

**CANADA AND CULTURE:
CAN CURRENT CULTURAL POLICIES BE SUSTAINED IN THE
GLOBAL TRADE REGIME?**

by

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A. Introduction

Since the early part of this century, the Canadian government has sought to protect and enhance Canadian culture. At that time, the federal government recognized the potential threat posed by the U.S. entertainment industry. This initial recognition of the threat soon led to government action on the policy front. The government identified areas, primarily within the mass media, that were in need of its attention. The government went about building a fortress of sorts around these media interests, acknowledging that while it would be undesirable and impossible to attempt isolation from foreign influences, Canada had to protect certain sociocultural interests that affected its cultural patterns. Over time, these interests came to be recognized as a distinct group of cultural ingredients, which were believed essential to the formation and composition of the Canadian culture. They would become known as the “cultural industries.”

Agreements such as the Canada-U.S. Free Trade Agreement¹ and the North American Free Trade Agreement² have sought to provide an exemption of sorts for Canada’s cultural in-

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¹ Canada-United States Free Trade Agreement (Part A, Schedule to the Canada-United States Free Trade Agreement Implementation Act, S.C. 198, c.65), art. 2005 [hereinafter FTA].

² North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, [1994] Can. T.S. No. 2 [hereinafter NAFTA]. In 1991, the United States, Canada and Mexico began negotiating a trilateral free trade agreement. The NAFTA came into effect on January 1, 1994 and, in terms of the Canada-U.S. trade relationship, built on the previous arrangements contained in the FTA. Pursuant to Article 2106, the NAFTA carries over the cultural industries exemption that had been secured by Canada in the FTA. In the FTA, Article 2005 provided the cultural industries with an exemption from all provisions of the FTA, except where cer-

dustries. However, other agreements like the General Agreement on Tariffs and Trade³ do not specifically address the cultural industries.⁴ These agreements recognize that the cultural industries are unlike other Canadian industries in that they seek to foster cultural knowledge and understanding within Canada. The predicament that Canada has now started to find itself in, however, concerns the increasingly prominent *industrial* nature of the cultural industries. With many of the cultural industries intent on exporting their products, their industrial significance may be taking precedence over their cultural nature. As this happens, it becomes increasingly difficult for the Canadian government to justify certain components in the policy framework that supports the cultural industries. Canada's dilemma then becomes how best to continue to support Canadian culture, while at the same time, remain in compliance with international trade and investment agreements.

I. Contemporary Approach to the Classification of Cultural Activities

There appears to be a relatively consistent approach in distinguishing between two sets of the various activities that operate within modern western culture. The classification terms employed by various commentators differ; nevertheless, the ideas underlying the terms are basically the same.⁵ Essentially, cultural activities may be grouped according to whether or not the activ-

tain provisions of the FTA specifically provided otherwise.

³ The General Agreement on Tariffs and Trade, opened for signature October 1947, Can. T.S. 1988 No. 31, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter the GATT]. The GATT 1947, as subsequently amended by decision of the GATT Contracting Parties, forms the basis of the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization [hereinafter the WTO Agreement] includes the GATT 1994. However, for the sake of simplicity, all subsequent specific references to the GATT provisions in this article will be made by way of reference to the term, "GATT," as opposed to "GATT 1947" or "GATT 1994." The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (hereinafter the Final Act of the Uruguay Round) and the WTO Agreement were signed at the Marrakesh Ministerial Meeting. The Uruguay Round of multilateral trade negotiations was launched formally in September 1986 at a meeting of trade Ministers in Punta del Este, Uruguay, with an ambitious agenda that would prove to become one of most important undertakings in the history of the GATT since its inception in 1947. The Uruguay Round concluded in December 1993, although there were outstanding issues which were eventually dealt with at the Ministerial Meeting in Marrakesh. The process culminated with the Marrakesh Declaration of April 15, 1994, in which the nations agreed on the provisions found in the Final Act of the Uruguay Round. The World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts* (Geneva: WTO, 1995) at i.

⁴ This statement is to be qualified by noting that Article IV of the General Agreement on Tariffs and Trade, supra note 3, does contain special provisions relating to cinematograph films, providing that contracting parties may maintain screen quotas for films of national origin, subject to certain conditions. In addition, Article XX provides that contracting parties may adopt measures that are imposed for the protection of national treasures of artistic, historic or archaeological value.

⁵ Susan Crean distinguishes between Official Culture and Mass Culture, saying Official Culture is represented by the arts, i.e. fine arts such as operas, symphonies, ballets, museums, and galleries. Mass Culture uses television, the press, movies, and recordings as the arts organizations for popular culture. Fine arts are non-

ity espouses a commercial or industrial strategy, as opposed to one that is closer to being purely artistic in nature. Those cultural activities with a non-industrial nature would tend to include the fine arts, which is representative of activities and institutions such as art galleries, concerts, operas, museums, and ballets. However, the fine arts account for only a small part of cultural activities as a whole. Innumerable Canadians lack access to many of the fine arts. Therefore, popular cultural institutions are of tremendous value to society, since they are public communication networks of culture on a level other than that of the fine arts.

The popular cultural activities that are industrially driven are essentially what is referred to in Canada as the “cultural industries,”⁶ namely films and videos; television and radio program-

commercial. Mass cultural institutions remain of value to society, since they are public communication networks for unofficial culture. Susan M. Crean, *Who's Afraid of Canadian Culture?* (Don Mills, Ontario: General Publishing Co. Limited, 1976) at 16.

Kevin Dowler distinguishes between “‘pure’ culture” and “industrially organized forms of cultural production” in much the same manner. Kevin Dowler, “The Cultural Industries Policy Apparatus” in *The Cultural Industries in Canada*, Michael Dorland, ed. (Toronto: James Lorimer & Co., 1996) 328 at 342-3.

George Woodcock distinguishes between the arts and the cultural industries, saying that “[t]he industrial side of cultural industries like film, television and recording is likely to be as frankly financial as that of any other business: a matter of profit, tax breaks, good pay for unionized technicians, precarious returns for artists who happen to find their way into the maze.... For this reason we must be sure what we are talking about, and if we are talking about the arts, let us do so and not talk about culture.” George Woodcock, *Strange Bedfellows: The State and the Arts in Canada* (Vancouver: Douglas & McIntyre, 1985) at 139-40.

G. Stuart Adam discusses the distinctions made by Bruce Feldthusen, between the two domains that the word “culture” is normally used. The first is the arts, and the second is “the domain of society ... a way of life that constitutes a unique society.” G. Stuart Adam, “Broadcasting and Canadian Culture: A Commentary,” *The Beaver Bites Back? American Popular Culture in Canada*, David H. Flaherty and Frank E. Manning, eds. (Montréal and Kingston: McGill-Queen's University Press, 1993) 75 at 77. Bruce Feldthusen, “Awakening from the National Broadcasting Dream: Rethinking Television Regulation for National Cultural Goals,” in *The Beaver Bites Back? American Popular Culture in Canada*, David H. Flaherty and Frank E. Manning, eds. (Montréal and Kingston: McGill-Queen's University Press, 1993) 42.

Mary Vipond distinguishes between high culture, including art; literature; architecture; and classical music and popular culture. Mary Vipond, *The Mass Media in Canada* (Toronto: James Lorimer & Company, 1992) at 101.

⁶ The term “cultural industry” originated in a work by Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment*, translated by John Cumming, (New York: Continuum Publishing Company, 1972), original edition: *Dialektik der Aufklärung* (New York: Social Studies Association, Inc., 1944) in which the authors identify the term “culture industry.” In large part, they refer to the U.S. entertainment industry. At the time of their writing, in the middle part of this century, they took the view that culture had begun to impress the same stamp on everything from films and radio to magazines.

ming; sound recordings; and books, magazines and newspapers.⁷ Of course it is possible for overlap to exist between industrial and non-industrial forms of cultural products. Poetry books, classical music recordings, and television specials on interpretive dance are examples in this respect. Yet the industrial forms of cultural products dominate contemporary society to a significant extent. It has even been suggested that along with the growth of cultural industries in Canada, the meaning of culture itself has shifted over the years away from meanings involving community and tradition to industrial and media-inspired definitions.⁸

The Canadian cultural industries have been shaped in part by events and trends occurring within the U.S. entertainment industry. Canadians are aware of this relationship and many Canadians share the concern that Canada may be culturally overpowered by a neighbour ten times its size. There has been and continues to be a fear that Canada is developing into a northern extension of the continental economy,⁹ and that the economic links will soon lead to even closer cultural links. The effectiveness with which American products are produced, marketed and distributed in the entertainment sectors¹⁰ has made competition by Canadians *in the Canadian market* in these sectors extremely difficult. As unsettled as Canadians might be regarding the deepening relationship between Canada and the United States, it is certainly not the case that Canadians wish to sever their ties with the United States.¹¹ The simple fact is that there are a large number of similarities between the U.S. and Canadian identities, about which little can be done. Taking an historical approach, the two countries shared experiences that arose by virtue of the continent they came to occupy. The subsequent development of the countries occurred on a parallel basis; as a consequence, many aspects of life are similar.¹²

⁷ The internet, along with related technologies involving convergence, is surfacing as a supplementary and complementary aspect to several of the cultural industries.

⁸ Adam, *supra* note 5 at 77.

⁹ George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Ottawa: Carleton University Press, 1988, orig. pub. 1965) at 9.

¹⁰ For a comprehensive overview of the various sectors of the American entertainment industry along with economic and cultural explanations of their success in the American and global markets, see Michael J. Wolf, *The Entertainment Economy* (New York: Random House, 1999).

¹¹ George Grant, in discussing North American integration, states that "...Canadians want it both ways. We want through formal nationalism to escape the disadvantages of the American dream; yet we also want the benefits of junior membership in the empire." Grant, *supra* note 9 at ix.

¹² Roy Daniells, in observing some of the experiences that give Canadians and Americans a common background, states, "Their houses and cities and general mechanism of life look similar. To cross from Seattle to Chicago is parallel to crossing from Vancouver to Fort William. Colonization, Indians, bush settlement, fur trade, wheat farming and stock raising, transport on a long inland river, westward expansion, boom and slumps, gold rush, frontage on two oceans, contact with the arctic, democratic institutions of fair efficiency, free speech most of the time..." However, Daniells cautions that many of these elements occur in different proportions and combinations in each country. Roy Daniells, "Poetry and the Novel" in *The Culture of Contemporary Canada*, Julian Park, ed. (Ithaca, New York: Cornell University Press, 1957) 1 at 19.

