstrate below, when one Canadian lawyer attempted under the aegis of NAFTA to practice law in the United States, he encountered a landscape of fences.

A. The Landscape of Fences

The progress witnessed under NAFTA is largely twofold. A growing number of states have accepted the concept of the foreign legal consultant and all states have now eliminated the need for citizenship or permanent residence as requirements for

69. These include Annexes I-VI. *See* NAFTA, *supra* note 2, at 32 I.L.M. 706-776.

70. NAFTA, *supra* note 2, at 32 I.L.M. 744, 757 & 767-68.

71. Besides Florida, the other states permitting foreign legal consultants are Alaska, California, Connecticut, the District of Columbia, Georgia, Hawaii, Illinois, Michigan, New Jersey, New York, Ohio, Oregon, Texas and Washington. *See* ALAN S. LEDERMAN & BOBBE HIRSH, THE NAFTA GUIDE: HOW NAFTA WILL AFFECT YOU AND YOUR BUSINESS 41 (1995).

72. NAFTA, *supra* note 2, at 32 I.L.M. 766.

73. NAFTA, *supra* note 2, at 32. I.L.M. 744-45.

74. The three Canadian provinces permitting foreign legal consultants are British Columbia, Ontario and Saskatchewan. *See* LEDERMAN & HIRSH, *supra* note 71, at 41.

sitting for their respective bar examinations.[75]

Beyond these two ostensible advances, there are still multiple fences and no real progress has been made to facilitate the Canadian lawyer that wishes to engage in the practice of law in the United States on a permanent or temporary basis. For the most part, regarding the practice of law, a lawyer, as a listed professional under NAFTA, may still only seek temporary admission into the United States as a foreign legal consultant. In fact, as explained below, due to increased educational requirements established by the American Bar Association in the last decade,[76] access of Canadian lawyers to local American markets has become more restricted.

As discussed above, the principle of national treatment aspires toward parity: it states that each NAFTA party shall treat service providers of another NAFTA party no less favorably than it treats its own service providers under similar circumstances.[77] In reality, however, Canadian lawyers are not afforded such national treatment regarding their ability to offer legal services at a local level when compared to their American counterparts. That is, a Canadian lawyer cannot move to the state of Florida and just commence lawyering. Despite the fact that the reservations concerning any service sector were to be "de minimis, confined to well-defined areas, and where possible, set to terminate within a specified time period,"[78] seven years later, the Canadian lawyer must still re-certify or retrain.[79]

To practice law in a state like Florida a foreign lawyer must, of course, first be admitted to the Florida Bar.[80] But if the principle of national treatment were really applied, admission

75. *See* Mears, *supra* note 44, at 402 (discussing how Supreme Court decisions *In re Griffiths*, 413 U.S. 717 (1973), prohibited states from discriminating, on the basis of citizenship, against foreign applicants seeking to become lawyers and *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274 (1985), prohibited states from denying admission to state bars on the basis of non-residency).

76. In 1993, the ABA reduced the number of advanced credits that it would permit United States law schools to grant to anyone having completed foreign legal study from two-thirds of the credits required to obtain a United States law degree to one third of the credits so required. *See* ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 308 (1993).

77. NAFTA, *supra* note 2, 32 I.L.M. at 649.

78. *See* Broadman, *supra* note 51, at 636.

79. RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR, Rule 2-11 (1998).

80. *See id.* at Rule 2-11.2.

requirements to the Florida Bar would have to be the same for a Canadian lawyer as for any American lawyer coming from another jurisdiction within the United States. A lawyer who has practiced law in a state other than Florida, who wishes to become a member of the Florida Bar, encounters fewer obstacles than a Canadian lawyer with the same goal. First, a lawyer who has graduated from an accredited law school in the United States may apply to take the bar examinations. The only way, however, such a method could embrace a Canadian lawyer is if that lawyer graduated from a law school in the United States, proceeded to become a lawyer and practice law in Canada and then sought readmission into any jurisdiction in the United States. Although the authors have not compiled such statistics, it is safe to say that there are not many Canadian lawyers that would fit such unique circumstances.

The Florida Bar rules do, however, provide an alternate avenue to admission if the educational requirement cannot be fulfilled. Any lawyer who has practiced in another state for no less than ten years may be admitted by means of a motion after demonstrating to the Florida Bar Board of Examiners meritorious experience.[81] This method essentially means presentation of that lawyer's work product. Once again, this alternate option provides no substantial benefits for the Canadian lawyer. Although this procedure is theoretically available to them, there are likely not many Canadian lawyers who have ten consecutive years of prior legal work experience in the United States. As such, with respect to a Canadian lawyer seeking to practice law in the United States, "national treatment" is a mere hollow concept.

