

Barriers to Cross-Border Labor Mobility for Professionals Doing Business in Canada and the United States

LYNN SHOTWELL + ANDREW YEWDELL + STEPHEN CRYNE

ONE ISSUE
TWO VOICES

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From the American authors
LYNN SHOTWELL and
ANDREW YEWDELL

- Inconsistent decision-making, unpredictable work-permit adjudications, and outdated lists of qualified occupations are the principal obstacles limiting the flow of labor between Canada and the United States.
- In the current political environment, any programs that govern cross-border labor mobility must satisfy both budgetary and national security requirements.
- Canada and the United States should expand visionary risk-based immigration solutions that go beyond those outlined in the Beyond the Border Action Plan.

From the Canadian author
STEPHEN CRYNE

- The movement of people is equally important as trade in goods; supply chains include human capital.
- Canada's archaic tax laws deter increased trade and employee mobility.
- Canada and the United States should modernize the occupations on the NAFTA Professionals List, and the two governments should implement a Trusted Employer Program.





INTRODUCTION We live in a globalized world and, if countries and companies are to prosper, it is essential that goods and business personnel can cross borders both quickly and easily. This flexibility is particularly important for Canada and the United States, which at present share the largest bilateral trade relationship in the world. Several thousand corporations have operations in both countries and collectively employ millions of people; to succeed, they must be able to move their employees freely between projects and across our common border.

Yet, as our experts Lynn Shotwell and Stephen Cryne show us, there are significant impediments to cross-border labor mobility. First, the list of occupations qualified for expedited work permits in the North American Free-Trade Agreement is outdated and omits many modern professions—computer software engineers, financial analysts, and IT professionals, to name but a few. Second, many of the regulations governing temporary work permits are ambiguous, and the border officials who interpret them lack sufficient training. Their decisions can be unpredictable and inconsistent. As one employer complained, the outcome for any application “depends on the time of day, the port of entry, and who is on duty.”

A third obstacle stems from some major domestic concerns within the United States. Ever since September 11, 2001, security has trumped trade, and demands for enhanced travel documentation and inspection have made border crossing more complicated. In addition, the recession following the financial crash in 2008 has inaugurated a period of intense job protection in which positions of

all kinds are first reserved for U.S. citizens. Recently, this protectionism has been linked to the hoary problem of immigration reform, thereby limiting the prospects for any updating of the regulations governing cross-border employment. Finally, the quest to balance the budget will inevitably lead to cuts in all U.S. agencies, including those overseeing labor mobility. Meanwhile, Canada’s archaic tax laws, with their onerous tax filing and withholding requirements, erect a fourth barrier to the movement of professionals and skilled workers across the border.

Shotwell and Cryne admit that neither the NAFTA Professional List nor security vigilance is likely to change in the foreseeable future. Despite all these impediments, however, they suggest very practical solutions that could well be implemented—if legislators and regulators in both countries have the will to make them happen. The most significant reform in the short term would be a Trusted Employer program, following on the success of the Trusted Trader and Trusted Traveler (NEXUS) programs. Once implemented, the authors say, this program would improve labor mobility across the U.S.–Canada border without compromising security in any way.

The Canada Institute thanks the authors for their critical analyses of a complex and evolving issue in the ongoing bilateral dialogue.

STEPHANIE McLUHAN
Program Consultant (Toronto)
Canada Institute
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Lynn Shotwell and Andrew Yewdell

CROSSING THE NORTHERN BORDER: THE CHALLENGES OF LABOR MOBILITY FROM THE UNITED STATES TO CANADA AND A RISK-BASED SOLUTION

The 2011 Beyond the Border (BTB) Action Plan advanced a bold vision for strategic cooperation between the United States and Canada, building on previous free-trade agreements and joint programs to enhance security and promote trade. A decade after September 11, both governments still struggle to balance securing their common borders with promoting international trade. Although the BTB plan recognizes a number of modern challenges (the threat of cyber-attacks) and endorses modern solutions (risk-based Trusted Trade and Trusted Traveler programs) to simultaneously advance national security and trade, it proffers a modest and traditional approach to achieving the stated objective of increased labor mobility—the flow of workers and jobs—between the two countries.

Modern corporations have offices and clients in multiple countries, and they need mobile labor. With inextricably intertwined corporate and citizen communities, cross-border labor mobility is particularly important for the United States and Canada. Yet, despite having the largest bilateral trade relationship in the world, there are many significant impediments to cross-border labor mobility. Post-September 11 border security requirements slightly restrict labor mobility by mandating enhanced

travel documentation and closely scrutinizing applications for travel documents. Between our two countries, travelers into the United States must now show a passport or an enhanced identification card to enter, whereas previously they could cross with ease by presenting a standard driver's license.

Beyond these security protocols, the principal obstacles limiting the flow of labor from the United States into Canada can be attributed to unpredictable and inconsistent work-permit adjudications caused by ambiguous regulations and an outdated list of qualifying occupations for expedited work permits as set out in the North American Free-Trade Agreement (NAFTA) of 1994. Without improvements to processing efficiency and a 21st-century understanding of labor requirements, the barriers to mobility from the United States to Canada could hamper years of cooperation in international trade.

To begin, we will review cross-border trade and labor mobility data as well as the relevant programs that govern this flow to establish the context for the challenges of cross-border labor mobility. We will then understand the obstacles limiting labor mobility from the United States to Canada and how the Action Plan addresses these issues. Finally, we will propose a risk-based immigration solution that expands on the ethos of the Action Plan and delivers a modern approach to encouraging cross-border labor mobility. First, however, we will examine labor mobility on a global scale and identify the factors that fuel it.

Modern corporations have offices and clients in multiple countries, and they need mobile labor. With inextricably intertwined corporate and citizen communities, cross-border labor mobility is particularly important for the United States and Canada.

UNDERSTANDING GLOBAL LABOR MOBILITY

In an increasingly globalized economy, corporations must efficiently allocate and develop human capital on an international level to meet strategic business needs. Companies generally rely on globally mobile employees (GMEs) to



service cross-border customers and to integrate multinational operations, to address skills gaps in the local market, or to develop new business initiatives and markets. In this context, four categories of GMEs emerge:

- *Temporary Business Travelers* participate in short-term business activities such as meetings, professional development programs, and client engagements.
- *Intra-company International Assignees* are employees who are transferred to a business unit abroad on a mid- to long-term basis—for example, to foster a unified corporate culture, service clients, or introduce new products and technologies.
- *Global Leaders* are employees at the top of their field, recruited to provide a distinct competitive advantage and to spur innovation.
- *High-Skilled Professionals* are well-educated employees recruited by companies to address human capital

deficiencies in their organizations. Unlike Global Leaders, they may not be preeminent in their field but have often studied in the foreign country in which they are recruited and hired.