II. Canadian Federal Government Approach to Culture

An examination of Canada's cultural history makes it clear that throughout the twentieth century the state has taken an ever-deepening role in such history. Successive Canadian governments have in fact shaped national cultural development through the creation of publicly owned crown corporations and agencies such as the Canadian Broadcasting Corporation (the country's public radio and television broadcaster), the Canada Council (a government funded promoter of the arts), and Telefilm Canada (a federal agency dedicated to development of Canadian film and television). Furthermore, governments have enacted legislation that directly and indirectly regulates and affects aspects of Canadian cultural development, such as the *Broadcasting Act*¹³ or the *Investment Canada Act*.¹⁴ Finally, there have been numerous Commission, Task Force, and Committee Reports¹⁵ that have examined various aspects of Canadian cultural policy beginning with the Report of the Royal Commission on Radio Broadcasting (the Aird Commission)¹⁶ in 1929 and ending most recently with the Report of the Feature Film Advisory Committee in 1999.¹⁷ In dispensing policy advice, many of these reports have also attempted to define culture in Canada,¹⁸ and many times, once the recommendations of the Reports have been shaped and acted upon by governments, a policy shift or emphasis regarding certain aspects of

¹³ S.C. 1991, c. 11

¹⁴ R.S.C., 1985, c. 28 (1st Supp.)

¹⁵ The more notable Reports include: the Aird Commission Report, *infra* note 16; the Massey-Lévesque Report, Chairs: Vincent Massey and Georges-Henri Lévesque, Report of the Royal Commission on National Development in the Arts, Letters and Sciences (Ottawa: King's Printer, 1951); the O'Leary Commission Report, Chair: Grattan O'Leary, Report of the Royal Commission on Publications (Ottawa: Queen's Printer, 1961); the Applebaum-Hebert Report, Chairs: Louis Applebaum and Jacques Hébert, Report of the Federal Cultural Review Committee (Ottawa: Minister of Supply and Services, 1982); the Caplan-Sauvageau Report, Chairs: Gerald L. Caplan and Florian Sauvageau, Report of the Task Force on Broadcasting Policy (Ottawa: Minister of Supply and Services, 1986); Report of the Task Force on the Canadian Magazine Industry, Chairs: J. Patrick O'Callaghan and Roger Tassé, A Question of Balance, (Ottawa: Minister of Supply and Services, 1994).

¹⁶ Aird Commission Report, Chair: Sir John Aird, Report of the Royal Commission on Radio Broadcasting (Ottawa: King's Printer, 1929).

¹⁷ Report of the Feature Film Advisory Committee, *The Road to Success* (Ottawa: Minister of Public Works and Government Services Canada, 1999) [hereinafter Feature Film Advisory Committee Report].

¹⁸ In attempting to portray the various aspects to Canadian culture the Applebaum-Hebert Report, *supra* note 15 at 9-10, noted the important role that regional diversity and multiculturalism plays in Canada's cultural heritage. They believed that Canada's cultural policy should be shaped by this fact. The Report also addresses the important role played by the federal government in shaping Canadian culture, *supra* note 15 at 15-34. The Report of the Massey-Lévesque Commission, *supra* note 15 at 11-18, noted the important role that Canada's geography has played in shaping Canadian culture, both in terms of Canada's proximity to the United States and in terms of the cultural activities undertaken throughout the country. Although the Report examined the broadcasting, film and publishing sectors, as well as a number of non-industrial cultural activities, the authors also devoted chapters to national scholarships and university funding, *supra* note 15 at 144-56 and 352-64, along with several other chapters on matters concerning the Canadian universities.

the Canadian cultural definition, as determined by governments, often becomes immediately apparent.

Over the past several decades, the Canadian federal government has become an even stronger promoter of Canadian culture to the point where many organizations in both the industrial and non-industrial areas of the cultural sector have become significantly dependent on government funding.¹⁹ As the major source of funds for many organizations, the federal gov-

¹⁹ Provincial governments also provide financial assistance to cultural activities and regulate aspects of cultural development, but remain less influential than the federal government. See Douglas Bell, "Nova Scotia scores at Toronto film festival," *The Globe and Mail* [Metro Edition] (13 October, 1997) C4; "More money splashed on filmmaking in Ontario in 1997," *The Globe and Mail* [Metro Edition] (20 December, 1997) C2; and Michelle MacAfee, "Fog lifts from opportunities for Newfoundland talent" *The Globe and Mail* [Metro Edition] (31 December 1997) C2. The provincial government in Quebec has taken the most activist legislative stance toward cultural matters. Indeed, the Quebec Ministry of Culture and Communications has areas of responsibility similar to those of its federal counterpart. In particular, the Quebec Ministry is responsible for areas including: museology; cultural and scientific heritage; arts; literature; libraries; culture and scientific leisure; cultural industries; media; telecommunication; cable television; and new age information technologies.

Government of Quebec, Ministry of Culture and Communications. Available: <http://www.mcc.gouv.qc.ca/minister/mission.htm>.

Arguably, the Quebec government finds itself facing issues with respect to protection of Quebec culture that are similar to the ones faced by the Canadian government with respect to the Canadian culture. While the government of Canada is concerned with primarily U.S. cultural influences, the government of Quebec views Quebec as a French-speaking island in the English-dominated North American continent. For an incidental discussion of the similarities between Canadian and Quebec cultural policies, see Gaëtan Tremblay, "Is Quebec Culture Doomed to Become American?" (1992) v. 17 no. 2 *Canadian Journal of Communication* 237. Available: <http://www.cjc-online.ca/BackIssues/17.2/tremblay.html>. Also see generally Christine Beeraj, *Le Dilemme de l'État Québécois Face à l'Invasion Culturelle Américain: une redéfinition du protectionnisme culturel au Québec* (Laval, Québec: Institut Québécois des Hautes Études Internationales, Université Laval, 1995).

A new direction was revealed by the Quebec government in a 1997 report on culture and education, in which the Ministry of Culture and Communications and the Ministry of Education recognized that education reforms must guarantee the teaching of basic cultural foundations by offering, particularly to the young, an introduction to arts and culture. It is in this spirit that the Ministry of Education has sought to restructure primary and secondary school curriculum by insisting on the necessity of raising the cultural level and refocusing the teaching on essential cultural knowledge, notably language and history. The partnership aims to reinforce and develop a significant level of cooperation and coordination between both ministries in order to ensure coherence between educational and cultural projects in Quebec society. It is intended that there be a reinforcement and development of the cooperation and coordination between the two ministries with a view to ensuring the coherence between educational and cultural projects. See Ministère de la Culture et des Communications et le ministère de l'Éducation, *La Culture et l'Éducation – Deux partenaires indissociable*, protocol signed by Louise Beaudoin, Minister of Culture and Communications and Pauline Marois, Minister of Education, on April 9, 1997. Available: <http://www.mcc.gouv.qc.ca/culteduc/protocol.htm>.

ernment is in a position not only to support Canadian culture, but to shape it as well.²⁰ It is evident that of the two categories of cultural activities previously identified, the government directs its emphasis in terms of funding to the industry-based activities.

The Department of Canadian Heritage is responsible for all matters relating to Canadian heritage. The mandate²¹ includes responsibility in areas such as; multiculturalism; the arts; national parks and national historic sites; the promotion and development of amateur sport; the advancement of the equality of status and use of English and French; state ceremonial and Canadian symbols; broadcasting; the formulation of cultural policy, including the formulation of cultural policy as it relates to foreign investment and copyright; the conservation, exportation and importation of cultural property; and national museums, archives and libraries. In addition, it is responsible for cultural heritage and the cultural industries, including performing arts, visual and audio-visual arts, publishing, sound recording, film, video and literature.²²

Within the Department's internal structure, distinctions are made between the "industrial" and "non-industrial" cultural activities. It is also clear that the government, through the Canadian Heritage Portfolio, has decided to embrace the cultural industries as an equally important and necessary component of Canadian cultural heritage to be given similar priorities as the arts. Arguably, the level of commitment of the federal government to the various aspects of Canadian culture is best determined by examining the types of programs it chooses to fund and through the other resources, such as personnel, that it may deploy or direct. Direct payments to cultural industry vehicles, such as Telefilm and the CBC, account for a sizable portion of the overall spending of the Canadian Heritage Portfolio, and this spending is substantially more

²⁰ In discussing the role of the state in both the production and regulation of cultural products, Ted Magder observes that "...state regulation of the content and uses of cultural products has constituted an important element in the attempt to manage and to police social and cultural norms. Now, however, complicated regulatory, fiscal, and tax mechanisms have been designed to steer the course of contemporary cultural activity. This is nowhere more apparent than in Canada, where few cultural endeavours are not, in one way or another, deeply influenced by the policy decisions and administrative actions of the state." Ted Magder, *Canada's Hollywood: The Canadian State and Feature Films* (Toronto: University of Toronto Press, 1993) at 10.

²¹ The Minister's powers, duties and functions are set out in section 4 of the Act:

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to Canadian identity and values, cultural development, heritage and areas of natural or historical significance to the nation.
- (2) The Minister's jurisdiction referred to in subsection (1) encompasses, but is not limited to, jurisdiction over
- [..]
- (d) cultural heritage and industries, including performing arts, visual and audio-visual arts, publishing, sound recording, film, video and literature;

²² Ibid.

than that allocated to the more traditional arts organizations.²³ Further, the funds allocated to the Department of Canadian Heritage by the overall Canadian Heritage Portfolio are directed in large part to the cultural industries.

With the cultural industries being given special attention by both federal and provincial governments for much of the last century, beginning in the early 1970s one observes an increasing fusion of industrial, economic and cultural policy in Canada.²⁴ It has been suggested that despite drawing distinctions when discussing cultural or industrial sectors, those private and public institutions concerned with either cultural or industrial mandates are nevertheless united at the level of economic arrangements in relation to the Canadian state.²⁵ The areas of industry and culture, while conceptually unique, share various forms of public-sector subsidy and administration by agencies and regulatory bodies; and, from this perspective, both industry and culture are identical in that they have developed historically under the more or less direct supervision of the public sector.²⁶

III. The Canadian Cultural Industries

Federal government policy in the area of cultural policy has been driven by a broad belief that culture is important to all Canadians and that Canadians are willing to share in the costs of preserving and enhancing Canadian cultural initiatives. By targeting the cultural industries as the recipient of the major share of the funds available to further cultural initiatives, arguably the government has defined certain activities, which may also be thought of in an industrial sense, to be of an important cultural nature, and has placed the perceived importance of these activities ahead of other cultural activities. The government maintains that these targeted industries are worthy recipients of federal funding and other protective measures, since they contribute to Canada's identity, and at the same time, its economy.