The second principle in NAFTA that conceivably could be beneficial to the Canadian lawyer is that of the "most- ,favored nation" status under Article 1202[82] of NAFTA. The concept of "most-favored nation treatment," provides that each party to NAFTA will treat service providers of another NAFTA Party no less favorably than service providers of any other NAFTA Party or a non-Party, in similar circumstances.[83] The practical application of this concept to the legal profession raises questions about its effectiveness.

81. *Id.*
82. NAFTA, *supra* note 2, 32 I.L.M. at 649.
83. NAFTA, *supra* note 2, 32 I.L.M. at 649.

For a lawyer who has not graduated from a law school in the United States or who has not worked for ten years in the United States, the Florida Bar requires a Juris Doctorate degree to sit for the Florida Bar examination. As discussed above, the Florida Bar has adopted the ABA educational standard that bestows advanced standing on a Canadian lawyer, giving him or her no more than one third of the credits needed to obtain a Juris Doctorate degree. Essentially, since the standard law degree in the United States takes three years, a Canadian lawyer, like a lawyer from any other jurisdiction, is required to complete no less than two of the three years of law school. Ostensibly this looks fair and in harmony with the "most-favored nation treatment," but a closer look reveals that the process hinders the ability of Canadian lawyers to practice law in the United States. The problem is that it not only fails to provide any advantage to the Canadian attorney, but also does not recognize the common legal background and systems that Canada and the United States share, which was an impetus for the free trade agreements. In fact, Florida law schools are willing to grant lawyers educated in countries like South America where the legal systems are quite different and based on civil law the same advance standing as a lawyer educated in Canada with a common law system similar to the United States.[84]

As discussed above, state bars, such as the Florida Bar, have adopted the law school accreditation standards provided by the American Bar Association ("ABA"). According to Standard 507[85] of the ABA's Standards for Approval of Law Schools, applicants from foreign law schools are subject to the following requirements:

> (a) A law school may admit a student with advanced standing and allow credit for studies at a law school outside of the United States if:

84. Based on the experience of the Canadian co-author of this article. The superficiality of the most favored-nation treatment standard is also apparent in the Florida bar's rules for foreign legal consultancy. Once again, it is noted that Canadian lawyers are treated no less favorably than lawyers from their other NAFTA partner, Mexico, or lawyers from any other non-NAFTA nation. Essentially, the rules applying to Canadian lawyers working in Florida as foreign legal consultants are exactly the same as for lawyers from any other country in the world. The process for applying for a work visa may be different, but the certification and licensing requirements are no different. As such, no real material benefits were derived from the FTA and NAFTA.

85. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 507 (1999).

> (1) the studies were "in residence" as provided in Standard 304, or qualify for credit under Standard 305;
>
> (2) the content of the studies was such that credit therefor would have been granted towards satisfaction of degree requirements at the admitting school; and
>
> (3) the admitting school is satisfied that the quality of the educational program at the foreign law school was at least equal to that required by an approved school.
>
> (b) Advanced standing and credit hours granted for foreign study may not exceed one-third of the total required by an admitting school for its J.D. degree.[86]

Ironically, the ABA's standards regarding advanced standing and credit hours granted for foreign study were becoming more onerous at the same time that Canada and the United States were promoting the free trade of professional services and liberalizing access to one another's markets. Standard 507's predecessor, Standard 308,[87] was more liberal at the time the FTA was signed and continued to be so up to late 1992. Section 308 provided:

> advanced standing and credit allowed for foreign study shall not exceed one-third of the total required by the Standards for the first professional degree unless the foreign study related chiefly to a system of law basically followed in the jurisdiction in which the admitting school is located; and in no event shall the maximum advanced standing and credit allowed exceed two-thirds of the total required by the Standards for the first professional degree.[88]

By 1993, section 308[89] had been amended to eliminate any reference to a maximum advanced standing of two-thirds credits

86. *Id.*

87. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTEPRETATIONS, Standard 308 (1992).

