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The Impact of the Free Trade Agreement on the Flow of Services and Temporary Business Travel Across the Canada-U.S. Border

*Meriel V.M. Bradford**

I am going to address you today about services and human resources under the Free Trade Agreement (“FTA”). I noticed a logo on your form: It is the North American continent with a zipper running between Canada and the United States. I would like to ask Professor King, is the zipper opening or closing?

First, I want to acknowledge my lack of knowledge of the law; I am not a lawyer. My background is in Medieval and Renaissance studies. People say, “How does that knowledge prepare you for today?” Well, change is always with us, and it is relevant to trade in services. We are seeing changes taking place in the economy and in the international trading environment. Currently, I am experiencing those changes in the economy through my position with a large multinational company.

The FTA, despite the integration of many aspects of the North American market, does not provide for a common market. We do not have a common external tariff structure as the European Community (“EC”) does, nor do we have the full freedom of movement for factors of production. For instance, labor does not move, although capital does move relatively freely. As a result of the FTA, there are some improvements in the ability of capital to move from one country to another. However, North America is certainly not a free labor market. We heard from Mr. Ludolph that free labor markets are supposed to exist within the European Community. Despite the Treaty of Rome, things are still left on the agenda of labor mobility within the EC.

As Colleen Morton has explained, trade in services takes place in a variety of ways. Sometimes it takes place through the investment flow, putting an office into the other market and deferring the service, through the movement of people, through new telecommunication links or through the movement of data.

I also want to mention the importance of the FTA and its relationship to the General Agreement on Tariffs and Trade (“GATT”). We knew when we agreed to negotiate with the Americans that a services agreement would be a requirement of a Canada-U.S. Agreement,

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although we did not know what it would look like, or what it would cover. We knew it was certainly going to be included in the final product. From 1986 to 1988, we had to find out what was happening conceptually and in practice. Finally, the lawyers had to agree on how to write it down.

In the course of the negotiations various concerns came up from the U.S. side, and others arose from our side. Border security was certainly a key issue. The Americans were concerned with having a leaky northern border, but we felt that the American leaky border is actually on the south.

Labor competitiveness became a key issue. The U.S. Department of Labor is really a very protective department. In talking to the U.S. Labor Department we would receive one answer, and the Immigration Naturalization Service ("INS") would give us another answer. In Canada, we do not have an equivalent labor department. Instead we have an Employment and Immigration Department that is a two-part department under one minister. I think, as we heard this morning about the history of Canadian immigration policy, we have had a relatively more open immigration system than the United States has had.

One of the other problems we had was that the Americans said to us, "Well, if we were to agree on that, we would have to change our legislation." Interestingly, Canada was expected to change its investment legislation, banking legislation and numerous other pieces of legislation, while the United States was not. We decided it would become a stumbling block if the Americans felt it was not necessary for them to change any piece of legislation in order to have an agreement. Precedence was another problem, particularly for the Americans.

On the Canadian side, the brain drain was a more important concern. The fear was that our educated members would be going south. The Canadians said we cannot have this kind of an agreement because every smart individual is going to leave. Consequently, as this discussion has shown, there were several kinds of constraints under which both countries were working. Nevertheless, we were able to reach an agreement.

In terms of the elements of the FTA, we recognized that there is a special trading relationship between the two countries, and that there was a need to adjust our immigration procedure and policy to maximize the benefits of the FTA. We also agreed that we needed to facilitate the mobility of three or four groups of citizens who perform specific activities or professional services.

The FTA produced Chapter 15 which specifically outlines each country's obligations as to who should and should not be admitted under its provisions. Hopefully these provisions will serve to remove any doubt from the business person's mind and from the mind of the investigating officer at the border-crossing. We tried to ensure that it would be imple-

mented in a streamlined manner so that people would not have to spend an enormous amount of time obtaining documentation and getting through the border procedures.

We did preserve the existing immigration rights, so anyone who wants to travel under the old system can still do so. You do not have to use the FTA to travel from one country to another if you do not want to. We also provided new categories of who should be admitted. And, something else we did was to set up a mechanism whereby Canada and U.S. immigration officials will meet regularly to assess if the FTA is actually working in practice, and if new occupations should be added to the list. We wanted to make this dynamic relationship useful, both to serve the business community and to enhance the trading relationship.

There are four categories of trade in services. The first category concerns traders and investors who are executives, supervisors, or essential skills personnel of companies conducting substantial trade or investing in either country. For visas, the United States has not recognized this category. Canada has been able to add that category for Americans wishing to take advantage of it. The piece of paper becomes part of your passport and can be used for multiple entries. It is a very useful document if you travel frequently back and forth over the border.

The second category is intra-company transfers who are defined as managers, executives, or employees with special knowledge employed by affiliates, subsidiaries or parent companies. It is very important for international businesses to know that they can send their employees to the other country under this category, and not have an artificial time cap that might make it difficult to have them there for a sustained period. This category makes it clear that we have removed the Canadian requirement for an American subsidiary to train any additional management personnel in Canada.