²³ Of total planned spending for 1999-2000 of \$2 758.1 million, the Canadian Heritage Portfolio will allocate \$1 048 million directly to organizations within certain sectors of the cultural industries, while arts organizations will receive \$257 million. An additional amount of \$834.6 million will be allocated to the Department of Canadian Heritage, of which \$225.1 million will flow to the Cultural Development area, which by definition includes broadcasting and the cultural industries, while \$48.9 million will flow to the Arts and Heritage area. Of the \$225.1 million allocated to the Cultural Development area, roughly \$92 million will go to the cultural industries and \$134 million will go to broadcasting.

²⁴ By 1980, the then Department of Communications had adopted the position that "...emphasis would be placed squarely on the development of Canada's cultural industries, as much for economic as cultural concerns. In the context of a world-wide recession, the ever-expanding global market for cultural products and information technology had been targeted as important growth areas in the Canadian economy." Magder, *supra* note 20 at 195.

²⁵ Dowler, *supra* note 5 at 341.

²⁶ *Ibid.*

Within the Canadian film and video sector an extensive network of programs and policies attempt to encourage artists to pursue projects of a Canadian nature. There are a large number of programs and policies currently in effect that each originate from several main agencies or bodies, namely, Telefilm Canada; the National Film Board of Canada; the Canada Council for the Arts; and the Department of Canadian Heritage. Each uses public funds in their programs with the majority of the programs seeking to provide subsidies to producers in the sector. At present there are no quotas in place that would impose minimum levels for Canadian films at either the distribution or exhibition levels.²⁷

Cultural policy with respect to the broadcasting sector essentially reflects a dichotomy between policies designed to encourage the production of Canadian programs to air on television or radio, and regulation stipulating the amount of programming on television or radio stations that must be of a Canadian nature. The television industry does not have the same variety of subsidy support as the film industry. Rather, there are a few central programs that have been established and are administered by key agencies. However, what the television industry lacks by way of variety of subsidy support programs, it gains by way of restrictions on programming content through legislated Canadian content rules. Similarly, the policies regarding radio broadcasting focus on Canadian content provisions.

In recognition of the role newspapers and magazines play in Canadian cultural expression, successive governments have put in place a number of policies to ensure that Canadians have access to Canadian ideas and information through Canadian magazines and newspapers. Long-standing government policies have focussed on two areas within the magazine sector: distribution and advertising. The policies attempt to balance the objective of maintaining a place for Canadian periodicals in their own domestic market while at the same time permitting foreign periodicals entry into the Canadian market.²⁸ The Department of Canadian Heritage also develops, implements and maintains publishing policies and programs in support of small community newspapers.

²⁷ The legislation establishing Canadian content restrictions is concerned primarily with television and radio programming; and no new proposals regarding quotas in the film and video sector were made as a result of the report completed recently by a federal government advisory committee; however, at least one of the Committee members believed either quotas or tax-based incentives at the distribution and/or exhibition levels could be given further consideration. See Report of the Feature Film Advisory Committee, *supra* note 17 at 19. The recommendations of the advisory committee have yet to be acted upon by the federal government.

²⁸ In June 1997, the Appellate Body of the World Trade Organization (WTO) essentially agreed with the Dispute Settlement Body's earlier decision in holding that certain measures maintained by Canada were inconsistent with Article XI and Article III of the GATT. Canada has now tabled new legislation, in the form of Bill C-55, respecting advertising services supplied by foreign periodical publishers. These matters will be discussed in greater detail below.

B. Analysis of Current Canadian Policy Initiatives in the Context of International Agreements

Federal and provincial government expenditures on the cultural industries have grown significantly since around the middle of this century, although most of the creation and evolution of a cultural policy framework has taken place at the federal level. The overall extent and pervasive reach of the framework is remarkable, as the federal government's intervention has taken a number of distinct policy routes, each contributing to a portion of the overall construction of the framework. The federal government has chosen to employ various policy instruments to bring about the desired effect on cultural policy. Essentially, the government's policy measures can be grouped within four broad categories of tools, which include subsidies; quotas and Canadian content provisions; foreign investment restrictions and Canadian ownership provisions; and other legislative measures. Within this article, each of these instruments will be examined in light of the various programs and policies put in place by the federal government to serve the cultural industries. From within three sectors of the cultural industries, namely, public television broadcasting; film and video; and periodical publishing, recent policy initiatives may be identified, which illustrate the use of one or more of the above categories of policy instruments. These particular sectors have been selected for discussion because each is undergoing significant changes brought on as a result of international and other pressures. In addition, each of the areas will allow for a discussion of at least one of the four broad categories of policy instruments outlined above. The initiatives in each sector include: the provisions of the agreement between Canada and the United States resolving the dispute concerning "split-run" periodicals, along with the relevant Canadian legislation; the CBC proposals to the Canadian Radio-television Telecommunications Commission (CRTC) concerning the addition of specialty channels to the CBC's broadcasting mix, along with the CRTC's response; and the recommendations regarding the Canadian film industry put forward by the Canadian Heritage Department's Feature Film Advisory Committee.

The examination of these specific cases will begin by focusing on a description of the initiatives advanced by the government in each of the three sectors. Within each of the examples selected for discussion one observes an industry that is currently undergoing significant changes brought on as a result of international and other pressures. Further, each sector is affected by certain provisions of various international agreements, which in turn affects the legislative and policy initiatives of the government. Currently, there are three agreements in place that have a direct effect on Canadian cultural policy in these sectors – The NAFTA; the GATT; and the General Agreement on Trade in Services (GATS).²⁹ In addition, the recent international negotiations relating to a multilateral agreement on investment necessitates an examination of the

²⁹ General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 44 (1994) [hereinafter the GATS]. The GATS was considered one of the major achievements of the Uruguay Round. The GATS establishes rules and disciplines for policies affecting access to service markets, greatly extending the coverage of the multilateral trading system

provisions of the failed Multilateral Agreement on Investment (MAI),³⁰ because a similar agreement in the future could affect the cultural industries through easing of foreign direct investment restrictions. Each of these agreements contains provisions that may affect certain sectors within the cultural industries, and in some cases, the cultural industries as a whole. The examination then concludes with an analysis of the probable future of the initiatives in light of any constraints imposed by the international agreements. As well, an attempt is made to comment on whether the practical application of Canada's commitments under the international agreements is consistent with the direction of the current policy regime.

I. The CBC and the Future of Canadian Public Broadcasting

On May 21, 1999 the CRTC handed down its much-awaited decision regarding the awarding of French-language specialty channel licences.³¹ The Commission announced that it was approving four of the seventeen applications to provide certain broadcasting services to the French Canadian specialty channel market. Canal Évasion will be devoted to tourism, adventure and travel; Canal Z will carry programs focusing on themes associated with science and technology; Canal Histoire will focus on presenting Canadian and international history; and Canal Fiction will broadcast both new and existing drama programs.³² Although the CBC had put forward four of its own applications, none was among the successful proposals.

³⁰ OECD Directorate For Financial, Fiscal And Enterprise Affairs, *The MAI Negotiating Text* (as of 24 April 1998) (Paris: OECD, 1998). Available: <http://www.oecd.org/daf/cmisis/mai/negtext.htm> [hereinafter MAI Text]. In May 1995, the OECD Council, at Ministerial level, committed the Organization to begin negotiations in the OECD aimed at reaching a Multilateral Agreement on Investment (MAI), which would provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection. However, a combination of negotiating stumbling blocks and widespread public opposition to the MAI led to the suspension of the negotiations in April 1998, with the entire negotiation process being reassigned to the WTO. Essentially, the MAI would have extended the MFN and National Treatment principles to international investment, and therefore, despite the agreement's demise, it is useful to examine certain of the provisions of the MAI in order to understand how a renegotiated agreement on investment could potentially affect the Canadian cultural industries in future years.

³¹ CRTC, Public Notice CRTC 99-89 (21 May 1999) Available: <http://www.crtc.gc.ca>. The CRTC, operating under the Canadian Radio-television and Telecommunications Commission Act, is an independent agency with administrative and quasi-judicial authority, operating at "arm's length" from government and reporting directly to Parliament through the Minister of Canadian Heritage. The CRTC has been given the authority to license, regulate and supervise all broadcasting undertakings within Canada and to regulate telecommunications common carriers that fall under federal jurisdiction. The CRTC regulates over 5,600 licensed broadcasters including AM and FM radio, television, cable, pay and specialty television, Direct-to-Home (DTH) satellite systems, Multipoint Distribution Systems (MDS), Subscription Television (STV), and Pay Audio.

³² CRTC, *ibid.* at para. 23. The proposals put forward by the successful applicants are detailed in separate Decisions of the CRTC. See CRTC, Decision CRTC 99-109 (21 May 1999); CRTC, Decision CRTC 99-110 (21 May 1999); CRTC, Decision CRTC 99-111 (21 May 1999); and CRTC, Decision CRTC 99-112 (21 May 1999) All available: <http://www.crtc.gc.ca>.

On July 5, 1999 the CBC filed an appeal with the federal government of the CRTC decisions granting the new French specialty channel licences.³³ The last such appeal filed by the CBC to review a decision by the CRTC occurred in 1974.³⁴ In its Petition, the CBC asked the government to refer the matter back to the CRTC for reconsideration and hearing based on the allegation that “the Commission’s decisions have denied Francophones in Canada [sic] equivalent access to programming devoted to the arts and culture in their own language that is available to English Canadians.”³⁵ The CBC argued that its proposed channel, *le Réseau des Arts*,³⁶ was the only application submitted to the CRTC for a French language specialty channel devoted to the arts and culture.³⁷

In support of its petition, the CBC cited provisions of the *Broadcasting Act* that call for promotion of arts and culture as a priority for the creation of television specialty channels.³⁸ The CBC argued that while the *Broadcasting Act* makes no specific mention of news, sports, youth or business programming, there are specialty channels currently in existence that are devoted to these areas of programming; at the same time, arts and culture are specifically mentioned in section 3 of the Act, but, the CBC argued, they “have yet to find their way into the

³³ CBC, “News Conference Concerning the Appeal to the Governor in Council of the CRTC Decision of May 21, 1999 Regarding French Specialty Licence” (5 July 1999) Available: http://cbc.radio-canada.ca/htmen/2_2.htm [hereinafter News Conference Concerning the Appeal].

³⁴ Ibid.

³⁵ Ibid.

³⁶ The proposal for *Le Réseau des Arts* was developed in collaboration with the European channel Sept ARTE and BCE Media. It was the only application for a specialty French-language service devoted exclusively to arts and culture submitted to the CRTC in December, 1998. See CBC, News Release (11 August 1999) Available: http://cbc.radio-canada.ca/htmen/2_1.htm

³⁷ CBC, News Conference Concerning the Appeal, *supra* note 33.