88. ABA STANDARDS OF APPROVAL OF LAW SCHOOLS, *supra* note 87, at Standard 308.

89. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 76, at Standard 308.

allowed. The last paragraph of the 1993 version of Standard 308 reads as follows, "Advanced standing and credit hours allowed for foreign study shall not exceed one-third of the total required by the school for its first professional degree."[90] All reference to a "foreign study related chiefly to a system of law basically followed in the jurisdiction in which the admitting school is located"[91] was dropped. It is interesting to note that following ABA hearings in San Francisco and Indianapolis to discuss the proposed amendment to Standard 308 in the latter half of 1992,[92] the only comment regarding the proposed amendment that merited special mention in a follow-up ABA memorandum[93] to the Council from James P. White, the Consultant on Legal Education to the American Bar Association, provided that "one person brought up the issue of the Canadian schools being both post baccalaureate and in the common law tradition, and whether there should be any special exemption for them."[94] Apparently, the ultimate decision was that no special exemption was appropriate, and the amended standard reducing the maximum possible advanced standing from two-thirds of required credits to one-third was adopted in 1993 and not changed after that. It is the states that regulate the legal profession in the United States.[95] Each state has its own bar that prescribes rules for the admission of lawyers and governs the ethical conduct of lawyers. Most states do require, however, that every applicant obtain a degree from a United States' law school and pass the bar examination before becoming a full member of the state bar. Florida is one of those

90. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 76, at Standard 308.

91. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 87, at Standard 308.

92. In accordance with the procedures for amendment of the ABA Standards for Approval of Law Schools, the Standards Review Committee makes a recommendation to the Council of the Section of Legal Education and Admissions to the Bar of the ABA. If the recommendation is accepted, the Standards Review Committee then declares its intention to amend the specific standard, as recommended. Following this declaration, the proposed amendment is circulated among the members of the ABA for comment and hearings are held to provide a forum for the receipt of comments, both in written and oral form. Based on the comments received, the Council of the Section of Legal Education and Admissions to the Bar of the ABA makes its final consideration and the amendment becomes effective in its final form. Audio tape: Telephone Interview with Andrew Arnone, Consultant, Office of the Consultant on Legal Education, ABA (Feb. 2, 2001) (on file with author).

93. Memorandum from James P. White, Consultant, to the Members of the Standards Review Committee (October 21, 1992) (on file with author).

94. *Id.*

95. The Constitution of each State authorizes its highest court to create such bodies as may be necessary to assist in the administration of justice.

states.

Pursuant to rules of admission,[96] to qualify for the Florida Bar Examination and be ultimately be recommended for admission to The Florida Bar:

> an applicant must have received the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school at a time when the law school was accredited or within 12 months of accreditation or be found educationally qualified by the Board under the alternative method of educational qualification.[97]

According to the rules of admission, "private study, correspondence school or law office training; age or experience; or waived or lowered standards of legal training for particular persons or groups" cannot be "substituted for the required degree from an accredited law school."[98]

If an applicant's educational qualifications do not satisfy these requirements, an attorney may, pursuant to Rule 2-11.2, seek admission into the Florida Bar Examination and ultimately recommended for admission to The Florida Bar by means of an alternative method of educational qualification.[99] A candidate not meeting the educational requirements, may submit whatever evidence may be required by the Board of Examiners to demonstrate that he or she was "engaged in the practice of law in the District of Columbia" or elsewhere in the United States, or "in practice in federal courts of the United States or its territories, possessions or protectorates for at least 10 years, and was in good standing at the bar of said jurisdictions in which the applicant practiced."[100] In addition, the candidate must submit a representative compilation of the work product in the field of law showing the scope and character of the applicant's previous experience and practice at the bar, including samples of the quality of the applicant's work, such as pleadings, briefs, legal memoranda, contracts or other working papers which the applicant considers illustrative of the applicant's expertise and

96. RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR (1998).
97. RULES OF THE SUPREME COURT, *supra* note 79, at Rule 2-11.1.
98. RULES OF THE SUPREME COURT, *supra* note 79, at Rule 2-11.1.
99. RULES OF THE SUPREME COURT, *supra* note 79, at Rule 2-11.2.
100. RULES OF THE SUPREME COURT, *supra* note 79, at Rule 2-11.2.

academic and legal training.[101]

The Board has discretion in evaluating the academic and legal quality of an applicant's work.[102] Sections 2-11.1 and 2-11.2 effectively prevent a lawyer educated at a Canadian law school or who has not practiced in the United States from sitting for the Florida Bar examinations without first having obtained a Juris Doctorate degree from an accredited law school.[103] At present, no Canadian law school has been accredited.

