

Will NAFTA remove state licensing requirements?

By Jerry R. Broadus, LS, Esq.

The North American Free Trade Agreement (NAFTA) is an international agreement signed by the United States, Mexico and Canada for the purpose of removing trade barriers and tariffs and to encourage commerce between the signing parties. The agreement was negotiated under the authority of the Omnibus Trade and Competitiveness Act of 1988, and was enacted into federal law by the NAFTA Implementation Act, PL 103-182 (1993). NAFTA covers trade in professional services as well as trade in goods. As such, it might affect providers of surveying and mapping services by potentially opening new markets and creating new avenues of competition.

The requirement of state licensing for surveyors and engineers is, without question, an impediment to free trade in services, both between countries and between states. The right of state governments to regulate such professionals through the use of licensing procedures of their own making, has long been allowed despite its effect on interstate commerce. A state has the right to protect its citizens, and can do so by regulating professional services as long as those regulations are rationally related to the legitimate purpose of protecting the public, and as long as the burden on interstate commerce is outweighed by the state interest in enforcing the regulations. International commerce is, however, a potentially different matter because the U.S. Constitution gives the power to regulate commerce with foreign countries to the federal government. NAFTA is not a Treaty, but through the Implementation Act it is a federal law governing commerce with foreign countries and supersedes any conflicting state law or regulation.

One might wonder, then, whether NAFTA could prevent a state from requiring its own license of a foreign surveyor or engineer who wished to work on a project within the state. I know of no court interpretations of this issue, but NAFTA and its supporting documents appear to provide ample guidance. Chapter 12 of NAFTA covers cross-border trade in services in general. It imposes broad obligations on the signing countries (the "parties"). Each party must accord to service providers of the other party treatment no less favorable than it accords to its own service providers or to providers from any other country which receives most-favored-nation treatment. NAFTA prohibits citizenship or permanent residency requirements for licensure of citizens of the other parties. A party also may not require a service provider from another party to establish a representative office or any form of enterprise within its own territory. Each party is required to ensure that its "competent authorities" (state, provincial or other units of government that issue professional licenses) process license applications from providers of services from other parties in a timely manner.

However, each party's enforcement powers are limited. The NAFTA document envisions a process whereby the parties consult periodically with a view toward gradually removing barriers to trade in services. For example, if one party finds that another party is requiring citizenship or permanent residency as prohibited by the agreement, it may reciprocate until a negotiated settlement can be reached.

Beyond those general observations NAFTA includes several recommendations. These amount to provisions that require parties to encourage their own competent authorities to develop mutually acceptable standards for licensing professional service providers from the other parties. These standards may be developed with regard to education, examination, experience, conduct and ethics, professional development, scope of practice, local knowledge and consumer protection.

There is a specific section annexed to Chapter 12 which requires that each party consult with its relevant professional societies to obtain recommendations for the temporary licensing of engineers

and then to encourage its competent authorities to accept those recommendations. As a result of that annex, a document titled 'Mutual Recognition of Registered/Licensed Engineers by Jurisdictions of Canada, The United States of America and the United Mexican States to Facilitate Mobility in Accordance with the North American Free Trade Agreement' was drafted and signed by a group of professional representatives from all three parties in June 1995. The document recommended that for temporary licensure the various competent authorities require an applicant from another party to demonstrate the following: a combination of education and engineering experience; the requisite knowledge of local regulations, codes, and laws governing the practice of engineering; the ability to communicate in the language of commerce of the host country; proof that the applicant has provided for client and consumer protection enforceable under the host jurisdiction's laws; and a willingness to accept cross-border discipline.

It appears that NAFTA does not obligate a state to accept a foreign practitioner who is not licensed under its regulations. What NAFTA specifically prohibits is discrimination against qualified foreign professionals who desire to obtain a license to practice within a state. Of course, the state licensing mandate which is generally viewed as most burdensome is the examination requirement. NAFTA does not say that a state must allow a foreign professional to practice within its territory whether or not he or she has taken its licensing examination. Examinations are specifically allowed under NAFTA, and (while not specifically mentioned in the Mutual Recognition document) would be a logical way for a state to satisfy itself that an applicant for a temporary license possesses the requisite knowledge of local regulations, codes and laws.

Suppose a state or provincial agency does discriminate against an applicant from one of the other signing countries NAFTA does not allow that applicant to directly sue the offending agency. All disputes under NAFTA must be handled between governments. Thus the aggrieved person would have to convince his or her government to complain to the government having authority over the agency, which would then have the option of bringing a lawsuit against the agency or of ignoring the matter. If the government of the offending agency does not take action, the government of the aggrieved party can invoke certain dispute resolution procedures. Consequently NAFTA is not a simple law to invoke.

Furthermore, NAFTA does allow each country to impose different standards in judging the education or experience of a professional from one of the other countries, so long as those different standards are necessary to protect consumers to the same extent that they would be protected by the standards already imposed on local providers. NAFTA prohibits imposition of laws and regulations designed to skew the terms of competition in favor of local providers; it does not prohibit legitimate regulatory distinctions between local and foreign professionals. Thus it seems unlikely that a federal court would invalidate a local licensing regulation unless it found that the regulation had no purpose other than to limit trade in services between the signing countries.

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Neither the author nor P.O.B. intends this column to be a source of legal advice for surveyors or their clients. The law changes and differs in important respects for different jurisdictions. If you have a specific legal problem, the best source of advice is an attorney admitted to the bar of your jurisdiction.