³⁸ Ibid. The CBC’s reference is to section 3 of the *Broadcasting Act*, which makes reference to “alternative television services.”

range of specialty services available for Francophones and Francophiles in Canada.”³⁹ The CBC further argued that the CRTC’s stated criteria on the selection of the channels placed a disproportionate emphasis on market considerations over programming diversity and the objectives of the Act.⁴⁰

On August 11, 1999 the federal government announced that it would formally request the CRTC to report on whether there is a need for a French language cultural and arts channel; however, at the same time, the government refused to overturn the CRTC decision to grant the four French-language specialty channels to private broadcasting consortiums.⁴¹ The government asked the CRTC to prepare a report by autumn regarding “the earliest possible establishment across Canada of a French-language arts television service that reflects the uniqueness of Quebec culture and the needs and circumstances of French-language communities in other parts of Canada.”⁴² On November 19, 1999 the CRTC announced that it had submitted a report to the government supporting the creation of a national French-language arts specialty channel.⁴³ The Commission found that such a channel could “...enrich and diversify the high quality French-language cultural programming already available through [the] broadcasting sys-

³⁹ Ibid. Section 3 of the Broadcasting Act states:

It is hereby declared as broadcasting policy for Canada that
[...]
the programming provided by alternative television programming services should
be innovative and be complementary to the programming provided for mass audiences,
cater to tastes and interests not adequately provided for by the programming provided for mass audiences,
and include programming devoted to culture and the arts,
reflect Canada’s regions and multicultural nature,
as far as possible, be acquired rather than produced by those services, and
be made available throughout Canada by the most cost-efficient means;
[...]

⁴⁰ The CBC argued that, in its decision, the CRTC had cited the following criteria as the basis for its choices:

The need to give cable subscribers a package of new channels at a reasonable cost of about \$6.00 a month;
The need to strengthen some private-sector operators in the French -language market;
The need to rebalance the availability of French specialty channels compared with those serving English
Canada.

See CBC, News Conference Concerning the Appeal, *supra* note 33.

⁴¹ Graham Fraser, “Cabinet ruling favours CBC” *The Globe and Mail* [Metro Edition] (12 August, 1999) A14, A15.

⁴² Department of Canadian Heritage, “Government of Canada Supports CRTC Decision: Specialty TV Services Expand in French-Language Market,” News Release (11 August 1999) Available: <http://www.pch.gc.ca/bin/News.dll/>

⁴³ CRTC, CRTC News Release, “CRTC submits report to Governor-in-Council on creation of a national French-language arts specialty television channel” (19 November 1999) Available: <http://www.crtc.gc.ca>.

tem, offer new opportunities and create new sources of funding for Canadian producers, creators and artists.”⁴⁴ The Commission would hear applications early in 2000, with public hearings to be held in the summer of 2000.

1. *Background*

The disagreement regarding French language specialty channels is only part of the larger picture of current tensions between the CBC and CRTC. Essentially, there are two recent processes initiated by the CRTC that directly involve the CBC in its capacity as a public television broadcaster. Both were initially announced by the CRTC in October 1997.⁴⁵ First, the CRTC announced that it would undertake a review of Canadian television policy with public hearings to begin in September 1998.⁴⁶ The Commission noted that the last such review took place in the mid-1980s and, therefore, cited industry restructuring and an increasingly competitive domestic and international marketplace as the central reasons for the review. The review would address issues such as the effectiveness of Canadian content requirements; the underrepresentation of certain program categories; the viability of the private broadcasting sector; the role of Canadian pay and specialty services; and the role of the CBC.⁴⁷ In the television policy review the Commission sought to consider “in general terms, the role of CBC television and how it [could] best complement the private sector in fulfilling the objectives of the Act.”⁴⁸ The Report of the Commission was released in June 1999.⁴⁹

Second, the CRTC undertook a separate comprehensive review of the national public broadcaster’s role in the Canadian broadcasting system with a view to determining how the CBC could best complement the private sector in fulfilling its mandate under the *Broadcasting Act*.⁵⁰

⁴⁴ Ibid.

⁴⁵ The processes were announced in a speech in October 1997 and were later published in the CRTC document, *Vision Action Calendar* (Ottawa: 1998) Available: <http://www.crtc.gc.ca/eng/backgrnd/cal9804e.htm>.

⁴⁶ CRTC, Public Notice CRTC 1998-44 (6 May 1998) Available: <http://www.crtc.gc.ca> [hereinafter *Canadian Television Policy Review - Call for Comments*].

⁴⁷ Ibid.

⁴⁸ Ibid. at 51. The CRTC sought answers to the following specific questions:

What strategies would be most effective in encouraging private and public broadcasters to cooperate more effectively to provide Canadians with the best possible Canadian programming?

How can the CBC best work with, and complement the role of, private broadcasters, particularly in the development of talent and the promotion of Canadian programs?

Ibid. at paras. 52-3.

⁴⁹ CRTC, Public Notice CRTC 1999-97 (11 June 1999) Available: <http://www.crtc.gc.ca>. For a review of the issues addressed by the CRTC in the report, see John McKay, “CRTC releases review of TV regulation” *Financial Post* (11 June 1999) B12.

⁵⁰ Françoise Bertrand, “Evolving Towards a Better Canadian Communication System: Call for Collaboration and Dialogue” Notes for an Address (21 October 1997) Available: <http://www.crtc.gc.ca>. The CRTC’s three

Throughout March 1999, the Commission held a series of consultations canvassing the public for its views on the role that the CBC should play in the broadcasting system in Canada.⁵¹ The CRTC sought to gather views on the CBC's French and English national radio and television networks and specialty services – Newsworld and Réseau des Informations.⁵² These consultations were in addition to a more formal public hearing on the CBC, which began in May 1999 and lasted for three weeks. The public hearing coincided with CRTC hearings regarding applications for renewal of the network television licences issued to the CBC.⁵³ The final report of the Commission was released in January 2000.⁵⁴

The Commission last considered licence renewal applications by the CBC for its television services in 1994.⁵⁵ Since 1994, however, there have been a number of significant changes in the television services market. Rapidly changing technology continues to outpace the corresponding initiatives of the public and private broadcasting sector.⁵⁶ In addition, the period since the early 1980s has witnessed a generally recognizable worldwide crisis in public broadcasting brought on by the increasing sensitivity of governments to large fiscal deficits and the erosion of the commitment of governments to the public broadcasting model.⁵⁷ In light of these changes one potential path for the CBC was to continue branching into additional specialty services, while maintaining its generalist channels.⁵⁸ In 1993, the CBC put forward six specialty licence applications. It was awarded one licence on its own and a second in partnership with a firm in

year action plan involves a review of CBC's radio and television policies, followed by a review of the CBC's licence renewals. The CRTC will then study those of CTV and Global. Also see CRTC, Canadian Television Policy Review - Call for Comments, *supra* note 46 at para. 50.

⁵¹ The CRTC stated that the purpose of the consultations was "to allow Canadians in various parts of the country to express their views on the programming and operations of the CBC, and on what direction the CBC should take in the coming years, both at the national and the regional level." CRTC, Public Notice CRTC 1998-134 (18 December 1998) Available: <http://www.crtc.gc.ca> at para. 1.

⁵² CRTC, CRTC News Release, "What do you think of CBC Radio and Television?" (18 December 1998) Available: <http://www.crtc.gc.ca>.

⁵³ CRTC, Notice of Public Hearing CRTC 1999-3 (29 March 1999) Available: <http://www.crtc.gc.ca>.

⁵⁴ CRTC, CRTC News Release, "The CRTC renews Radio Canada and CBC's radio and television licences" 6 (January 2000) Available: <http://www.crtc.gc.ca> [hereinafter CBC Licence Renewal].

⁵⁵ *Ibid.*

⁵⁶ In 1995, revenues of the Canadian cable sector (cable, pay TV, and specialty services) exceeded revenues of the Canadian conventional broadcast sector (private television, the CBC, and provincial/non-profit television) for the first time. See Sheridan Scott, "The Impact of Technological Change on Canada's Cultural Industries" in *The Culture/Trade Quandary*, Dennis Browne, ed. (Ottawa: Centre for Trade Policy and Law, 1998) 54 at 57.

⁵⁷ Marc Raboy, "Public Television" in *The Cultural Industries in Canada*, Michael Dorland, ed. (Toronto: James Lorimer & Co., 1996) 178 at 180.

⁵⁸ Raboy, *ibid.* at 195.

the private sector.⁵⁹ There has been criticism that by insisting that the CBC compete with the private sector directly for audiences, for advertisers, and for access to cable channels, there is the risk that the CBC will become so constrained that it will not be given an adequate opportunity to be able to effectively fulfill its mandate.⁶⁰ This has also led to criticism from the private broadcasters that the CBC is crowding the private broadcasters out of advertising markets by undercutting them.⁶¹

For its part, the CBC has chosen to stand its ground with the CRTC, as evidenced by its refusal to accept the Commission's decision regarding the French language specialty channels. In response to the Commission's *Canadian Television Policy Review - Call for Comments* issued in May 1998, the CBC submitted a response outlining its position on the issues raised by the CRTC therein.⁶² The CBC document, *Canadian Television for Canadian Audiences*, touches on a number of issues that have international dimensions and that may be affected by certain provisions contained in certain of the international agreements referred to earlier. As well, in March 1999 the CBC submitted a planning document as part of the CRTC public hearing and licence renewal

⁵⁹ Ibid.

⁶⁰ Ibid. at 199. The CBC's mandate is outlined in subsection 3(1) of the Broadcasting Act, which states that:

- (l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;
- (m) the programming provided by the Corporation should
 - (i) be predominantly and distinctively Canadian,
 - (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,
 - (iii) actively contribute to the flow and exchange of cultural expression,
 - (iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,
 - (v) strive to be of equivalent quality in English and French,
 - (vi) contribute to shared national consciousness and identity,
 - (vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and
 - (viii) reflect the multicultural and multiracial nature of Canada;

⁶¹ Ian Jack, "CBC has strayed from mandate: Péladeau" *The National Post* [Toronto Edition] (2 June 1999) A5. Mr. Péladeau, president of Quebecor Inc., charged the CBC uses taxpayers' money to subsidize advertising rates and undercut private sector competitors.