It should be noted that skilled trade workers may also be part of this GME paradigm. They may be deployed internationally to perform specialized maintenance or repairs. Nonetheless, in this essay we will primarily examine labor mobility for higher-skilled workers.

Challenges associated with arranging for each class of GMEs to cross borders depend on the length of the international engagement. The speed and reliability of obtaining entrance and work permits present a universal challenge for all categories, but it is most problematic for Temporary Business Travelers and Intra-company International Assignees. For short-term engagements, even slight processing delays can threaten the execution of a business engagement.

Despite the overarching challenges, global labor mobility has increased over the past decade and will continue

Over the past decade, the total number of U.S. Temporary Foreign Workers (TFWs) in Canada has increased steadily. From 2002 to 2011, it grew from 20,215 to 35,637, with an average annual growth rate of 6.5 percent. Additionally, for every year during the same period, the United States was the top source country for total TFW entries into Canada.

upward in future decades. According to a study by PricewaterhouseCoopers (PwC), the number of GMEs rose by 25 percent from 1998 to 2009, with an additional 50 percent growth projected for 2020. Moreover, in that same period, the average number of global locations for a single organization increased by 70 percent, with an additional projected growth of 50 percent by 2020. These figures indicate that organizations are developing the infrastructure to accommodate increasing numbers of GMEs. Younger employees are more receptive to working internationally: 71 percent of millennials expect to work in other countries during their careers. Notably, over the past decade, the proportion of short-term assignments has doubled to 20 percent of all assignments.¹ As the number increases, entrance and work authorization processing delays will become a greater barrier to efficient cross-border commerce.

Demographic and economic factors best explain increased global labor mobility. As populations in the developed world age, they increasingly rely on GMEs to fill labor voids. According to the United Nations, 22 percent of the more-developed world is older than 60, compared to 9 percent of the less-developed world and 5 percent of the least-developed world.² This aging gap certainly fuels global labor mobility but is only part of the equation. Growth in the international trade of services is another factor driving increased global labor mobility, because GMEs are needed to deliver services to foreign clients.

UNDERSTANDING U.S.-TO-CANADA LABOR MOBILITY

Although demographic shifts may explain the larger global mobility trend, cross-border labor mobility between the United States and Canada is primarily driven

by cross-border trade. Both countries have similarly aged populations, with 21 percent of the current population in Canada and 19 percent in the United States older than 60 years.³ With parallel demographic profiles, aging plays a minor role in driving cross-border labor mobility.

Canada is the United States' single largest trading partner, with approximately \$616 billion in goods traded between them in 2012.⁴ For 2011, vehicles (\$46.9 billion), machinery (\$44.2 billion), electrical machinery (\$27.1 billion), agricultural products (\$19 billion), oil and natural gas (\$18.4 billion), and plastics (\$12.6 billion) represented the largest export categories, accounting for nearly 60 percent of all goods exported to Canada. Between 1993, the last year before the North American Free-Trade Agreement (NAFTA), and 2011, the export of goods to Canada increased by 180 percent.⁵ Canada was also the largest importer of U.S. private services. The export of private commercial services to Canada accounted for \$56 billion, or 9.5 percent of total U.S. private services exports in 2011. That year, business, professional, and technical (BPT) services (\$9.1 billion), financial services (\$4.9 billion), insurance services (\$2.8 billion), and telecommunication services (\$800 million)—all intensive human-capital services—represented a significant portion of the export of U.S. private services to Canada, totaling \$17.6 billion, or 31.5 percent of the total export of private services.⁶ Moreover, after the implementation of NAFTA, the export of private services increased by 230 percent.⁷ In terms of labor mobility, the exports from the United States to Canada translate into thousands of accountants, lawyers, consultants, and automotive executives traversing the border to conduct business.

The expansive trade relationship between the United States and Canada, particularly in the trade of private

services, propels labor mobility between them. Over the past decade, the total number of U.S. Temporary Foreign Workers (TFWs) in Canada has increased steadily. From 2002 to 2011, it grew from 20,215 to 35,637, with an average annual growth rate of 6.5 percent. Additionally, for every year during the same period, the United States was the top source country for total TFW entries into Canada. In 2011, TFWs from the United States accounted for approximately 18 percent of all TFW entries into Canada.⁸ Although trade fuels this consistent flow of labor, free-trade agreements and joint programs ultimately determine the volume and ease of the flow.

WHAT FACILITATES CROSS-BORDER MOBILITY?

Beyond each country's general immigration framework, special arrangements between the United States and Canada in the form of NAFTA and the NEXUS program promote cross-border mobility. Implemented as a tri-lateral agreement between the United States, Canada, and Mexico in 1994, NAFTA facilitates the cross-border flow of labor by easing the entry requirements for qualified U.S. citizens coming to Canada to engage in business activities. NAFTA grew out of the bilateral U.S.–Canada Free-Trade Agreement of 1988, which initially established the special visa classes that NAFTA superseded. NAFTA codified four categories of business persons:

- *Business Visitors*: Corresponding with the Temporary Business Traveler GME grouping, Business Visitors do not need work permits provided they remain on a non-Canadian payroll, their primary location of employment is outside Canada, and the nature of their business is limited in scope so they do not enter the Canadian labor market.
- *Professionals*: Similar to the High-Skilled Professionals GME grouping, NAFTA Professionals must have an offer of employment in Canada and qualify as a professional in a NAFTA-listed occupational field. NAFTA Professionals must apply for a

work permit at either a port of entry or a consulate, but do not require a “labor market opinion” determining that their employment would benefit the Canadian market and that no Canadian worker is available to do the job.