The third category provides access to professionals, which includes accountants, engineers, architects, scientists and management consultants. This is not a new category. This opportunity previously existed for American entry, but it was not documented in a precise manner for the entrants who presented themselves at the border. Now, it is quite clear. If you are able to identify yourself as one of the professional occupations on the list, then you can gain entry more easily.

The fourth category is for business visitors. Business visitors are defined as those who do not earn money in the other country and are engaged in one of the following activities: research and design; growth, manufacturing and production; marketing; sales; distribution after sales service and general services. General services are those performed by computer specialists, financial services personnel, public relations and advertising personnel and tourism personnel.

The Department of External Affairs in Canada has provided a list of statistics (see Exhibit A). They have been co-generated by American and

Canadian officials to enumerate the numbers of entrants in these four categories. Exhibit A demonstrates that U.S. to Canada movement, as seen in the brain drain area, is taking place. Mr. Hurtig in Canada, is very concerned that the brain drain movement may be much more from Canada to the United States. Statistics for many visitors are still not available because they are not documented entries. There are a large number of crossings into Canada and into the United States every year; about thirty-five million for Canadian entries. Entry from Canada to the United States is also in the millions. Thus, although the FTA is not a particularly significant change, transfers, especially company transfers are taking advantage of it.

The traders and investors category is a new one. Canadians are watching its development. Since the FTA came into effect on January 1, 1989, we have had more than a year's experience working under its provisions. There have been some additions, some suggestions and some removals from the list. One group that was upset with us were the journalists. In fact, I received several calls from journalists when the FTA was first made public. The journalists asked, "What is this about? Why does this journalist have to have a university degree?" I replied, "Are you covering this story as a newspaper person, or are you covering it as a professional under a particular category of the FTA?"

Journalists are now no longer on the list. The journalists have reverted back to the regular provisions for entry to the United States. The reason they did not want to be on the list was that they felt that there was a danger of regulating them by specifying what they had to do to qualify for entry. I think that is very spurious.

Several new professions have been added, so we do have a net gain in the number of professions. You will see that the physiotherapists are now included on the list of professionals, and also bus drivers have been added. This provision adding bus drivers specifies what they can and cannot do. They can only take passengers over the border if they have originally had them as passengers on the other side.

I am going to quote my colleague in INS, Mike Miller. He said that Chapter 15 is "one of the least problematic of any chapters." It is a good sign that we have not had a lot of problems with this chapter. We have facilitated entry and we have people to ask the right questions. For instance, if you want to improve market access, how can you liberalize the movement of labor?

At the moment, all the effort has been concentrated on the higher skilled end. Eventually, we must address the question of semi-skilled and lower-skilled labor. We have had some issues relating to the entry of blue collar workers entering the country to install major capital equipment. This has been occurring with a greater frequency since there has been fairly large capital expenditures in Canada following the signing of the FTA.

This makes sense in that Canadian industry is re-equipping itself to compete in a more liberal trading environment. A lot of that equipment is imported, and a great deal of it comes from the United States. Now, installers may easily move to install new equipment. There have been complaints from Canadian labor groups that too many blue collar people are coming in and doing these installations. Canadian labor groups would prefer to do the installation themselves.

I would like to say a word about joint training by Canada and the United States for point-of-entry officers. We should be able to train our border people to handle entrance procedures in a similar way. I think this has been more of a desire than what has actually taken place. However, I understand that in the customs area, there is discussion about a joint facility for Canada-U.S. customs officers to work together at the border. There has not been much publicity about these new categories, and it will be a while before the business community learns how to use these new instruments.

There is also the continuing question of entry for spouses of temporary transfers, and their ability to gain access to the work place. In Canada, we have a problem providing work for spouses accompanying temporary transfers. Typically, the female spouse must give up labor access in order to allow the male spouse to take the job in the other country. However, with the increase in the number of highly skilled professional couples, we are going to see more of this problem. It is something that we must bring to the attention of the Canadian government, particularly since we are concerned with the increase in skill shortages. We must use all this human capital when there is such a short supply of skilled workers.

In our company, we are utilizing the model of a diplomatic community. Canada has an agreement with some countries which allow for the spouse of a diplomat to enter the labor force for two to three years while the diplomat is posted in another country. This is one of the ideas we should consider for the private sector, provided there is reciprocal access offered by the sending country.

One final point is that we cannot have an integrated trade area if we cannot travel efficiently. It took me almost six hours to get from Ottawa to Cleveland. There is something wrong with that. We need to have another bilateral air agreement, and I hope the pressure will bring about some improvements.

I would suggest that while your human resource department should be looking for people with multiple skills, it should also be looking for people with multiple passports.

EXHIBIT A

EXPERIENCE TO DATE
FTA BUSINESS STATS

	US to Canada Jan-Sept/89	Canada to US Jan-Oct/89
Professionals	1134	3054
Inter-Company Transferees	577	4359
Traders	20	199
Investors	19	704
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Total	1750	8316
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N.B. Statistics for individuals entering under the category of Business Visitor are not available because neither country documents such entries

Source: External Affairs & International Trade