⁶² CBC, *Canadian Television for Canadian Audiences - Response of the Canadian Broadcasting Corporation to the CRTC's Call for Comments on Public Notice 1998-44* (16 July 1998) Available: <http://cbc.radio-canada.ca/htmen/405.htm> [hereinafter *Canadian Television for Canadian Audiences*].

hearings involving the CBC.⁶³ The Strategic Plan details specific policy directions that the CBC proposes for the future of Canadian public broadcasting. In January 2000, the CRTC released details outlining conditions for the renewal of the CBC's broadcasting licences. Once the recommendations, proposals and licence renewal conditions are outlined below, it will be determined whether the policy proposals and subsequent issues are likely to be affected by any of the international agreements to which Canada has committed itself.

2. The CBC Response to the CRTC's Review of Canadian Television Policy

Although the CRTC had stated that its Canadian Television Policy review would focus on the CBC only to the extent of the CBC's role in complementing the private sector in fulfilling the objectives of the *Broadcasting Act*, the CBC submitted a comprehensive document describing the current challenges facing Canadian broadcasting and detailing a vision of the future of Canadian television.⁶⁴ The CBC focused on what it saw as the challenge of increasing viewership of Canadian content programming in the "under-represented" categories of drama, documentaries and children's programs.⁶⁵

The CBC points out that since 1961, regulators have relied on quantitative Canadian content requirements to accomplish the cultural objectives of the *Broadcasting Act*.⁶⁶ The CBC argues that even though the Canadian television industry meets the content requirements on English-language television, the industry does not provide enough of the programming that defines Canadian culture and values, citing drama, documentaries and children's programs as being under-represented categories.⁶⁷ In order to increase viewing of Canadian programs on English television, the CBC advocates increasing the production in the under-represented categories through policies that encourage Canadian broadcasters to devote an increasing amount of the money they spend annually on programming to production in those categories.⁶⁸ Specifically, the CBC requests that the CRTC tighten the current Canadian content quotas especially for the under-represented categories.⁶⁹ In the French language market, in which Canadian programs are not plagued by low viewership, the CBC advocates a focus on expansion - ensuring the widest possible distribution of French-language programs within Canada and around the world. Spe-

⁶³ CBC, *Our Commitment to Canadians - The CBC's Strategic Plan*, Ottawa: 1999, available: <http://cbc.radio-canada.ca> [hereinafter the Strategic Plan].

⁶⁴ CBC, *Canadian Television for Canadian Audiences*, supra note 62.

⁶⁵ *Ibid.* at 14.

⁶⁶ *Ibid.* at 15.

⁶⁷ *Ibid.* at 15. The CBC points to statistics showing that in the 7 p.m. to 11 p.m. prime-time viewing slots, where audiences are largest, relatively few viewers watch Canadian programs in the under-represented categories.

⁶⁸ *Ibid.* at 17.

⁶⁹ The CBC points to a similar approach taken recently by the CRTC with respect to Canadian content in radio. The CBC further posits that given the evidence of lack of increase to viewing of Canadian content on television over forty years based on current rules, the CRTC is justified in giving serious examination to such an increase, *ibid.* at 33.

cifically, the CBC would achieve this through specialty channels, as well as exporting not only programs, but also signals to the world market.⁷⁰

Essentially, the CBC's new goals are driven by the emergence of new delivery technologies.⁷¹ The CBC warns that Canadian programmers will have to be allowed freedom to adopt the most successful technologies for delivery of their programs if they are to be successful. The CBC believes it must embrace a *constellation model* in order to position itself effectively throughout the evolution of the delivery of programs. The constellation model entails a closely-knit web of distribution and programming functions.⁷² Constellations involve agreements with producers, alliances with distributors and other constellations. Their wide access to distribution outlets means they are able to maximize the distribution value of their products, allowing them then to spread their costs across more showings of the same program. Constellations would allow economies of scale, financial risk-reduction, the targeting of niche markets and program promotion between channels.⁷³ The CBC claims that constellations have moved in to replace networks as the dominant industrial structures.⁷⁴ The CBC cites its own positive experience with the CBC Newsworld and RDI specialty channels as evidence of the effectiveness of the constellation approach.⁷⁵

The CBC believes that the constellation approach can, in addition to improving its own effectiveness, assist in increasing viewing of programs in the under-represented categories. The

⁷⁰ Ibid. at 18.

⁷¹ The CBC points to the steady decline of the Canadian viewing shares held by traditional networks, such as itself and CTV, and the American networks, ABC, CBS and NBC, *ibid.* at 21. In addition, the advent of direct-to-home satellites and other technologies has allowed the number of distinct broadcasting services to multiply and foreign material now enters the Canadian market through numerous channels, *ibid.* at 25.

⁷² As examples of large constellations, the CBC cites corporations such as Disney, with roughly \$25 billion in broadcasting and film revenues, which controls ABC network; Time Warner, with sales of \$17 billion, which controls CNN and HBO; and New Corp., with \$7 billion in revenues, which controls the Fox Network, *ibid.* at 23.

⁷³ Ibid. at 27.

⁷⁴ Constellations typically incorporate a wider variety of services than the typical "network", including cable, satellite and new media services, and beyond this cultivate alliances with independent producers and other corporations in the entertainment industry. Successful constellations act as global marketing organizations in selling the programs in their industry. The CBC points to cable and other broadcast distribution technologies that it says have replaced the local network affiliate as the prime gatekeeper of the programming viewed by people in any particular region, *ibid.* at 24-5.

⁷⁵ The CBC claims the relationship between its English and French language television networks, its owned and operated stations, and the two specialty channels involves the sharing of production facilities, journalists, and producers, and in this sense, the CBC has already taken on a number of the features of a constellation. Major newscasts are broadcast at different times on the specialty channels than on the main services, in order to increase their accessibility to viewers. The CBC states that the research undertaken in Francophone markets for the application for le Réseau des Arts indicated that significant potential exists for similar relationships in cultural programming between a general interest network and a specialized network, *ibid.* at 24-5.

CBC recognizes that simply increasing production of Canadian programs would not necessarily achieve the goal of increasing viewing of Canadian programs, and the federal government may be averse to providing a significant increase in funding available through the Canadian Television Fund.⁷⁶ Therefore, the CBC advocates copying the successful marketing practices of the U.S. constellations,⁷⁷ and calls on the CRTC to encourage an industrial restructuring that would incorporate the constellation model on an industry-wide basis.⁷⁸ The CBC believes the CRTC should broaden its approach to regulation to the new reality of the constellations, as opposed to networks and stations. Further, the CRTC should require a commitment to produce, distribute and export Canadian programs as a condition of approving constellation groupings of any further program service licences. In addition, the CRTC should allow cross-promotion of upcoming Canadian programs on other services owned and controlled by the program broadcaster.⁷⁹ Also, the Commission should encourage, through its review of licensing commitments, the participation of constellations in international joint ventures. Finally, the Commission should consider tightening Canadian content quotas for the under-represented program categories during prime time hours on English television.⁸⁰

3. The CBC's Strategic Plan

As its main response to the CRTC's comprehensive review of the national public broadcaster's role in the Canadian broadcasting system, the CBC submitted its Strategic Plan outlining its plan for the future of its television and radio operations. Recalling that the CRTC review encompassed hearings regarding applications for renewal of the network television licences issued to the CBC,⁸¹ the CBC's Strategic Plan outlines specific commitments for each of the

⁷⁶ Ibid. at 29. In the fall of 1996, the Minister of Canadian Heritage announced the creation of the Canada Television and Cable Production Fund (CTCPF). The program was billed as a government-industry partnership that would provide funds to maintain and increase the quantity and quality of Canadian programming to form an approximate \$200 million per year television funding initiative. In February 1998, the Minister announced the extension of the CTCPF to 2001. In September 1998, the Canadian Television Fund (CTF) became the new name for the Canada Television and Cable Production Fund. The CTF is an independent, non-profit corporation, governed by a Board of Directors that is comprised of representatives from the television, cable, production and film and video distribution industries, as well as representatives from the Department of Canadian Heritage and Telefilm. The primary objectives, as stated by the CTF, include increasing the amount of Canadian programming available to Canadians, and at the same time seeking to create employment and growth in the sector.

⁷⁷ The CBC believes that constellations in the U.S. assist American programs significantly in the areas of re-broadcasting, in simultaneous broadcasting on two or more channels and in export sales, *ibid.* at 30.

⁷⁸ *Ibid.* at 33.

⁷⁹ The CBC claims that one of the reasons American programs do so well both in the U.S. and Canada is the promotion surrounding the programs. U.S. constellation services engage in cross promotion of their programs, *ibid.* at 34.

⁸⁰ The content quotas had been originally set at 55 per cent, but now stand at 60 per cent, *ibid.* at 15.

⁸¹ At the hearings, the Commission considered applications by the CBC to renew the licences for the following

CBC's broadcasting services, including English and French language television and radio. The Strategic Plan builds on the vision outlined in the CBC's earlier document, *Canadian Television for Canadian Audiences*, in the sense that it incorporates the constellation concept in its specific plans for each of its services. In addition, the Strategic Plan also outlines commitments to specific areas within its broadcasting mandate, including under-represented program categories, regional interests, arts and cultural expression, and English and French language concerns.

The CBC provided a number of detailed commitments in the above-mentioned areas; yet a common element in addressing the areas is the reliance on principles of the constellation model. The CBC's commitments to under-represented program categories include co-production initiatives with the private sector, as well as partnerships with the independent production sector.⁸² In order to enhance coverage of the arts and culture on English television, the CBC plans to maintain a weekly arts program in prime time, but also plans to co-operate with French television, including *le Réseau des Arts*, to co-produce and schedule more arts programming.⁸³ In order to improve the regional aspect of its service, the CBC will invest a greater proportion of English television's resources in the regions, but will also initiate inter-regional projects and package certain programs for network play.⁸⁴ A main component of the strategic direction for French television includes the addition of specialty services and positioning Radio-

services:

The English and French language radio networks;

CBC Newsworld;

Le Réseau de l'information;

The English and French language television networks; and

CBC owned and operated television stations across Canada.

CRTC, Notice of Public Hearing CRTC 1999-3, *supra* note 53.

⁸² CBC, Strategic Plan, *supra* note 63 at 20.

⁸³ *Ibid.* at 22. Given the CRTC's initial rejection of the CBC's proposal for *le Réseau des Arts*, the CBC may have to shelve, at least temporarily, its plans of co-operation with the service.

⁸⁴ *Ibid.* at 21.