- *Intra-company Transferees*: Mirroring the Intra-company International Assignee GME grouping, this NAFTA designation allows U.S. employees of a company to transfer to a Canadian branch provided they are continuously employed in a managerial or executive role or possess specialized knowledge about company operations. Applicants for this designation can apply for a work permit at a consulate or port of entry and do not require a labor market opinion.
- *Traders and Investors*: The Trader designation refers to individuals who create substantial trade between the United States and Canada, while the Investor designation covers visitors who oversee substantial capital investments in Canada. These categories require a work permit, but not a labor market opinion, and, because of the complexity of the application, are advised to apply for one at a consulate.⁹

NAFTA visas confer two benefits that drive cross-border labor mobility. First, applicants have the option of applying for work permits at either the border or a consulate, giving them a high degree of flexibility. Second, the exemption from obtaining a labor market opinion allows NAFTA applicants to avoid an additional time-consuming step that could significantly delay a work-permit application. The Professional and Intra-company classes are the two largest segments of the TFW population. In 2011, there were 13,255 NAFTA Professionals and 8,194 NAFTA Intra-company Transferees, representing approximately 61 and 38 percent, respectively, of all such TFWs.¹⁰ The increased flexibility in adjudication and the expedited processing of NAFTA visas generally help cross-border trade.

To further expedite cross-border mobility, the Canada Border Services Agency (CBSA) and the U.S. Customs and Border Protection (CBP) jointly launched NEXUS.



NEXUS lanes at the Peace Bridge in Buffalo, New York

Under NEXUS, low-risk travelers can access accelerated border processing at air, land, and marine ports of entry. Citizens and Permanent Residents of both the United States and Canada can qualify for NEXUS benefits provided they pass an array of background checks. Ultimately, NEXUS aims to mitigate national security risks by establishing a “trusted” class of travelers, who in turn benefit from expedited cross-border travel.

WHAT ARE THE COMMON CHALLENGES?

Despite efforts on both sides to improve cross-border labor mobility through NAFTA and NEXUS, significant challenges persist. In 2012, the American Council on International Personnel (ACIP) and the Canadian Employee Relocation Centre (CERC) conducted a survey of employers to determine the most common obstacles in moving employees between the United States and Canada. Surveyed organizations include large multinational corporations and conglomerates with business operations in an array of industries, including telecommunications, information technology, legal services, and consulting services. Of the almost 90 percent of respondents who described cross-border labor mobility as a regular

component of business operations, 82 percent reported experiencing delays. There are two major immigration-based challenges: inconsistent adjudications stemming from regulatory ambiguity and insufficient training of officials; and NAFTA’s outdated Professional List. Not only do they frequently delay cross-border labor mobility but, in some cases, prevent it entirely.

The organizations surveyed identified inconsistency in decisions as the most frequent cause of border processing delays: 82 percent of respondents cited inconsistent decision making by inspectors. Moreover, respondents rated differences in rules between Canada and the United States as the most significant challenge when transferring labor across the border. As part of this problem, 46 percent also noted that a lack of clear guidance on entry requirements contributed to delays. Anecdotally, one organization based in the United States stated that information from border officials was frequently incorrect. As discussed previously, visa processing efficiency is a central concern for all categories of GMEs, but particularly travelers with short-term international engagements. Delays at the border remove certainty from business planning, creating significant challenges for businesses, especially as the frequency of short-term international assignments increases.

Canadian tax laws present another challenge to cross-border labor mobility. Survey respondents noted that U.S.-based employers and employees face onerous tax filing and withholding requirements when employees travel to Canada to work for short periods.

The NAFTA Professionals list, formulated in the 1980s and ratified in 1994, delineates qualifying occupations for the NAFTA Professionals designation. A number of modern professions are omitted, including computer software engineers, financial analysts, and operations research analysts. The omission of many modern professions makes it difficult for companies to move employees into Canada, preventing the achievement of critical business objectives. Among the surveyed organizations, 63 percent reported employing cross-border mobile personnel in occupations that were omitted from the list. Many large private services firms, particularly in the information technology, finance, and consulting industries, employ professionals in omitted fields, and the outdated occupations list severely limits their trade. Clearly, the NAFTA occupational list has failed to keep pace with evolving business demands.

In theory, this list can be updated to accommodate modern professions. In practice, however, the list is static, and organizations must classify employees under ill-fitting occupational designations, leading to adjudication issues and processing delays. Because the list is a tri-lateral agreement, it is exceptionally difficult to amend or add new occupations to the list. First, the United States, Mexico, and Canada would all need to agree on changes, and each country would need to approve the changes on a national level—a scenario that would take years at best to accomplish.¹¹

Canadian tax laws present another challenge to cross-border labor mobility. Survey respondents noted that U.S.-based employers and employees face onerous tax filing and withholding requirements when employees travel to Canada to work for short periods. This additional administrative burden further stymies the flow of labor from the United States into Canada by raising the cost of mobility.

WHAT DOES THE BTB ACTION PLAN DO?

The Beyond the Border Action Plan includes provisions intended to improve cross-border mobility and to address some of the challenges limiting the flow of labor. As part of the plan, the United States and Canada committed to six initiatives pertaining to cross-border labor mobility:

- improving administrative guidance and training for border officials to facilitate the entry of business visitors and temporary workers;
- developing policies to allow the entry of “specialized maintenance and repair personnel”;
- amending rules to authorize the entry of business visitors for “after-lease servicing”;
- enhancing the NEXUS client profile for more predictable expedited clearances;
- exploring ways to provide advance adjudication processes;
- and reviewing the efficacy of existing redress / recourse mechanisms and implementing improved procedures.

Notably, Canadian procedures allowed for the advance adjudication of work permits at consulates as well as for the entry of business visitors providing “after-lease servicing” before the announcement of the Action Plan.¹² The Canadian side of the plan therefore has only four actionable labor mobility components.

The Action Plan also initiated stakeholder consultations to refine and develop policies that advance cross-border labor mobility. In consultations, stakeholders addressed the common challenges, suggesting improved regulatory clarity and adjudication transparency, a modernized NAFTA Professionals List, and reductions to the administrative burdens caused by Canadian tax laws. They also sought to expand access to the Business Visitor classification, facilitate the entry of specialized maintenance and repair personnel for critical business engagements, and develop a working group to monitor the progress of cross-border labor mobility. Finally, they suggested the development of risk-based programs allowing expedited entry for employees of trusted employers. All these suggestions would provide welcome improvements to cross-border mobility, supplementing the core initiatives of the Action Plan.

