

RESPONSE



CANADIAN  
**NURSES**  
ASSOCIATION®

# **NORTH AMERICAN FREE TRADE AGREEMENT**

2017 Government of Canada Consultation

CNA is the national professional voice of over 139,000 registered nurses and nurse practitioners across Canada. CNA advances the practice and profession of nursing to improve health outcomes and strengthen Canada's publicly funded, not-for-profit health system.

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# Background

On July 17, 2017, the Canadian Nurses Association (CNA) responded to the government of Canada's public consultations to help the country prepare for the renegotiation of the North American Free Trade Agreement (NAFTA) with the United States and Mexico.

This document presents CNA's responses to the four government questions (highlighted in grey) that were posed in the NAFTA consultation.

## Responses

### 1. In your view, what should be a priority for the Government of Canada in the renegotiation of NAFTA (e.g. trade areas, practices, issues)?

#### Health care

As set out in the original 1994 agreement, NAFTA still contains exemptions to protect medicare, Canada's publicly funded universal health insurance system.<sup>1</sup> Because this system is not fully protected from international trade agreements, the government must continue to prioritize its protection in upcoming NAFTA negotiations.

CNA believes that trade among NAFTA countries affects both health-care services and the professionals who supply them. Trading in services (including health care) follows four basic methods:

- ▶ A resident of one country supplies services to residents within another country.
- ▶ Residents purchase services while abroad.
- ▶ Foreign suppliers establish subsidiaries or branches in another country.
- ▶ Individuals are offered permission to enter another country to supply a service.

Each method raises issues, such as access to employment, professional self-regulation (i.e., establishing and maintaining professional standards, liability and accountability), the protection of domestic health and social policies in the public interest, intellectual property rights, privacy of information, and labour practices. Canada's willingness to address such areas directly affects our health system's ability to respond to the health needs of Canadians.<sup>2</sup> In addition, analysts have argued that current policies in NAFTA threaten public health, as they eliminate barriers to trade for potentially harmful

<sup>1</sup> (Government of Canada. Department of Health, 2016)

<sup>2</sup> (Canadian Nurses Association [CNA], 2017)

products. For example, a 2017 study found that NAFTA was strongly associated with an increase in the high-fructose corn syrup supply (and likely consumption) in Canada.<sup>3</sup>

## **2. Are there elements of NAFTA that are working well and should be preserved or improved upon?**

CNA believes that NAFTA exemptions safeguarding Canadian medicare must be preserved. Despite significant advances, humanity continues to confront unacceptable disparities in economic and social development, health and well-being. These injustices have moral and legal ramifications that can lead to conflict or otherwise threaten peaceful relations between and within countries. Canadians have accepted a vision of social justice that supports the principle that all people, without discrimination, have the right to live in dignity and freedom and to enjoy and contribute to the fruits of social progress. Canada's universal health-care system and its wide-ranging social programs speak to our national sense of fairness and community as well as to our support and interest in social justice ideals.<sup>4</sup>

CNA believes that NAFTA implications pertaining to nurses and the Canadian health-care system include health-care worker migration, government and investor-state dispute settlements, intellectual property rights, anti-privacy measures and labour conditions.

### **Health-care worker migration**

When nurses (and other health-care workers) relocate to another country to provide services, they are subject to the employment conditions and requirements for professional licensure and registration. Attempts to facilitate migration through trade agreements can introduce conditions that limit migration or potentially reduce professional standards to the lowest common denominator. For registered nurses in Canada, professional self-regulation is in place to ensure that competent and qualified nurses provide safe and ethical care in the public interest. However, international trade agreements (ITAs) can effectively reduce occupational qualifications (possibly to the lowest common denominator) by standardizing them across many countries.

### **Government and investor-state dispute settlements**

The health of Canadians depends on a broad range of factors known as the social determinants of health, which include education, social services, working conditions, social and physical environments, housing, water quality, access to health care, etc.

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<sup>3</sup> (Barlow, McKee, Basu, & Stuckler, 2017)

<sup>4</sup> (CNA, 2010)

Therefore, our governments' ability to regulate these services in the public interest is critical. ITA foreign investor protections and investor-state dispute settlement (ISDS) mechanisms, however, can constrain a government's power to legislate, regulate and implement domestic policies and programs. Such measures have the potential to put Canada's publicly funded, not-for-profit health system at risk. In Europe, "foreign investors have used investment treaties to challenge reversals of privatization in public health insurance systems. In at least two instances they succeeded."<sup>5</sup>

ISDS mechanisms also allow foreign investors to bring the Canadian government before international tribunals if they construe government actions (including routine actions) as unfairly interfering with current or anticipated profits. As of 2014, Canada has been targeted in 35 claims under NAFTA's ISDS mechanism, paying out damages of over \$172 million and spending more than \$65 million in legal costs. In addition, many other claims are pending. In 2012, Eli Lilly filed a \$500 million claim against Canada after the Federal Court invalidated an extension of its Zyprexa drug patent because the drug had not delivered on its promised utility.<sup>6</sup>

### **Intellectual property rights**

ITA intellectual property rights have the potential to further protect brand-name drug manufacturers and their profits, delaying the entry of generic medicines and increasing the costs of patented drugs which, in Canada, are already "the third highest among comparator countries."<sup>7</sup> The estimated increase to drug costs for Canadians due to the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) are "between \$850 million and \$1.645 billion annually. . . . Since 2003, Canadian brand-name manufacturers have consistently failed to meet pledges to invest 10% of their sales revenues in [research and development] that they made in 1987 in exchange for greater market exclusivity."<sup>8</sup>