Canada as a leader in Francophone content on the internet.⁸⁵ In addition, the CBC plans to extend and improve international coverage through other strategic partnerships.⁸⁶

The specific policies put forward by the CBC regarding its future direction essentially rest on two premises. The first is the successful emulation of the American constellation model, and the second, which flows from the first, is an increase in the available outlets, or “shelf space,” for the CBC to display Canadian programs. The CBC refers to its role under the *Broadcasting Act*⁸⁷ requiring that it distinguish itself as Canada’s main supplier of all-Canadian content.⁸⁸ The CBC believes that a constellation approach would provide economies of scale and create the

⁸⁵ Ibid. at 23. Obviously the fact that the CRTC has denied the CBC’s initial application for more French language specialty services means the CBC will have to re-evaluate the availability of this strategic tool. The denial of the application also raises questions regarding whether the CRTC is even in agreement with the CBC’s vision of re-positioning itself by incorporating the constellation model. As the national broadcasting regulator, the CRTC is in the position to hinder the CBC’s move toward a constellation model should it disagree with the concept of moving toward the American-style constellation approach. The CRTC’s position respecting the model is expected to be outlined in its report regarding the review of the public broadcaster, which has yet to be released.

⁸⁶ Ibid. at 24.

⁸⁷ Section 3 of the Act states:

3 (1) It is hereby declared as the broadcasting policy for Canada that

[...]

(l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;

(m) the programming provided by the Corporation should

(i) be predominantly and distinctively Canadian,

(ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,

(iii) actively contribute to the flow and exchange of cultural expression,

(iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,

(v) strive to be of equivalent quality in English and in French,

(vi) contribute to shared national consciousness and identity,

(vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and

(viii) reflect the multicultural and multiracial nature of Canada;

⁸⁸ Ibid. at 19.

additional broadcasting outlets needed to increase viewing shares of Canadian programming.⁸⁹ The CBC states that given the high level of Canadian content achieved on the main network, English television simply needs more shelf space to deliver Canadian programs. The CBC cites the success of the all-news specialty channels of RDI and CBC Newsworld as models for future specialty programming in both English and French television.⁹⁰ Therefore, it would appear that the CBC is suggesting that the main component to enable it to enhance the English television offerings is the securing of a spectrum of television services providing Canadian content programming.⁹¹

4. The CBC Licence Renewal Announcement

The CRTC did not provide an enthusiastic endorsement for this approach in its announcement that it would renew the licences for the CBC's English and French radio and television networks, its owned and operated television stations, and its specialty services for a seven year period.⁹² The CRTC called on the CBC to strengthen representation from all regions of the country and "devote all available resources to its existing services in order to reach the most listeners and viewers possible."⁹³ The Commission also urged the CBC to place more emphasis in peak times on regional programs; reduce the total number of hours of professional sports programming; and provide weekend newscasts in its affiliated stations.⁹⁴ The Commission further suggested that the presence of the French-language service should be increased in communities outside Quebec, providing as wide range of cultural programming as possible and offering more original programming for children and youth.⁹⁵

The CRTC did not specifically address the CBC's desire to embrace a constellation approach to broadcasting. As cable distributors shift to digital technology and channel capacity increases, soon many more channels will be available to consumers. There is nothing in the Licence Renewal Announcement that explicitly prevents the CBC from attempting to secure more specialty channels in future years. Yet because the CRTC is the agency responsible for granting licences for specialty channels, it may prove difficult for the CBC to secure more spe-

⁸⁹ For example, the CBC cites the loss of viewers of drama, music, dance, documentary and film to U.S. channels such as A&E and The Learning Channel, and believes that those audiences could be repatriated to Canadian television if more high quality Canadian programming were available, *ibid.*

⁹⁰ RDI's percentage share of hours of Francophone audience viewing measured over a 24-hour period is 2.6 per cent, the highest of all French specialty channels. Newsworld achieves an all-day audience share of 1.2 per cent with a weekly reach of 26 per cent in the highly competitive English television market. CBC, Strategic Plan, *supra* note 63 at 18.

⁹¹ Recently, the CBC applied to the CRTC to license two English language specialty channels, Land and Sea and the People Channel; however, the Commission has yet to issue a decision respecting the applications.

⁹² CRTC, *supra* note 54.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

cialty channels over the course of its seven year licence term. However, the CBC may still pursue partnerships and build alliances with other entities such that it is able to begin the makings of a constellation model. Whether these strategies will encounter significant hurdles or be allowed to flourish remains to be seen.

5. Analysis of the CBC's Proposed New Direction under GATS

The key aspects of the CBC's new policy direction necessitate modifications to the Canadian content requirements, but also require a shift in the CBC's industry operations to the constellation model. Embracing the constellation model would require the CBC to cultivate a variety of relationships with other industry players, as well as to secure additional programming outlets, preferably in the form of specialty channels. The constellation model may also alleviate some of the dependence on the industry's subsidy programs by enabling more effective marketing and promotion of existing programs.⁹⁶ The CBC has also proposed that Canadian content regulations could be improved by shifting the focus away from the provision of programs in all program categories, especially those that are already provided in abundance, such as news and sports, and by focussing primarily on programs from the under-represented program categories.⁹⁷ In order to increase viewing of Canadian programs on English television, the CBC advocates increasing the production in the under-represented categories through policies that encourage Canadian broadcasters to devote an increasing amount of the money they spend annually on programming to production in those categories.⁹⁸

Of the international agreements under discussion, only the GATS could have significant impact on the CBC's proposed policies concerning alterations to the Canadian content requirements. The GATT, dealing with goods, could not apply to the broadcasting sector, as the products therein would appear to have been classified primarily as constituting services.⁹⁹ The

⁹⁶ Therefore, instead of focusing on increased production of the programs, i.e. quantity, the model would allow a decreased number of programs to be more successful.

⁹⁷ CBC, *Canadian Television for Canadian Audiences*, supra note 62 at 41.

⁹⁸ The CBC suggested that were the CRTC to set a lower Canadian content requirement overall, and focus its regulations on evening viewing hours, broadcasters would be able to devote their Canadian programming dollars to providing higher quality Canadian productions in the peak viewing hours; however, the peak hour requirements should apply to under-represented program categories only and should not include news or sports programming, *ibid.* at 17, 41-2.

⁹⁹ One question that has arisen in the past is whether the GATT provisions, including those relating to National Treatment and MFN, apply to television programs as goods. It has been argued that television programs, when in the form of traded products among nations, constitute goods. See Clint N. Smith, "International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on Tariffs and Trade" (1993) 10 *International Tax and Business Lawyer* 97 at 124-7. However, given that the GATS has now defined television services as part of the audiovisual service sector, which is governed by the GATS, it would appear that the international community has settled this question. It is somewhat unclear whether trade in television programs constitutes trade in goods or trade in services. For the most part the United States conceives of trade in television

MAI, by definition could have application to investment in the broadcasting and cable industries,¹⁰⁰ but would have no immediate operation respecting the CBC's proposed policies. Further, the NAFTA provides an exemption to the sector by defining the exempted "cultural industries" to include "all radio, television and cable broadcasting undertakings."¹⁰¹ Essentially, the purpose of the GATS is to extend general principles governing the GATT to trade in services,¹⁰² including MFN, National Treatment and Free Market Access. A plain reading of GATS Article I (3)(b), which states, "'services' includes any service in any sector except services supplied in the exercise of governmental authority," implies that GATS extends to the audiovisual sector.

The threat to the Canadian television quota system lies in Article XVII:1 of the GATS, which requires that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."¹⁰³ With no cultural exception

programs as being trade in goods; while the European view is that such trade constitutes trade in services. For a comprehensive discussion of television programming constituting a service as opposed to a good under the GATT see Tina W. Chao, "GATT's Cultural Exemption of Audiovisual Trade: The United States may have lost the battle but not the war" (1996) 17 *University of Pennsylvania Journal of International Economic Law* 1127.

¹⁰⁰ Indeed the use of the MFN and National Treatment principles in an investment-related context in the cable and television broadcasting sectors could have a significant impact on the ability of the CRTC to continue to regulate the industry in a manner similar to the one which it currently employs.

¹⁰¹ The industry would then be subject to the same debate as each of the other exempted sectors concerning permitted retaliation. The NAFTA defines "cultural industries" in Article 2107 as follows:

cultural industries means persons in any of the following activities:

the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

the production, distribution, sale or exhibition of film or video recordings;

the production, distribution, sale or exhibition of audio or video music recordings;

the publication, distribution or sale of music in print or machine readable form; or

radio-communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.

Annex 2106 of the NAFTA states:

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measures adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access – Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada – United States Free Trade Agreement....

¹⁰² GATS, *supra* note 29, preamble.

¹⁰³ Under the GATS, each member country has to formulate offers and commit itself by way of a written obligation

having been agreed on at in the GATS negotiations, the audiovisual services sector was integrated into the Final Act. Yet with the exemption from the MFN provision and the refusal to undertake any commitments to liberalize the audiovisual sector in its schedule of specific commitments, Canada achieved temporary protection for its audiovisual service sectors.

The CBC's proposed policy regarding the Canadian content television quotas could be made less offensive were it to abandon seeking increases in overall quota percentages in favour of focusing on decreases in the overall quota accompanied by increases in the quotas for the under-represented categories.¹⁰⁴ Yet there remain potential complications under the GATS. Although Canada made no commitments regarding the television or broadcasting industries in its Schedule of Specific Commitments in this regard, as noted earlier, countries have five years to inscribe all services in their schedule and to begin negotiations with respect to these services. Therefore, given the U.S. preoccupation with further liberalization in the audiovisual sector, any policy advocating further increases in quota requirements in Canada would appear to be short-sighted, as future discussions respecting audiovisual services will be focussed on implementing the reduction and eventual elimination of television programming quotas.

Unlike the broadcasting quotas, the CBC initiative regarding a structural shift to a constellation model, does not appear to offend any provisions of the international agreements. This is a clear shift in policy, whereby the CBC would no longer be concentrating only on its primary television service; rather, it would be diversifying its services based on the belief that an increased number of outlets would result in increased viewership. The successful adoption of such a model would essentially position the CBC nearer to the large U.S. entertainment conglomerates, which is a strategy that does not appear to be one the CRTC is willing to endorse for the national broadcaster in Canada, given the focus of the CBC Licence Renewal. Yet this initiative is exactly the type of strategy that the Canadian cultural industries must begin to embrace if they wish to continue to promote Canadian cultural products in the domestic market while at the same time seeking out export markets.

in the sectors it opens to competition. If a member country does not make any offer to liberalize specific sectors of services, it is not bound by the National Treatment rule. In 1993, when the Uruguay Round was concluded, the U.S. and EU agreed that there would be no immediate commitment concerning movies, television programs, and music recordings. GATS members had five years from the date of the agreement to start a new round of negotiations on the liberalization of services, sector by sector. Therefore, members were entitled to wait until 1998 before starting the process of undertaking commitments to liberalize the audiovisual sector. See Sandrine Cahn and Daniel Schimmel, "The Cultural Exception: Does it exist in GATT and the GATS Frameworks? How does it affect or is it affected by the Agreement on TRIPS?" (1997) 15 *Cardozo Arts and Entertainment Law Journal* 281 at 299.