In December 2012 the Canadian government released its first implementation report detailing the status of all proposed initiatives. Addressing the six labor mobility provisions, it reported improvements to guidance, training, and manuals for CBSA officers. The Canadian and U.S. governments also incorporated classes of admission into the NEXUS client profile and improved advanced adjudication procedures to address travel issues before travel. Finally, they implemented improvements to “recourse and redress mechanism” for business travelers who were denied entry. Notably, the report did not address any policies that facilitate the entry of “specialized maintenance and repair personnel,” nor did it mention specific process improvements.¹³ Furthermore, it will take some time to evaluate the efficacy of improved training procedures for CBSA officers. That said, this particular initiative is a step in the right direction by reducing ambiguity and increasing predictability at the border.

A RISK-BASED SOLUTION

A number of policy changes could improve the flow of labor from the United States to Canada, but some of the most promising solutions lie outside the purview of the Beyond the Border Action Plan. Updates to the NAFTA list would be welcome, but they are not covered in the Action Plan. Canadian tax reform for short-term foreign employees would also remove a significant barrier to cross-

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border mobility, but the plan does not reference taxes at all. Finally, Canadian officials have committed to developing a more consistent and transparent adjudication system through enhanced training, but this process will take some time to yield results. In sum, the provisions of the Action Plan represent a real yet modest effort to facilitate border mobility through changes in process.

Canadian and U.S. officials should also test new visionary projects with the potential to dramatically improve cross-border labor mobility. Along these lines, they should develop a cross-border labor mobility solution that expands on the risk-based programs outlined throughout the Action Plan. As a complement to the myriad risk-based cross-border mobility enhancements to the Trusted Trader (FAST) and Trusted Traveler (NEXUS) programs, Canada and the United States should launch pilot Trusted Employer programs. Recently, Customs and Border Protection successfully transitioned risk-based pilot programs for Trusted Shippers into larger-scale programs, providing a model for testing and implementing new trade processing systems. In October 2011, CBP launched two Centers of Excellence and Expertise (CEEs) pilots for pharmaceutical and electronic products to expedite import processing for Trusted Shippers, and, based on the success of these pilots, will roll out seven additional centers for other import classes. As part of a Trusted Employer pilot program, the U.S. and Canadian governments should create an option through which employers could seek recognition as a Trusted Employer, based on past and ongoing compliance with immigration requirements.

Like the similar risk-based government programs, Trusted Employer would allow the government to

pre-qualify Canadian and U.S. employers that have a proven track record of compliance with immigration regulations, thereby streamlining adjudication and freeing precious government resources to focus on other priorities. Simultaneously, both governments and employers would experience greater certainty and efficiency in the cross-border movement of GMEs, further cementing the special relationship between the United States and Canada and serving as a model for labor mobility cooperation and efficiency.

As the largest bilateral trade relationship in the world, cross-border trade between the United States and Canada should continue to flourish for the foreseeable future, in turn fueling cross-border labor mobility. Nonetheless, significant challenges to such mobility remain in the form of processing ambiguity and an outdated NAFTA list. If the flow of labor is to keep pace with trade, particularly trade in private services, these challenges require immediate resolution. Additionally, U.S. and Canadian officials should seize the political momentum of the Beyond the Border Action Plan to launch a new risk-based Trusted Employer pilot program that further improves cross-border labor mobility. As Christopher Sands points out in the September 2012 *One Issue, Two Voices*, the start of a new presidential term in the United States is “usually the best time to pursue big agenda items.”¹⁴ If there is ever a time to launch a risk-based Trusted Employer pilot, it is now. The potential benefits in the form of increased labor mobility and trade in private services far outweigh the costs.

NOTES

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Stephen Cryne

CANADA–U.S. MOBILITY: A COMPETITIVE ADVANTAGE IN THE GLOBAL ECONOMY

During the 1980 U.S. presidential election, Governor Ronald Reagan campaigned on the idea of a common market structure called the North America Accord.¹ Eight years later that proposal led to the signing of the Canada–U.S. Free-Trade Agreement (FTA) by President Reagan and Canadian Prime Minister Brian Mulroney. The FTA came into effect in January 1989 amid opposition in both countries, much of it based on the fear of job losses in each country, and in Canada on concerns about our independence.

At the time, the idea was to make North American business more competitive: a free-market structure would result in better access to inputs, thereby improving productivity. The FTA, despite initial opposition from the Liberal Party in Canada and the Democratic Party in the United States, became the foundation for the North American Free-Trade Agreement (NAFTA). This agreement, which created a tri-lateral trading bloc among Mexico, the United States, and Canada, was signed by President Carlos Salinas, President Bill Clinton, and Prime Minister Jean Chrétien and came into effect on January 1, 1994. It created the world's largest free-trade zone, linking some 450 million people producing \$17 trillion worth of goods each year.² Under NAFTA,

employment in North American countries has grown by almost 40 million jobs.³ This essay explores some of the challenges employers encounter under NAFTA when employees are traveling between Canada and the United States for business purposes.

In a typical year, Canada sends about \$275 billion in goods and services to the United States and, in return, imports almost \$250 billion worth.⁴ Not only has two-way trade almost tripled but the number of business visitors and workers traveling between the two countries has also increased. Two-and-a-half-million jobs in Canada and eight million jobs in the United States are directly related to NAFTA.⁵

CHALLENGES WITH CROSS-BORDER MOBILITY

Viewed from the perspective of 2013, it is clear that NAFTA's focus was largely on the movement of goods and services, although Chapter 16, Article 1605 of the agreement also contains provisions to cover the free movement of professional occupations. At the time of its inception, the agreement was a remarkable and forward-thinking achievement. A Canadian citizen qualifying under the Trade NAFTA (TN) Professionals List may obtain authorization for an initial three-year period to work in the United States and be remunerated for those services.

In addition, NAFTA has provisions to facilitate travel for Business Visitors: they can apply at the border for the Intra-company Transfers (L status) they will need. NAFTA also provides the basis for Canadians to apply for Trader and Investor E visas. Canadian business visitors traveling to the United States are permitted to carry out installation and repair or maintenance services, and in extenuating circumstances these visas may be extended for a further six months.

Several thousand corporations have operations in both the United States and Canada collectively employing millions of employees, and they require access to an adequate supply of highly skilled and trained workers to grow their businesses.



Security area at Denver International Airport

There are other channels, too, by which Canadian workers can enter the United States. The H1-B status visa is available for temporary workers in specialty occupations. To qualify, the offered position must require a degree in a specific field, and the employee must have at least a baccalaureate degree within that field. For example, the position of economist requires a degree in economics or a related field. An individual holding a bachelor's degree in English will not qualify for H1-B status as an economist.