B. A Canadian Lawyer Seeks To Practice Law In Florida

So how does a Canadian lawyer break down the walls and qualify to practice law in the state of Florida? Did NAFTA remove the old fences? I, Dennis O'Connor, law student at a university in South Florida, recently received the dubious distinction of becoming one of the daring few to undertake this journey and find the answer. This is my story.

I have always enjoyed a challenge. Perhaps as the youngest of nine children, raised on a dairy farm in an English enclave of the French-speaking province of Quebec, challenges came naturally and I never had to go looking for them. Upon reflection, it may very well be the planning, hard work and

101. RULES OF THE SUPREME COURT, *supra* note 79, at Rule 2-11.2.

102. RULES OF THE SUPREME COURT, *supra* note 79, at Rule 2-11.2.

103. New York provides the only example of a United States jurisdiction which has truly facilitated the Canadian lawyer's access to the local legal services market. New York allows attorneys who have been educated in foreign countries to sit for the bar examination. NEW YORK RULES OF ADMISSION OF ATTORNEYS AND COUNSELERS AT LAW, Section 520, *at* http://www.nybarexam.org/court.htm (Nov. 19, 2000). The New York State Board of Bar Examiners requires satisfactory proof of an appropriate legal education. *See id.* at Rule 520.6(a). The applicant must demonstrate that he or she has completed a period of law study at least substantially equivalent in duration to that of American law schools at a foreign law school that is accredited by the competent accrediting agency of the government of that foreign country. In addition, the foreign country's jurisprudence must be based upon the principles of the English Common Law, and that the curriculum of the program successfully completed by the applicant be substantially equivalent to the legal education provided by an approved law school in the United States. If the applicant does not meet the aforementioned requirements, he or she must successfully complete a full-time or part-time program at an approved U.S. law school with a minimum of 20 semester hours in professional law subjects. *See id.* at Rule 520.6(b). The State of New York not only serves to demonstrate that it is within the authority of each state to determine who may write its bar examinations, but that a state may make that determination according to professional qualification rather than according to arbitrary protectionist measures.

determination which has been required to overcome many of my life's challenges that led me to pursue a career in law. For the most part, I have found that most challenges, regardless of their grueling nature, always have some valid message or meaning to them. As a participant of thirteen marathons, I have always asked myself during training why I continued to run them, only to feel a tremendous sense of accomplishment at the finish line that definitively answers my question. In January, 2000, however, I encountered a new challenge in my professional career for which I have yet to determine the purpose.

At the end of 1999, I felt the need to pursue some form of career change. At that time I was working as one of two wills and estates law practitioners in a mid-sized firm. Despite its small size, the firm had a long and highly respected reputation in Ottawa, a city of over one million people. My senior colleague in the estates department of the firm had been practicing for close to fifty years and had established himself as one of the preeminent city lawyers in the area of wills, estates, and trusts. With his guidance and knowledge, I was fast-tracked to a position of recognition in those areas of law within the Ottawa legal community and among a very attractive clientele. By the end of my sixth year in practice, I had been teaching in the estates section of the Provincial Bar Admissions course and participating in many seminars and presentations on behalf of the local estates bar, the federal and provincial bars, and major banks and trust companies.

Hoping to maximize the solid job qualifications that I had built, I decided that it was time to look for employment in either a larger or a more dynamic commercial market. Like many skilled young Canadians of today, I began looking south for my career opportunity. The United States would provide automatic benefits. Lower income tax rates, a more populous market, and much warmer weather. My decision then focused on choosing the most desirable American urban location. Boston, New York and Washington, D.C. all had their career attractions, but in the end I was drawn to South Florida. Like many other Canadians, I had frequently visited the Sunshine State in the past to escape the Canadian winters. Along with the familiarity, I already had a nucleus of good friends in South Florida. Perhaps most importantly, from a career perspective, the number of retirees living in Florida made it an obvious choice for someone hoping to

continue practicing in wills and estates law. After I made my decision, the next step was to complete what I expected would be the mildly annoying, bureaucratic requirements. Based on my knowledge of the state bar requirements of a few northeastern American states, I assumed that a couple of months of studying for the Florida Bar examinations would suffice. To my amazement, rather than a couple of months, I discovered that I would have to prepare myself for a two and a half year ordeal before I could practice law in the state of Florida, despite the fact that I had already been practicing law in Canada for over six years.