¹⁰⁴ Possible increases to the Canadian content requirements have been criticized, with critics citing the fact that there are no studies showing a link between Canadian content requirements and any measure of national identity or cultural sovereignty. William T. Stanbury, "Regulation and Competition in Broadcasting in the Age of Convergence" in *The Electronic Village*, C.D. Howe Institute Policy Study 32, Dale Orr and Thomas A. Wilson, eds. (Winnipeg, Manitoba: Printcrafters Inc., 1999) at 214.

Certain policies put forward by the CBC advocate overall expansion and distribution of programs around the world; as well, the policies speak of increasing export opportunities and enhancing market opportunities. These policies are inconsistent with an industry in need of cultural protection in that the policies suggest that the industry within Canada is ready and able to compete in the world marketplace and is not in need of protection from the foreign cultural influences. Given the dubious effectiveness of the broadcasting quotas in strengthening national identity or cultural sovereignty,¹⁰⁵ and the push at the international level to reduce such restrictive measures, Canada may wish to consider reducing its dependence on this form of support in the Canadian television sector. The CBC's proposed shift to a constellation model in its operations is one example of how the Canadian public broadcaster can enhance its domestic and international operations and yet remain in compliance with Canada's international commitments. Such measures should be given serious consideration by the CRTC.

II. The Feature Film Advisory Committee and Canadian Film

Historically, the Canadian film industry has struggled to achieve a minimal level of recognition of its films within its own country. Despite decades of subsidization, the production of Canadian films still takes place only with the assistance of government subsidies with success at the box office remaining a relatively uncommon phenomenon. Yet even those films touted as great Canadian success stories often remain virtually unknown to a significant percentage of the general population, who relate more readily to the latest Hollywood releases.¹⁰⁶ Indeed, it has been observed that Canadian feature films almost never recover their budgets from theatrical admissions.¹⁰⁷ Aside from the industry's "structural problems" related to an exodus of talent to

¹⁰⁵ It has been suggested that the quota system has contributed to the exodus of talented artists to the U.S., where success or failure can be made without navigating a bureaucratic quagmire of quotas and subsidies. William T. Stanbury, "Canadian-Content Requirements: Description, Rationale, Politics, and Critique," revised version of paper presented at the conference, "Economic and Public Issues of the Information Highway," University of Toronto, October 17-18, 1997 at 243; and Lionel Chetwynd, "Lament for genuine Canadian talent" *The National Post* [National Edition] (23 December 1998) A14.

¹⁰⁶ In its Report, the Feature Film Advisory Committee lists 18 Canadian films that have "earned international acclaim and box-office success." Canadian readers of this article may wish to review the list below and determine themselves how many of these "top" Canadian films they have viewed or, at least, are familiar with. The films include: *C't'à ton tour* Laura Cadieux (*It's Your Turn* Laura); *The Confessional*; *Crash*; *The Decline of the American Empire*; *Double Happiness*; *Eldorado*; *Exotica*; *The Hanging Garden*; *Jésus de Montréal*; *Last Night*; *Les Boys*; *The Red Violin*; *The Sweet Hereafter*; *Thirty-two Short Films about Glenn Gould*; *Un zoo la nuit*; *August 32nd On Earth*; and *2 Seconds*. Feature Film Advisory Committee Report, *supra* note 17 at iii. Regarding the lack of knowledge of domestic feature films displayed by Canadians see also Doug Saunders, "Copps endorses film funding proposal" *The Globe and Mail* [Metro edition] (4 February 1999) E1, E3.

¹⁰⁷ Between 1987 and 1990, only three of forty-eight Canadian films released in English Canada earned more than \$500,000 in gross box-office receipts (*Black Robe*, *Dead Ringers*, and *Jésus of Montréal*). Further, 75 per cent of the films released earned less than \$100,000, and 60 per cent earned less than \$50,000. Ted Magder, "Film and Video Production" in *The Cultural Industries in Canada*, Michael Dorland, ed. (Toronto: James

the U.S.¹⁰⁸ and a relatively small population available as audiences,¹⁰⁹ the major problem in the industry stems from the fact that the major Hollywood studios have come to dominate the film distribution industry in Canada.¹¹⁰ Many Canadian films simply are not provided with access to theatre screens at the theatre chains in Canada.¹¹¹

There are two major theatre chains that dominate the Canadian theatrical market. Cineplex Odeon and Famous Players receive roughly two-thirds of the annual theatrical revenues in Canada.¹¹² Each theatre chain has strong ties to major U.S. studios. Famous Players is owned by Viacom, a U.S. corporation which also owns Paramount Studios, while Universal Studios owns a 50 per cent equity interest in Cineplex Odeon. The two theatre chains have arrived at arrangements with the major U.S. studios regarding screening of the studios' first-run films.¹¹³ Naturally, the best available screen time at Cineplex Odeon and Famous Players is afforded to the films distributed by the major U.S. distributors, while films distributed by non-majors, including most of the Canadian films produced, are unable to secure access to screen time at either theatre chain.¹¹⁴

Film distribution rights are, in fact, a key component of the entire film industry. Control of distribution is a critical step in bringing films to exhibition, and is also important in maximizing profits in the industry.¹¹⁵ The major Hollywood production-distribution companies not only

Lorimer & Company, 1996) 145 at 150.

¹⁰⁸ Canadian actors like Jim Carey, Neve Campbell, Matthew Perry, Sandra Oh, Dan Ackroyd, William Shatner, Margot Kidder, Michael J. Fox and a number of others have all headed south in search of better opportunities in Hollywood.

¹⁰⁹ It is argued that with a population of only 30 million people, of which about 25 per cent are native Francophones, it is difficult, if not impossible, for the Canadian producers to amortize the cost of making movies over their home market alone. This reality has meant that many productions must be geared to exports, and oftentimes, references to things Canadian may be avoided in order to appeal to the international audience. Matthew Fraser, *Free-for-All* (Toronto: Stoddart Publishing Co. Limited, 1999) at 222.

¹¹⁰ Distributors serve as brokers between producers and the various sites of exhibition, and in many cases function as producers and investors as well.

¹¹¹ It has been estimated that 96 per cent of cinema screen time in Canada is taken up by foreign movies, mostly U.S. fare. Measured by box-office receipts, Canadian movies take in only 3 per cent of total revenues in Canada, while about 95 per cent of the revenues go to Hollywood movies. Further, if Quebec statistics were removed from these figures, English Canadian movies would have a box-office share of less than 1 per cent. Fraser, *supra* note 109 at 222-3.

¹¹² David Ellis, *Split Screen: Home Entertainment and New Technologies* (Toronto: Friends of Canadian Broadcasting, 1992) at 98.

¹¹³ Famous Players has first-run rights in Canada to all MGM-United Artist, Paramount, and Warner Bros. Films, while Cineplex Odeon has exclusive first-run rights to the films of Columbia and Universal Studios. The two chains share distribution rights for films from other studios. See Magder, *supra* note 107 at 149.

¹¹⁴ Magder, *supra* note 107 at 149. See also Robert Everett-Green, "Not coming to a theatre near you" *The Globe and Mail* [Metro Edition] (18 January 1997) C4.

¹¹⁵ Film distribution firms are in the business of obtaining rights to films, arranging for the manufacture of video-

produce and distribute their own (proprietary) films; they also seek to distribute (non-proprietary) films produced by independent production firms.¹¹⁶ Film distributors based in the U.S. have traditionally been able to purchase the rights to distribute non-proprietary films for both the U.S. and Canada, effectively treating the two countries as one market. For Canadian consumers, this arrangement means that they are given access to U.S. films immediately upon their U.S. release dates; however, the arrangement also means the Canadian market is treated as one with the American market for the purposes of product content, which is essentially subject to the regulations set by the U.S. film-rating agencies.¹¹⁷ Further, the arrangement deprives Canadian distribution firms from distributing major films in the Canadian market, resulting in the loss of significant revenues to the Canadian firms.¹¹⁸ The major U.S. distributors insist on obtaining the Canadian distribution rights as a condition of distributing independently produced films to theatrical and home video markets in the U.S. The major U.S. firms then distribute these films in Canada through their subsidiaries,¹¹⁹ with the result that Canadian distributors are denied the ability to compete for Canadian-only rights to such films.¹²⁰

Unfortunately little can be done to change this practice, as the major U.S. distributors have entrenched their positions by securing protection under Canadian legislation.¹²¹ In 1987

cassettes through duplication and packaging, promoting films, arranging for their exhibition and collecting and disbursing revenues to producers and profit participants. Statistics Canada, *Canada's Culture, Heritage and Identity: A Statistical Perspective* (Ottawa: Statistics Canada, 1997) at 62.

For a detailed description of the importance and complexities of the distribution sector see W. Ming Shao, "Is there no business like show business? Free trade and cultural protectionism" (Winter 1995) 20 *Yale Journal of International Law* 105 at 132-3.

¹¹⁶ Magder, *supra* note 107 at 152.

¹¹⁷ Many Canadians were outraged in the summer of 1999 when the distribution arrangement resulted in Canadians having to view the U.S. censored version of the Stanley Kubrick film, *Eyes Wide Shut*. Canada's provincial film ratings boards were never given the opportunity to judge the director's version of the film. Warner Brothers ordered the "digital masking" in order to satisfy the peculiar demands of the U.S. classification system. However, the only version of the film that the provincial ratings boards judged had already been altered to appease the U.S. ratings system. The European market received the uncensored version of the film. Richard Foot, "Genitalia snipped from Kubrick film" *The National Post* [National edition] (8 July 1999) A1, A2.

¹¹⁸ The federal government expresses concern over this situation because it views these lost revenues as a lost opportunity to commission these funds for reinvestment into developing new Canadian films. See Department of Foreign Affairs and International Trade, *The Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), Canadian Culture in a Global World – New Strategies for Culture and Trade* (Ottawa: February 1999) at 14. Available: <http://www.infoexport.gc.ca/trade-culture/menu-e.asp>

¹¹⁹ The Canadian distribution market is dominated by a small number of American companies. In 1989-90, fifteen U.S. subsidiaries operating in Canada together generated 85 per cent of the total profits from film and video distribution. Magder, *supra* note 107 at 152.

¹²⁰ Feature Film Advisory Committee, *supra* note 17 at 19.