### **Anti-privacy measures and labour conditions**

Some ITAs, e.g., the Trans-Pacific Partnership Agreement (TPP), feature "several anti-privacy measures that would restrict the ability of governments to establish safeguards over sensitive information such as financial and health data as well as information hosted by social media services. . . . according to the Canadian government's summary,

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<sup>5</sup> (Sinclair, 2016, p. 11)

<sup>6</sup> (Sinclair, 2015)

<sup>7</sup> (Patented Medicine Prices Review Board, 2015, p. 16)

<sup>8</sup> (Lexchin & Gagnon, 2013, p. 1)

the agreement prevents governments in TPP countries from requiring the use of local servers for data storage.”<sup>9</sup>

With respect to labour conditions, workers in poor countries are generally disadvantaged by market integration. Most live without labour legislation to protect wages and ensure the health and safety of their workplaces (World Health Organization, 2008). Deregulation and the liberalization of trade have meant a more widespread commercialization of services (including health care, water and electricity) and a corresponding growth in unhealthy working conditions. The unregulated commercialization of health services results in unequal access to care and disparities in health outcomes.<sup>10</sup>

### **3. Are you aware of any trade practices, laws or regulations in the United States, and/or in Mexico, that undermine or could undermine meaningful market access for Canadian goods and services?**

As NAFTA currently contains exemptions to protect medicare, there are trade practices, laws and regulations in the U.S. or Mexico that undermine market access for Canadian goods and services in health care. Policies that are priorities for CNA include continuing to protect medicare and cross-border employment.

Some analysts argue that “any government effort to expand universal public health insurance into new areas where U.S. firms are involved could incur financial penalties under NAFTA.”<sup>11</sup> This point was included in the 2002 Romanow royal commission on the future of health care in Canada. A portion of NAFTA “specifically exempts anything that is a ‘social service for a public purpose’ [including existing provincial and local arrangements] from the overall NAFTA requirement that eligible foreigners be allowed to invest freely. . . . Both allow the current medicare system to operate as a single-tier, public monopoly that limits the role of private insurers and for-profit hospitals.”<sup>12</sup> Since the original negotiation, the medicare-protected Canadian market for U.S. insurance and hospitals remains unexplored. Undoubtedly, free trade with the U.S. has stimulated Canada’s economy, so not being a part of NAFTA would be an economic loss for the country. It has been suggested that the U.S. has a possible interest in exploiting this area and will pressure Canada to eliminate the exemptions that safeguard medicare.

#### **Cross-border employment**

In recent years, a misinterpretation of NAFTA has prevented nurse practitioners (NPs) and other specialized nurses from being recognized as registered nurses (RNs) under

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<sup>9</sup> (Geist, 2015, paras. 5-6)

<sup>10</sup> (World Health Organization, 2008)

<sup>11</sup> (Walkom, 2016, para. 3)

<sup>12</sup> Ibid., paras. 5, 7.

the non-immigrant professional visa (TN) classification, which would allow them to work in the U.S.

According to U.S. Citizenship and Immigration Services, the “TN nonimmigrant classification [within NAFTA] permits qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level.”<sup>13</sup> While RNs are included in the list of medical/allied professionals under the TN classification, NPs or other specialized nurses are not.

According to a BBC News report, hospital officials said “some 30 advanced specialty nurse practitioners and nurse anaesthetists employed by HFHS [the Henry Ford Health System in the Detroit area] could be affected by any policy changes related to the TN NAFTA professionals classification.”<sup>14</sup> A special advisor from the University of Windsor Cross Border Institute added that “border problems might not be related to any direct CBP [U.S. Customs and Border Protection] policy changes but instead a more literal reading of NAFTA regulations by border officials under the Trump administration. . . . Registered nurses do qualify to work in the US under the TN category — but the NAFTA text does not specify anything with regard to nurses who have specialised skills. ‘They are doing a literal interpretation . . . reading line-by-line.’”<sup>15</sup>

CNA strongly encourages the Canadian government to seek clarity about the exclusion of NPs and other specialized nurses from the NAFTA TN classification as a result of this misinterpretation by the U.S. administration.

#### **4. Are there any new issues that you believe should be incorporated into NAFTA, or are there issues that you believe should be expanded upon to reflect advancements since NAFTA was originally negotiated?**

##### **NCLEX-RN exam**

As of 2015, the 10 provincial/territorial RN regulators in Canada have used the National Council of State Boards of Nursing (NCSBN), an American company, as the provider of the Canadian RN entry-to-practice exam: the National Council Licensure Examination for Registered Nurses (NCLEX-RN). Regarding this use of a private U.S. company to supply the Canadian RN entry-to-practice exam, CNA is concerned about protecting the privacy of Canadian nurses, whose personal information is submitted to NCSBN for administrative purposes associated with the exam. Currently, Canadian nurse regulators and NCSBN have agreed to comply with U.S., Canadian and provincial/territorial

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<sup>13</sup> (U.S. Citizenship and Immigration Services, 2017, para. 1)

<sup>14</sup> (“Canadian nurses get US work permit clarification,” 2017, para. 12).

<sup>15</sup> *Ibid.*, paras. 15-17.

privacy laws protecting the information of Canadian nurses in the U.S.<sup>16</sup> CNA strongly recommends that the Canadian government uphold privacy laws throughout the upcoming NAFTA negotiations to protect Canadian nurses who have written or plan to write the NCLEX-RN exam.

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<sup>16</sup> (Canadian Council of Registered Nurse Regulators, 2013)



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