1. Fence One: The Florida Bar Requirements

My initial inquiry to the Florida Board of Bar Examiners uncovered my first obstacle. Under the Rules of the Supreme Court Relating to Admissions to the Bar of Florida, I learned that I did not have the educational qualifications to automatically qualify to sit for the state bar examinations. To be admitted into the Florida Bar Examination and ultimately recommended for admission to The Florida bar, an applicant must have received the degree of Bachelor of Laws or Doctor of Jurisprudence from an accredited law school. Unfortunately for me, no Canadian law schools were on the ABA's list of accredited schools.

The restriction imposed by the educational qualification rule came as a surprise to me. I had always felt that my educational background was quite solid. After graduating from high school, I was accepted on scholarship to an academically prestigious post-secondary institution in the province of Quebec.[104]

I then completed a Bachelor of Arts degree, majoring in Political Science from McGill University,[105] in Montreal, considered by some to be Canada's equivalent to the American "ivy league" schools. Upon completing my undergraduate degree and hoping to better learn the French language while completing

104. The author attended Marianopolis College, a private, English language cegep that has a reputation for its high academic standards. A cegep is an educational institution which consists of two years of study preceding entry by Quebec residents into a university in the province of Quebec. Highschool study in the province of Quebec is completed at the end of the eleventh grade to offset the cegep requirement.

105. McGill University requires graduates to obtain ninety credits (requires at least three years) to obtain a Bachelor of Arts degree.

my Bachelor of Laws degree, I attended the Ecole de Droit, Université de Moncton[106] in eastern Canada. As the only school in the world to teach English common law entirely in the French language, the uniqueness of the Université de Moncton was very attractive to me. Never having been formally educated in the French language, studying law in the French language also provided me with another worthy challenge.

Upon completing law school, my hope was to then practice law in my nation's capital city of Ottawa, Ontario. Consequently, successful admission to the Law Society of Upper Canada[107] became the next challenge. In comparison to all other jurisdictions in North America, admission to the Law Society of Upper Canada is a comparatively long and intensive process. Law school graduates are required to complete a one month in-class introductory bar course, followed by a one year apprenticeship with a law firm or other law-based employer, followed by an additional four months of in-class bar admissions courses and examinations covering nine fields of law. Finally, on February 3, 1994, after a long educational road, I was called to the bar, as a solicitor and barrister, of the Law Society of Upper Canada.

Despite this long educational road, upon deciding to move to South Florida, I reluctantly conceded that my educational qualifications simply would not be adequate in light of the educational requirements imposed by the Florida bar. I therefore sought to determine whether my six years of practice in the common law system in the province of Ontario might otherwise entitle me to sit for the Florida Bar exams. Once again, I was disappointed. The Rules of Admission to the Florida Bar did, in fact, provide an alternative method of educational qualification. Unfortunately for me, the alternative method would offer no assistance. The alternative method would require that I had practiced law in another U.S. jurisdiction for at least ten years and that I be capable of presenting work product to demonstrate that level of experience. I, quite simply, could not fulfill that requirement.

---

106. Ecole de Droit, Universite de Moncton is located in Moncton, New Brunswick and requires students to obtain ninety credits in French language study of the common law in order to obtain a Bachelor of Laws degree.

107. The Law Society of Upper Canada is the administrative agency authorized to govern the practice of law in the province of Ontario.

So after two university degrees, one in English common law, a one year legal apprenticeship, successful completion of provincial bar courses and examinations and subsequent admission to that provincial bar, and six years of practice in a common law jurisdiction, it appeared that my wish to practice law in the common law based state of Florida was not going to be as easy as I first thought.

2. Fence Two: The American Bar Association Requirements

Having accepted that my return to a university in pursuit of a Juris Doctorate degree was inevitable, I initially welcomed the possibility of returning to law school. After all, I already had a Bachelor of Laws in common law. I imagined that I would simply have to provide evidence of my educational credentials or, at worst, take a series of equivalency exams and the degree would be mine. Once again, I soon learned that it would not be that easy. According to the rules of the American Bar Association ("ABA"), no United States law school is permitted to grant an incoming law student more than 30 credits of advance standing, unless that student is simply seeking to transfer credits already obtained from another ABA accredited law school. It was apparent that that nasty accredited law school list was, once again, my greatest nemesis. Given that all American law schools require their graduates to have obtained at least 90 credits to graduate, the addition, was easy. I was going to have to return to law school to complete two years of a three-year program.