The reality today is that the movement of people is equally as important as the trade in goods. Supply chains are not just about physical assets but also include human capital. Every year, approximately four million people cross the border to conduct business. Several thousand corporations have operations in both the United States and Canada collectively employing millions of employees, and they require access to an adequate supply of highly skilled and trained workers to grow their businesses. With an aging workforce and the emergence of the "new economy" in both countries, access to skilled workers is essential to maintaining competitiveness in the global market. Canada and the United States must work together to facilitate the movement of highly skilled workers, who

are often in short supply. Companies must be allowed to deploy those workers in either country with the greatest efficiency and a minimum of red tape.

The events of September 11, 2001, completely shattered the progress that had been made in developing an open border between Canada and the United States. The attack on U.S. citizens changed the psyche of the nation and the American government's approach to trade and security. Despite the obvious benefits of more economic activity, the reality today is that security now trumps trade. The increased security and enhanced documentation requirements imposed since 9/11 have seriously impeded the flow of legitimate business travelers between our two countries. And, while programs such as the NEXUS pass have served to improve security screening, they have not addressed the ongoing delays encountered by professionals and business travelers wishing to enter the United States. These delays have been compounded by the economic downturn since 2008, which has increased political pressure to protect domestic employment markets.

On December 7, 2011, Prime Minister Stephen Harper and President Barack Obama issued the much-anticipated Beyond the Border Action Plan: A Shared Vision for Perimeter Security and Economic Competitiveness.

The plan flows from a joint Canada-U.S. declaration in February 2011 to improve security while also accelerating the legitimate flow of people, goods, and services between our two countries. In the two years since, Canadian and U.S. government officials have been working on the development of an action plan in support of this declaration and have consulted business groups and stakeholders in both countries on a broad range of issues, including the rules around the temporary entry of business travelers.

Estimates from McKinsey & Company in a global employment report published in June 2012 suggest that employers face a major shortage of highly skilled workers on a global scale.⁶ Recent reports by Bloomberg state that the shortage of skilled workers will threaten some US\$100-billion worth of U.S. energy development projects during the next decade. This damage cannot be allowed to happen. The problem extends beyond the energy industry: employers in health care, engineering, manufacturing, financial services, and mining represent just some of the industries facing severe skills shortages. Many of these companies have operations on both sides of the border and must be able to move employees freely between projects and across borders.

While NAFTA covers only professional workers, employers are facing shortages in many skilled and technical trades as well. At the same time, there is also a growing skills mismatch: while medium and highly skilled workers are increasingly in short supply, estimates project that by 2020 there will be a global surplus of approximately 58 million low-skilled workers.⁷ In the United States, the unemployment rate among people without a high school diploma is 12.7 percent, triple the rate of people with a bachelor's degree or higher.⁸ In Canada, the equivalent level of unemployment is 11.1 percent, compared with just 4.5 percent for Canadians with a university certificate or bachelor's degree.⁹ After the recovery from the 2008 recession, employment in Canada increased by 463,000 between January 2011 and February 2013. Over that same two-year period, the number of occupations requiring a college education or apprenticeship training rose by 267,000, and occupations requiring a university education grew by 120,000.¹⁰

The issue of a global skills shortage is raising concerns among leading think-tanks and institutions around the

Employers in health care, engineering, manufacturing, financial services, and mining represent just some of the industries facing severe skills shortages. Many of these companies have operations on both sides of the border and must be able to move employees freely between projects and across borders.

world. The World Economic Forum has been taking a close interest in the matter, culminating in a series of reports, including the landmark *Stimulating Economies Through Fostering Talent Mobility*.¹¹ The report calls for a greater harmonization of rules governing the temporary entry of workers and the creation of short-term visa programs targeting the highly skilled. In his January 2012 address to the Economic Forum, Klaus Schwab, the founder and executive chairman, said, "The success of any national or business model for competitiveness in the future will be placed less on capital and much more on talent ...the world is moving from capitalism to talentism."

Under the auspices of NAFTA, more than 30 working groups, committees, and other subsidiary bodies have been established to ensure the effective implementation and administration of the agreement in all three countries. However, the Working Group on Temporary Entry which is supposed to meet annually, has in fact met only sporadically, the last time being in January 2008. Sources within the Canadian government indicate that there has been, and continues to be, more of an appetite in Canada than in the United States to modernize the NAFTA TN (Treaty National) list and make it more robust. This reluctance is closely linked to political lobbying and pressures to protect domestic jobs in the United States.

One of the major problems is that the NAFTA TN list has not adapted to the rapidly changing economy and its many new careers—for example, those technology

Although the U.S. tax system is complicated by stringent compliance requirements, it is far preferable for foreign workers to the Canadian system, where a withholding tax is required on the first \$1 of income for employment services performed in Canada unless a waiver from the withholding tax is obtained.

jobs supporting the Internet and cloud-based computing. These occupations are not on the TN list, so employees will be denied entry under NAFTA. At the same time, many of the professions on the list in both countries—zoologists, plant breeders, and vocational counsellors, for instance—are not driving economic growth and creating new jobs. Another problem is that virtually all the occupations on the list require at least a baccalaureate degree. This stipulation discounts many of the highly skilled technologists, technicians, and specialized-knowledge workers who are in short supply in both countries.

U.S. border officials are often criticized in Canada for the various ways in which they interpret and adjudicate the rules, especially those pertaining to short-term employment. The category of business consultant, for instance, requires that applicants possess a baccalaureate degree “or equivalent experience” as a management consultant. This “experience” qualification leaves much room for interpretation by border officials and causes frustration for employees and their employers when entry is denied. Two further examples cited by employers are revealing:

- *Project controls personnel* are called either project planners or project cost controllers. These employees assist project directors and are responsible for maintaining the schedules and the budgets on projects of any size. A very small job (\$1–2 million) likely requires one project planner with knowledge of the organization and how it controls projects. A multi-billion-dollar project will need a team of 20 or 30 people, responsible for all aspects of cost control and forecasting, as well as project planning, construction scheduling, and execution. These individuals have a background in engineering, business planning, finance, or

procurement and, inevitably, a combination of both formal education and years of practical experience. At the present time there is no formal NAFTA designation for these individuals, despite the extensive background they must have.