3. Fence Three: Employment in the State of Florida

Faced with the prospect of returning to law school for such an extended period of time, one might ask, why bother? Well, where my goal of writing the bar examinations was not met with much success, my search for employment in Florida proved more fruitful. In November, 1999, while still under the uninformed presumption that qualifying to practice law in Florida would be but a minor inconvenience, I applied to six law firms in the Fort Lauderdale/Miami area which, on paper, instantly appealed to me. Having found their respective firm profiles in Martindale-

Hubbell's[108] legal directory, I faxed my letters of employment request with my resume and awaited a reply. I fully expected that finding employment would be my greatest hurdle. Within five weeks, all six firms had replied, one of them expressing interest in me. One telephone call later, I was making reservations to fly to Miami for the purposes of participating in a face-to- face interview.

In the application process, I had targeted international law firms that had estate planning and taxation departments. I believed that my common law degree combined with my ability to speak both French and English would be an asset to a firm practicing law on an international scale. My belief proved to be accurate as I left the face to face interview, in early January, with a proposed employment contract in hand and verbal confirmations that my qualifications would be a welcome addition to the firm. The Miami firm handled a large number of files dealing with trusts, wealth management, asset protection and estate planning, many of them for French-speaking Canadians and Europeans.

At this point in time, however, my employment was conditioned upon my completion of all the necessary formalities relating to the Florida Bar and the United States Department of Immigration and Naturalization ("INS") requirements.

4. Fence Four: Immigration Requirements

Before learning that I would be required to return to law school, I thought that working in the United States would simply involve acquiring a work visa. I was now faced with a conflict. Having to return to law school while also seeking to protect my newfound employment, I was uncertain whether a suitable immigration visa existed. My numerous telephone calls to the INS and visits to the United States Embassy in Ottawa confirmed that there was no such regular visa which would allow me to study and work at the same time. An I-20[109] student visa would allow me to pursue full-time study in the United States,

108. Martindale-Hubbell Legal Directory (2001), *available at* http://www.martindale.com (last visited Sep. 1, 2001).

109. *See* Consulate General of the United States of America, General Information for Students, at 1-2 (on file with University of Miami Inter-American Law Review).

but would prohibit me from working at the same time. Conversely, the various work visas would not permit me to participate in any activity, including attendance at an educational institution on a full-time basis, that was not expressly described in any employment contract that I would, by requirement, present to the INS. Since holding more than one visa simultaneously is not permitted by U.S immigration rules, I was at a loss as to how I should proceed.

Having obtained an undergraduate degree in Political Science and having completed courses in International Trade and Commerce Law during law school, I expected that a quick and easy solution to my quandary would be found in NAFTA. After all, NAFTA was supposed to have eradicated the protectionist ideals of yesteryear and trumpeted the benefits of globalization. One of the objectives of NAFTA was to facilitate the free flow of professionals across the borders of the United States, Canada and Mexico as part of its overall goal to encourage trade and commerce. Lawyers were included in the list of professionals eligible for a temporary grant of entry into the United States. Obtaining this visa[110] was procedurally simple as long as I met the substantive qualifications. After researching the laws relating to my case, I learned that, despite its simplistic procedures, NAFTA would only provide me with short-term relief.

The appropriate procedures for professional status required that I present evidence of Canadian citizenship, a letter of employment offering employment in a professional status, evidence that I was in possession of the said status, and appropriate evidence of compliance with provincial licensure requirements. The citizenship and possession of status requirements would pose no problems. The letter of employment and state licensure requirements, however, seemed to be problematic. For previously explained reasons, I could not practice law in the state of Florida. If I could not practice law in the state of Florida, then how was I going to obtain a letter of employment from a Florida law firm offering me a position that would not violate immigration rules? After much study of my case, a NAFTA specialist confirmed that I could work as a foreign

110. This visa is classified as a TN visa. *See generally* AUSTIN T. FRAGOMEN ET AL., IMMIGRATION PROCEDURES (2001).

legal consultant with a Florida law firm and still qualify as a professional under NAFTA as long as the law firm needed my expertise as a Canadian attorney. The TN visa would only permit temporary entry into the United States, with a possibility of renewal at the end of one year. What had begun as a definite plan of some permanence to live and practice law in the state of Florida, had suddenly become, at best, a temporary plan that would permit me a one year trial at life as a foreign legal consultant and as a first year law student.

Given the volume of Canadian clients held by my prospective employer in Miami, and my expertise in Canadian estate planning, trusts and taxation, my employer in Miami agreed to redefining my job description into that of a foreign legal consultant. It was therefore agreed that I would work part-time as a consultant for the duration of my studies. If all proceeded as planned, in two and a half years, I would become a full-time practicing member of this firm.

But did the NAFTA work authorization also allow me to study at the same time? All other regular work visas prohibited the simultaneous status of employee and student. This question stumped even the various NAFTA specialists with whom I consulted. As previously explained, no foreigner to the United States is permitted to hold more than one visa at any given time. Consequently, obtaining an educational visa was an impossibility. After much discussion with the head office of the Trade NAFTA department in Washington, D.C., it was determined that there was nothing in NAFTA that prevented me from pursuing full-time post-secondary study incidental to my privilege of working under NAFTA, nothing except, as clearly stated by my NAFTA specialist, a sane mind.

5. Fence Five: Law School Admission

There remained one last hurdle to overcome to my both studying and working in the United States. I would have to gain admission to a law school in order to pursue my Juris Doctorate degree. My new job was located in Miami. This fact combined with my decision to live near the few close friends that I already had in Fort Lauderdale afforded three law schools as choices, the

University of Miami,[111] Nova Southeastern University[112] and St. Thomas University.[113] On the recommendation of my employer, I applied to St. Thomas. My application for admissions was greeted enthusiastically. But in step with the routine to which I had now become accustomed, there were some obstacles to my admission.

First, the ABA required that any applicant for admissions to an American law school submit an LSAT[114] score obtained within the last five years. I had written the LSAT in order to gain admission to my Canadian law school, but that was back in 1989. This hurdle appeared, at first, to be the proverbial straw that broke the camel's back. I took issue with the fact that I was going to have to prove an aptitude for legal study when I had already completed law school once and had been practicing law for over six years. Fortunately, the admissions department at St. Thomas University School of Law obtained consent from the ABA to allow me to submit my now dusty 1989 LSAT score, as long as it was a high enough score. After being told by the national LSAT administrators that they could no longer find my archived score, my rescue came in the form of a last resort telephone call to my mother back in Canada who successfully found my copy of my LSAT score report in a box in the basement of my parents' house. My application for admissions soundly submitted, with LSAT score included, I was accepted to St. Thomas University School of Law for commencement of my two year Juris Doctorate degree in the fall of 2000.

6. Fence Six: Status at the Law School Itself

With job in hand, admission to law school secured and the appropriate immigration visa worked out, I had thought that my bureaucratic troubles were over. I was miserably mistaken. The admissions office at St. Thomas University was required, once again by the ABA, to compel me to submit all my post-secondary education transcripts to an international transcript evaluation service to determine how my grades compared to the grades of

111. University of Miami is located in Coral Gables, Florida.

112. Nova Southeastern University is located in Fort Lauderdale, Florida.

113. St. Thomas University is located in Miami, Florida.

114. The Law School Admissions Test ("LSAT") is administered by Law School Admission Services, in Newton, PA.

American universities. I was beginning to feel as if Canada was a very different and far-off land, rather than the very close and culturally similar neighbor that I had always imagined. One month, several transcript requests and one hundred American dollars later, as expected, it was confirmed that the grades of my transcripts were at par with American standards and I was therefore granted the advance status, at St. Thomas University, of 30 law school credits.

Next, the admissions and student academic services departments of St. Thomas University wrestled with the problem of trying to determine where to place me among my fellow students. Although I was a new law student, I already had been granted 30 credits. I would therefore be expected to graduate one year ahead of my first year classmates. It was therefore decided that a review of the courses that I had taken in my Canadian law school would best serve to determine which courses I would be required to take at St. Thomas University.

It was explained to me by representatives of St. Thomas University School of Law that in order to graduate it would be essential that I complete an unnegotiable list of mandatory courses.[115] This came as no surprise to me, because with the exception of the course on Professional Responsibility and the Pro Bono requirement, these were the very same courses that were required for graduation from any Canadian law school. Accepting that differences exist in Civil Procedure and Criminal and Constitutional Law between the Canadian and American legal systems, it made total sense to me that I would be required to complete these courses. I was, however, discouraged to learn that I would only be exempted from Torts and part of a course on Introduction to Legal Writing and Research. As a result, I effectively became a first year student, or as termed in law school, an "1-L."