- *Contracts managers* negotiate and manage the many contracts that are put in place as part of a construction project—contracts ranging from small (\$25,000) to large (several hundred million dollars). These managers sometimes have legal backgrounds and usually possess experience in the purchasing or procurement side of the engineering / construction industry. Many of them are interchangeable with similar roles in client companies, where they may be involved in negotiating and awarding overall contracts to companies in the EPC (engineering, procurement, and construction) industry. Again, there is no formal NAFTA designation for these individuals, but their skills are rare and hard to find.

A further issue that causes significant problems for employers is the level of consistency in decisions from border officials. In a 2011 survey of major Canadian companies that transfer employees into the United States, the Canadian Employee Relocation Council (CERC), found that inconsistency in decision making was one of the biggest complaints.¹² As one respondent lamented, “It depends on the time of day, the port of entry, and who is on duty.” While some of the inconsistency can be traced to the complexity of the rules of entry, a large part is also due to poor levels of training, a lack of understanding of the occupations and industries being adjudicated, and even a reaction to negative news in local communities



regarding job losses—to complaints about “Canadians stealing American jobs.” One employer with an employee who was denied entry reported that the border official told the worker, “Nobody is getting in today.”

In developing trade and economic agreements with other jurisdictions that include provisions for business travelers, Canada is moving away from the NAFTA model of prescribing which professional occupations are covered. Rather, it provides a negative list of the professional occupations that are not permitted under the business traveler provisions. Canada is in the final stages of negotiations with the European Union for a Comprehensive Economic Trade Agreement (CETA), for instance, and, if ratified, the agreement will cover all occupations at a professional level (with the requirement for a four-year university degree), with exceptions as described in the agreement. Those exceptions include occupations in health care, education, social services, and the cultural industries. The agreement also provides for a wide range of technicians and trades people who would be granted entry. Ironically, many of the same occupations included are the ones that Canadian and U.S. firms are currently struggling to move between our two countries—computer technicians, avionics mechanics, contractors, and heavy construction equipment

operators, all of which do not require a baccalaureate degree but are in high demand around the globe.

Canada is entering into negotiations under the Trans-Pacific Partnership (TPP) with many other countries, including the United States and Mexico, Singapore, New Zealand, and Chile. The TPP offers a significant opportunity to engage more actively in the fast-growing Asia-Pacific region while also deepening Canada’s partnerships in the Americas. The TPP agreement will include provisions covering the temporary entry of workers, and, if the Canadian approach to the rules on temporary entry is adopted, the question will be, “What happens to NAFTA, and specifically to Article 1605 of Chapter 16?”

In addition to the rules of entry, there are other issues around the withholding tax that Canadian employers need to understand. Under U.S. domestic law, no withholding tax is required until salary attributable to employment services performed in the United States exceeds US\$3,000 in any year. Although the U.S. tax system is complicated by stringent compliance requirements, it is far preferable for foreign workers to the Canadian system, where a withholding tax is required on the first \$1 of income for employment services performed in Canada unless a waiver from the withholding tax is obtained. Obviously, there is much room for improvement in this area to increase these limits in both countries.

WHERE ARE THE SOLUTIONS?

The Canadian Employee Relocation Council has been working together with a group of leading business associations and employers in the United States and Canada to develop a series of recommendations which can reduce the challenges for cross-border professional and business travelers. One of the key recommendations is to modernize the occupations listed under the NAFTA TN Professionals List to reflect the realities of today's global economy and the many new occupations that businesses need to remain competitive. Canada and the United States should also adopt the same approach that is used in trade agreements Canada is negotiating with other nations—one that provides greater flexibility for the movement of business travelers and skilled workers.

The business community is recommending the implementation of a Trusted Employer Program (TEP). The TEP builds on the concept of the current Trusted Trader Program, which covers the movement of goods between Canada and the United States. Under the proposed TEP, employers would voluntarily enroll in a program administered jointly by U.S. and Canadian border services. Employers would pre-register in the program and provide assurances that only employees within the NAFTA-prescribed job functions, and with the requisite skills, education, or experience, would travel for work between the two countries. This assurance would remove the adjudication of employment provisions from border officials. Combined with the NEXUS security pass, such a program would greatly reduce delays and inconsistencies at the border and deliver significant economic benefits to both countries. Under this voluntary program, employers would be required to demonstrate that they have met all obligations under the program and might also be subject to a potential compliance audit.

One of the most common complaints gathered in the 2011 CERC survey of employers was the inconsistency in decision making at ports of entry. To address this situation, the business group recommended more training for border officials to reduce inconsistencies in the adjudication of decisions in both countries. In response, the Beyond the Border Action Plan published in December 2011 made this commitment: “By June 30, 2012, the

As we enter the world of “talentism” and struggle to find the right personnel to fuel our productivity and innovation, we must, if we are to maintain our global competitiveness, establish ways to support industry by improving the mobility of business travelers.

Canada Border Services Agency and U.S. Customs and Border Protection will provide enhanced administrative guidance and training to their officers and enhanced operational manuals to achieve optimal operational consistency at all ports of entry on business traveler issues.” It will be interesting to trace what improvements, if any, have taken place when CERC conducts this survey again later in 2013.

A further recommendation of the business group is the ability to pre-file applications, allowing government officials to identify any potential issues before the date of travel. Canada already has a provision in place under the Temporary Foreign Worker Units to provide this pre-filing, and in the summer of 2012 the recommendation was also implemented by the United States. This initiative will remove inconsistencies in the decision-making process, and experience to date suggests that applications under this stream are being approved within the 15-day window.

The business group recommended that a formal review mechanism be put in place to identify discrepancies in the adjudication process for highly skilled workers. In this scenario, a working group of business and government officials from both countries would carry out the reviews and provide recommendations.

Former Quebec premier Jean Charest had it right when he spoke to the benefits of the Québec-France Agreement on the Mutual Recognition of Professional Qualifications. At that time he said, “If you’re a plumber and can fix a

pipe in Paris, you can fix a pipe in Montreal.” This agreement, signed on October 17, 2008, adopts a common procedure for recognizing professional competence and is designed to facilitate and accelerate the acquisition of permits by people in France and Quebec to practice a profession, a function, or a regulated trade in the other territory. In the years since the agreement was signed, about 100 professional authorities have applied its terms in cases where an overall equivalence, or mutual recognition of qualifications (MRA), has been proved to exist.¹³

Canada and the United States enjoy the closest relationship of any two nations on earth. We share vast natural resources and enjoy a standard of living that is the envy of the world. As we enter the world of “talentism” and struggle to find the right personnel to fuel our productivity and innovation, we must, if we are to maintain our global competitiveness, establish ways to support industry by improving the mobility of business travelers.