Aside from the rude self-esteem awakening, my "1-L" moniker, initially, did not appear to pose any significant problems. Further analysis, however, proved otherwise. My being classed as an "1-L" would create new problems. Since it

115. Constitutional Law I & II, Perspectives on Legal Thought, Appellate Advocacy, Property Law I & II, Advanced Legal Research & Writing I & II, Evidence, Professional Responsibility, Senior Writing Requirement, Pro Bono Requirement, Civil Procedure I & II, Contracts I & II, Torts I & II, Criminal Law and Criminal Procedure are the courses required for graduation at St. Thomas University School of Law.

was still my aspiration to some day practice estates law in Florida, I had looked upon my return to law school as an opportunity to complete all possible courses offered by St. Thomas that related to wills, estate planning and administration, taxation, probate and trusts. Like the course offering system at almost all other American and Canadian law schools, some of the upper level courses offered at St. Thomas require first having taken a prerequisite course. Given that I expect to be at St. Thomas for only two years coupled with the fact that I must first complete all but one of the required courses, it appears that I will only take but a few of the courses which apply to my desired area of practice.

Besides my curriculum difficulties, my status as a first year student has lead to other complications, such as, being prohibited by the ABA from participating in second year, on campus employment recruiting and applying for certain other bar-regulated employment opportunities. Fortunately, the question of employment should be moot for at least the next two years while I pursue my Juris Doctorate degree thanks to my part-time position of employment in Miami. Being categorized as a first year law student, however, has also meant that I am regularly omitted from automatic distribution and circulation of upper year notices. This omission can be problematic in itself when you consider that some of those notices pertain to graduation deadlines and the sort. The thought of missing a graduation deadline, at this point, understandably is no laughing matter.

7. Additional Fences

Besides the inconvenience of returning to school for two years, other factors come into play which are equally as discouraging. For the next two years, I will be without the comfort of the income to which I had become accustomed as a lawyer for the last six years. In addition, I will be required to pay law school tuition in excess of $44,000.00. Earning little income from a part-time only job, the tuition costs make a significant impact on my financial situation, particularly in light of the fact that any personal savings that I am using to pay the tuition costs are in Canadian dollars which is presently valued at $0.67 against the American dollar. I am not eligible for either American or Canadian government student loans due to my

ambiguous immigration status. Private student loans through financial institutions simply do not exist in Canada and those for which I may be eligible in the United States require me to provide an American guarantor since I am not a permanent resident nor citizen of the United States, as required.

Perhaps, on a daily basis, the greatest challenge, is getting out of bed. Then I have to face the fact that what was supposed to be a seemingly easy and exciting career move to that NAFTA partner, to that familiar and similar neighbor to the South, has branded me a first-year law student. Hopefully, my patience and tenacity can get me over the fences that surely lie ahead.

IV. CONCLUSION

In sum, the FTA aimed to confirm the already cooperative market for the trade of goods and services of both Canada and the United States and to foster the development of greater international cooperation.[116] NAFTA sought to enhance the progress that the FTA had already made with respect to the expansion of North American trade services and it contained provisions specifically designed to facilitate the trade of legal services.[117] As such, both NAFTA and its predecessor FTA embraced the concept that the eradication - - not the mending - - of walls made for good neighbors.[118]

After NAFTA, a growing number of states accepted the concept of the "foreign legal consultant" and all states eliminated the need for citizenship or permanent residence as a requirement for sitting for the bar examination.[119] But beyond these ostensible advancements, there still exist significant fences that impede a Canadian lawyer who wishes to cross the border and practice law in the United States on a permanent or temporary basis.[120] What the above O'Connor saga demonstrates is that the increased educational requirements that the American Bar Association has established in the last decade have further obstructed the Canadian lawyer's access to local American

116. *See supra* Part I.A.
117. *See supra* Part I.B.
118. *See supra* Part I.B.
119. *See supra* Part II.A.
120. *See supra* Part II.A.

markets.[121] In addition, this Canadian lawyer's story shows that the requirements of the immigration laws, local bar rules, and law school policies have aggravated such extant obstacles and thus serve to maintain the walls between neighbors.[122] In essence, this landscape of multiple fences undermines NAFTA, which recognizes that the trade of legal services benefits both countries and broadly enhances the practice of law in what is rapidly evolving into an interdependent world.

Not surprisingly, Robert Frost depicts the mender of walls as an "old-stone savage," someone who "moves in darkness" and atavistically clings to outmoded slogans.[123] If indeed the legal profession is to embrace that twenty-first century vision of a shrinking and interdependent world, it needs to recognize what Frost indeed implies - - that "good fences make *bad* neighbors"[124] - - and thus, eradicate the multiple walls that thwart the salutary goals of NAFTA.

121. *See supra* Part II.B.
122. *See supra* Part II.B.
123. *See* Frost, *supra* note 1 at 171.
124. *See* Frost, *supra* note 1 at 171.