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LYNN SHOTWELL AND ANDREW YEWDELL RESPOND TO STEPHEN CRYNE

In his essay, Stephen Cryne astutely observes that post-September 11 national security interests trump labor mobility interests and that the “great recession” has increased political pressure to protect domestic labor markets. Border security enhancements have certainly increased entry processing times, but the impact of the recession is more nuanced. Domestic employment protection has become a political priority in the face of recession-induced unemployment, though U.S. policymakers in both parties appear to recognize that high-skilled, employment-based immigration creates jobs and fosters economic growth. Accordingly, the ferocity of the opposition to labor-mobility reforms largely depends on the types of jobs involved.

The recession also sparked renewed political interest in balanced budgets, conjuring up the omnipresent specter of budget cuts for all U.S. government agencies, including those overseeing entry processes and labor mobility. This political environment, characterized by persistent fiscal and national security anxiety, colors the debate on any labor-mobility policy. To this end, politically viable solutions for improving cross-border labor mobility must enhance or maintain national security at minimal expense.

Beyond economic and security considerations, changes to any U.S. immigration policy are unlikely

until the more contentious issue of illegal immigration is resolved. Most Americans are familiar with our challenges on the southern border, but would be surprised to learn of the inefficiencies on the northern border, thereby limiting its political urgency. Although both parties may want to facilitate labor mobility and trade between the United States and Canada, particularly for high-skilled immigrants, this issue is bound to the legislative knot of comprehensive immigration reform. Without a compromise on legalization policies, the prospect for more than modest improvements in cross-border labor mobility is bleak.

THE GREAT RECESSION

In the wake of the great recession, unemployment and budgetary concerns dominate the political landscape. Washington struggles to develop policies that create and protect jobs for U.S. citizens while simultaneously devising a pathway to sustainable government spending and a balanced budget. This focus on employment and budget has had a major impact on cross-border labor-mobility politics and the mechanisms governing the flow of labor.

With unemployment at 7.6 percent, U.S. politicians are sensitive to claims that foreigners are taking jobs from U.S. citizens. Claims of stolen jobs, however, tend to focus on lower-skilled positions. Some of the most factious negotiations over a comprehensive immigration reform bill involve the management of low-skilled labor mobility. Because of high unemployment, some factions argue for robust protections for American jobs while others cite a dearth of low-skilled workers.

Cross-border labor mobility for higher-skilled positions, such as those that support the substantial cross-border trade in services, are less likely to provoke protectionist rhetoric. Such positions are in high demand, and the service industry struggles to cope with

Although both parties may want to facilitate labor mobility and trade between the United States and Canada, particularly for high-skilled immigrants, this issue is bound to the legislative knot of comprehensive immigration reform.

a skills gap. According to a study by the Society for Human Resource Management, HR professionals report that although the demand will increase for hiring in the service sector, it will be increasingly difficult to recruit candidates for positions in this sector.¹ There seems to be bipartisan consensus that high-skilled, employment-based immigration not only benefits the economy but also creates jobs. To this point, a 2011 study conducted by the conservative American Enterprise Institute and the bi-partisan Partnership for a New American Economy concluded that employment of high-skilled immigrants creates jobs for U.S. citizens.² Protectionist political rhetoric has characterized some of the labor-mobility discourse following the recession, but there is a growing political momentum in favor of high-skilled labor mobility, such as that occurring between the United States and Canada.

The continual budget strife stemming from the recession, however, is a leading factor exacerbating the challenges associated with cross-border labor mobility. All U.S. government departments, including those responsible for managing cross-border travel and trade, have been forced to scour for ways to trim costs. This reality has become more pronounced with the automatic budget cuts implemented as part of the March 1, 2013 sequester. To cope with the forced budget reduction, the U.S. Customs and Border Protection (CBP) has announced reduced overtime and a hiring freeze—potentially leading to severely reduced staffing at ports of entry. CBP also initially announced furloughs for all employees, but they have since been postponed and their exact impact remains to be seen. CBP will cut operating budgets and programs, meaning that cross-border travelers may face even longer lines at the border. Beyond the Border initiatives to improve CBP officer training could also face budget cuts and further uncertainty with border adjudications. Moreover, the sequester mandates \$1.2 trillion in budget cuts over 10 years through 2021, of which only approximately 6 percent is being implemented in fiscal year 2013. U.S. agencies must therefore cope with budgetary restraints through at least 2021. In any event, the endless budget uncertainty and sequestration will further impede cross-border labor mobility.

More than 40 percent of non-U.S. resident international business travelers reported that they would avoid traveling to the United States because of cumbersome customs and entry processes.

BORDER SECURITY

The attacks of September 11, 2001 drastically altered the nature of travel to the United States, particularly cross-border travel. Security-enhanced travel documents replaced driver's licenses as required identification, and cross-border trips that used to take a few minutes may now take hours, greatly discouraging casual cross-border trips for shopping or tourism. Despite these increased challenges, our special relationship with Canada continues to be recognized. For example, Canadians do not need to register with the Electronic System for Travel Authorization, as required for other visa-exempt foreign nationals.

The United States government is faced with the unenviable challenge of balancing national security interests with international trade and travel interests. On one side of this equation, policymakers must protect the country by securing borders, and, on the other, international trade and travel requires expedient border processing. This need to balance security with trade inspired the Beyond the Border Action Plan; however, as Cryne notes, the current balance heavily favors national security. According to a recent report from the U.S. Travel Association, more than 40 percent of non-U.S. resident international business travelers reported that they would avoid traveling to the United States because of cumbersome customs and entry processes. This reluctance to travel to the United States robs the economy of billions of dollars as well as hundreds of thousands of jobs.³ In the midst of a sluggish economic recovery, the United States is forfeiting money and jobs that could provide much needed stimulus.

In the current political environment, any programs that govern cross-border labor mobility must satisfy

both budgetary and national security requirements. Expensive labor-mobility programs or those that fail to enhance, or at least maintain, security will garner minimal support in a budget- and security-conscious Washington. It is not surprising, then, that cost-effective security programs that facilitate international trade and travel, such as the Trusted Trader and Trusted Traveler programs, have flourished. Between 2001 and 2012, the Customs-Trade Partnership Against Terrorism (C-TPAT) Program expanded from a mere 7 to 10,000 certified partners, and partner companies accounted for half of all imports by value into the United States.⁴ Trusted Traveler and Trader programs allow U.S. agencies to focus valuable resources on areas of greater security and compliance concern.

A Trusted Employer Program would further complement these programs, improving labor mobility without compromising security. Cross-border labor mobility is a pillar of the trade relationship between the United States and Canada, and, by extension, of the economy of both

countries. Each one would benefit from programs that improve labor mobility, particularly those that align with budgetary and security realities. With reports of progress on comprehensive immigration reform, such programs might be possible with determined negotiations in the future.

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STEPHEN CRYNE RESPONDS TO LYNN SHOTWELL AND ANDREW YEWDELL

The opinion essays show that we authors share many common views about the scope of the cross-border labor-mobility challenges facing our two countries and agree on their potential solutions. The American Council on International Personnel and the Canadian Employee Relocation Council have been working cooperatively to establish a broad coalition of business groups that will actively foster constructive changes under the Beyond the Border Action Plan to facilitate easier travel for employees.

One of the greatest frustrations for employers is the unpredictability in adjudication by both Canadian and U.S. border personnel. To alleviate this uncertainty, programs such as the Trusted Employer Program should be implemented to facilitate cross-border business travel.

As Shotwell and Yewdell state, Canada's archaic tax laws are another deterrent to increased trade and employee mobility, not only with the United States but with many other trading partners as well. For practical reasons, business travelers generally remain on their home country payroll and are sometimes exempt from Canadian taxation. Nevertheless, Canadian legislation requires that employers must withhold income tax from a foreign employee's pay from the first day on the job. Unless that individual has a waiver from paying Canadian taxes, employers must remit the withheld money to the

Canadian tax authorities. However, it is difficult to obtain such waivers unless the employee's exact date for entering Canada can be given far in advance. In a submission to the Canadian government early in 2013, the Canadian Employee Relocation Council made the following recommendations to improve this situation:

- Employers should be exempt from withholding and remitting taxes to the Canada Revenue Agency (CRA) for those individuals who are present in Canada for less than a certain period—for example, unless the employee is in Canada for a total of 20 days over a 12-month period.
- Employers should be relieved from remitting taxes until there is a clear indication that employees will exceed the *de minimis* dollar and time threshold (such as those in the Canada–U.S. tax treaty) before the income becomes taxable.

A matter of some concern is the overall decline in the Canada–U.S. trade relationship.¹ According to the Canadian Department of Foreign Affairs and International Trade, the value of trade between Canada and the United States is still the largest in the world. But for how long? In 2002, trade between our two countries was \$546 billion, while trade between China and the United States was \$239 billion. By 2011, U.S.–Canada trade had declined to \$534 billion, and U.S.–China trade had more than doubled to \$512 billion. In 2002, fully 87.1 percent of all Canadian exports went to the United States. By 2011, the corresponding figure was 74 percent.

There are many reasons for this decline, one of the most significant being the decimation of the manufacturing industry in both Canada and the United States. Today, growth in the Canadian labor market is driven by the service industry—which represents almost 70 percent of the Canadian economy and is responsible for

Canada's archaic tax laws are another deterrent to increased trade and employee mobility... Canadian legislation requires that employers must withhold income tax from a foreign employee's pay from the first day on the job.

Canada is the world's fourth-largest exporter of engineering services and a significant exporter in several other service sectors, from mining to finance to information technology. These skills are in short supply in both Canada and the United States.

nearly four in five Canadian jobs, or 13.5 million workers.² Canada is the world's fourth-largest exporter of engineering services and a significant exporter in several other service sectors, from mining to finance to information technology. These skills are in short supply in both Canada and the United States. Businesses on both sides of the border need access to these workers in order to achieve critical business objectives, but many of these occupations fall outside the NAFTA TN Professionals List.

Given that there is no likelihood in the foreseeable future of any update of this list to accommodate current professions, programs such as the Trusted Employer Program must be implemented to facilitate cross-border business travel. The ongoing discussions under the umbrella of the Beyond the Border Action Plan, together with the increased level of dialogue and seeming willingness of President Obama and Congress to chart a new course in U.S. immigration policy, present a window of opportunity for the business community to press for changes that will improve cross-border mobility.

Canada and the United States are parties with some 20 other countries at a World Trade Organization negotiat-

ing table on a plurilateral international services agreement. Such an agreement would include removal of the barriers to temporary entry and stay of business persons in member markets. These impediments include entering or working in a country on a temporary basis and cover licensing, certification, work permits, and other work authorization requirements.³ The negotiations also present a significant opportunity for Canada and the United States to craft a new model for the mobility of employees across our common border.

It is imperative that the business communities in both our countries get behind these two initiatives if they want to see improvements in cross-border labor mobility between Canada and the United States. The time to act is now.

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About the Authors

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Lynn Shotwell is executive director of the American Council on International Personnel (ACIP), a strategic affiliate of the Society for Human Resource Management. She focuses on developing best practices and policies for the global mobility of professionals employed by multinational organizations. She has served in leadership positions for a variety of organizations promoting international exchange of talent and has testified before the U.S. Congress and various international bodies, including the Global Forum on Migration and Development, the World Bank, and the United Nations.

Andrew Yewdell is a program assistant with the American Council on International Personnel, supporting ACIP's public diplomacy programs and global mobility research. In his previous positions, he developed and coordinated online international exchange programs and worked as an immigration paralegal. He holds a degree in comparative politics from Princeton University.

Stephen Cryne is the president and CEO of the Canadian Employee Relocation Council (CERC), working closely with government to change legislation and regulatory practices that impede workforce mobility. He has an extensive background in association management and government relations and has held senior management positions in the Ontario government. Cryne is a regular speaker at human-resources management conferences and relocation industry meetings and has written extensively on current challenges in these areas.

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Woodrow Wilson International Center for Scholars

One Woodrow Wilson Plaza

1300 Pennsylvania Avenue, NW

Washington, DC 20004-3027

canada@wilsoncenter.org

T (202) 691-4301

F (202) 691-4001

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