¹²¹ See the discussion regarding the film distribution policies under the Investment Canada Act, beginning at note

the federal government had sought to establish an import licensing system that would have limited foreign firms to distributing their own films or films for which they held world distribution rights.¹²² However, the major U.S. firms objected strongly to such an initiative and undertook an intense lobbying campaign¹²³ in opposition to the proposals. Eventually, the federal government abandoned the initiative in favour of an emasculated version of the proposal that was eventually introduced in 1988. This new version would have required only that the major U.S. firms enter into separate negotiations to distribute independent films in Canada; however, the bill that included these proposals did not proceed before the 1988 general election and the proposals were never adopted as legislation.¹²⁴ Due to the continued dominance of the major U.S. distributors, the Canadian-owned distribution sector remains in a stagnant state to this day.

1. Background

Canada has attempted a number of policy initiatives over the years in its efforts to bolster the feature film industry. Due in large part to the subsidies, the Canadian audiovisual production industry has appeared to flourish in recent years; however, this is due in large part to the strength of the Canadian television production industry.¹²⁵ Indeed the references concerning the strength of the audiovisual sector are a somewhat misleading indicator of the strength of the feature film sector, the revenues of which remain well behind that of the television and pay-television sectors.¹²⁶ Federal government financing continues to be the mainstay of feature film producers. For feature films that receive government loans and investment, the average public contribution to total budgets is greater than fifty per cent and in many cases reaches above seventy per cent.¹²⁷ However, those who would defend the subsidies say that each dollar spent by the federal government in the feature film industry generates another \$3.88 in investment from other sources.¹²⁸

133.

¹²² The Cultural Industries Sectoral Advisory Group on International Trade, *supra* note 118 at 14. For a discussion of various government-internal factors influencing the push toward the policy initiative and its ultimate failure, see Fraser, *supra* note 109 at 242-3.

¹²³ With the assistance of the U.S. trade negotiators at the time, the effort against the legislation included American threats to abandon the Canada-U.S. Free Trade Agreement during the final stages of negotiation. Magder, *supra* note 107 at 172.

¹²⁴ Magder, *ibid.*

¹²⁵ Total economic activity in Canadian film and television production now exceeds \$1.5 billion. Canada is now the second biggest exporter of audiovisual products in the global market. Fraser, *supra* note 109 at 221.

¹²⁶ In 1991-92 total revenues for film, video, and audiovisual productions were \$688.2 million; however the theatrical market contributed only a little more than one per cent or \$8.5 million to total production revenues. Magder, *supra* note 107 at 156.

¹²⁷ Magder, *ibid.* at 158.

¹²⁸ Feature Film Advisory Committee, *supra* note 17 at iii.

There is an extensive array of subsidy programs available to the film industry, the availability of which began in 1967 when the Canadian Film Development Corporation was established.¹²⁹ But in addition to subsidization, there were also changes to income tax regulations that caused the film industry to enjoy a mild boom in the late 1970s.¹³⁰ In the early 1970s only about ten feature films were being made annually in Canada, most with modest budgets, but by the end of the decade nearly eighty films were being produced annually with budgets ten times that of the films produced in the early 1970s.¹³¹ Many of the films produced during the tax-shelter boom were criticized for being unidentifiably Canadian productions.¹³² The tax-shelter boom ended in 1983 when the allowable capital cost deduction was drastically reduced, with further reductions implemented in 1988.¹³³

In 1988 the government implemented changes to the procedures under the *Investment Canada Act* that altered the regime governing investment in Canadian-owned and -controlled distributors. The policy prohibits foreign takeovers of Canadian-controlled distribution firms and allows foreign takeovers of foreign-owned firms only when investors agree to invest a portion of their Canadian earnings in developing Canadian culture.¹³⁴ In addition, the policy restricts foreign investors starting new businesses in Canada to distribute only proprietary films. However, this restriction applies only to new businesses established in Canada after the announcement of the policy on February 13, 1987, effectively grandfathering the major Hollywood production-distribution companies.¹³⁵ Therefore, the Hollywood distribution companies have continued to operate as they have for decades; however, any non-Hollywood foreign distributor is not allowed to distribute non-proprietary films in Canada.¹³⁶ This policy caused significant ten-

¹²⁹ Supra note 27 and surrounding text.

¹³⁰ Investors were allowed to write off 100 per cent of capital costs in one year as opposed to the previous 30 per cent per year. See Magder, supra note 107 at 166-7 and Fraser, supra note 109 at 241-4.

¹³¹ Fraser, supra note 109 at 241.

¹³² See Michael J. Trebilcock and S. Daniel Lyon, *Public Strategy and Motion Pictures – The Choice of Instruments to Promote the Development of the Canadian Film Production Industry* (Toronto: Ontario Economic Council, 1982) at 71.

¹³³ In 1983, the Capital Cost Allowance was reduced from 100 per cent in one year to 50 per cent in the first year and 50 per cent in the second year. In 1988, further reductions brought the rate down to 30 per cent per year. See Magder, supra note 107 at 167.

¹³⁴ Industry Canada, “The Canadian Film Industry and Investment Canada,” Text of “Fact Sheet” issued by Communications Canada FS-88-3844E. Available: http://www.investcan.ic.gc.ca/en_film.htm.

¹³⁵ The major Hollywood firms include: Paramount, Columbia, Time Warner, Fox, MCA-Universal, Disney and MGM. These companies are members of the Motion Picture Export Association of America (MPEAA), which is a trade association but acts much like a cartel. Studies dating back to the 1970s have shown that roughly 10 per cent of the distribution companies operating in Canada, which are all subsidiaries of MPEAA members in the U.S., take nearly 80 per cent of the total revenues from film and video sales. See Shao, supra note 115 at 131.

¹³⁶ In 1994, Viacom sought to acquire Paramount Communications, whose assets in Canada included the Famous Players theatre chain and other “cultural businesses”. The Directors’ Guild of Canada pushed the federal

sion when PolyGram Filmed Entertainment, a Dutch company, sought to establish a distributorship in Canada, but wanted access to the same rules under which the Hollywood majors operated in Canada.¹³⁷ The Canadian government allowed PolyGram to establish a film production subsidiary in Canada, but refused the request for an exemption from the investment policy.¹³⁸ The Canadian actions provoked an official protest from the EU.¹³⁹ The matter was prevented from going before the WTO when, in May 1998, Canada's Bronfman family bought PolyGram, making it a Canadian-controlled company.¹⁴⁰

2. The Recommendations of the Feature Film Advisory Committee

In February 1998 the Minister of Canadian Heritage announced that a review of Canada's feature film policy would take place. The Advisory Committee was to be composed of representatives from the film production, distribution and exhibition sectors. The Committee's Report was released in January 1999 and made a number of recommendations¹⁴¹ aimed at increasing the "production capacity, diversity and availability of Canadian films."¹⁴²

The main recommendation of the Committee was the creation of a feature-film fund that would support the production, distribution and exhibition of Canadian feature films. The \$150 million fund would require annual contributions from the federal government of \$50 million in the form of new federal financing,¹⁴³ as well as the consolidation of at least \$53 million of exist-

government to require Viacom to divest Famous Players to Canadian investors and to limit itself to distributing only those films that it produced. Eventually, an agreement was reached whereby Viacom committed \$377 million to film and television production in Canada by 1999. Magder, *supra* note 107 at 172.

¹³⁷ PolyGram offered to invest 20 per cent of its projected film revenue in Canadian production and distribution over a five year period. In return it sought permission to distribute any independent film to which it could obtain rights in Canada, in effect giving it access to the treatment enjoyed by the major Hollywood distributors. Hugh Winsor, "Film law sparks cabinet clash" *The Globe and Mail* [Metro Edition] (16 October 1996) A1.

¹³⁸ Reuters News Agency, "Manley shrugs off bid against film policy" *The Globe and Mail* [Metro Edition] (21 April 1997) B5.

¹³⁹ Heather Scoffield, "Europe threatens Canada over PolyGram" *The Globe and Mail* [Metro Edition] (24 December 1997) B2.

¹⁴⁰ Seagram Co. Ltd. acquired PolyGram NV for \$10.6 billion. In 1995 Seagram acquired MCA Inc [since renamed Universal]. Brian Milner, "Seagram snares PolyGram" *The Globe and Mail* [Metro Edition] (22 May 1998) B1. See also Fraser, *supra* note 109 at 250.

¹⁴¹ For a concise summary of the recommendations, see Graham Fraser, "Panel wants mandatory Canadian films on TV" *The Globe and Mail* [Metro edition] (21 January 1999) A1, A9.

¹⁴² Feature Film Advisory Committee, *supra* note 17 at ii.

¹⁴³ Feature Film Advisory Committee, *supra* note 17 at 25. A majority of the Committee proposed that the new federal funding would be raised through a tax of 3.5% on the gross receipts of theatrical and video distributors operating in Canada. Michael Herman, director of the motion Picture Theatre Associations of Canada, was the only member of the Committee who refused to support the proposed tax. See Fraser, *supra* note 141.

ing funds for feature films provided by Telefilm and the Canadian Television Fund, along with further commitments of roughly \$25 million from the CBC and \$5 million from the NFB.¹⁴⁴ The Committee recommended that a majority of the \$150 million should be directed to production and marketing of those films with high potential for success.¹⁴⁵ The remainder of the funds would be available to certain other films, as well as to emerging filmmakers and to training and mentoring programs.¹⁴⁶

The Committee further recommended changes to the Production Services Tax Credit.¹⁴⁷ The Committee endorsed a proposal to increase the Production Services Tax Credit to 20 per cent, but at the same time, called for its restriction to Canadian feature film producers producing Canadian feature films for theatrical release.¹⁴⁸ The Committee believed that support to foreign film producers was inconsistent with the other federal policies that support the cultural industries in Canada.¹⁴⁹

The Committee also took the position that the broadcasting system in Canada should play an increased role in the financing, promotion and airing of Canadian feature films. The Committee recommended tying licence renewals to commitments from public and private broadcasters to provide increased financing to feature film production and exhibition.¹⁵⁰ It was recommended that the financing could take the form of equity investments and licence fees.¹⁵¹ The Committee also called upon the CRTC to require both private and public broadcasters to devote a portion of their airtime during peak viewing periods to broadcasts of Canadian feature films.¹⁵²

¹⁴⁴ The Committee rejected the CBC's proposal to emulate Britain's Channel 4 in developing an in-house film unit, recommending instead that the CBC be required to dedicate at least \$25 million of its budget to the production of feature films by independent producers. Feature Film Advisory Committee, *supra* note 17 at 15.

¹⁴⁵ *Ibid.* at 13. In the autumn of 1999, it was reported that the Minister of Canadian Heritage would announce the creation of the Canadian Feature Film Fund to be administered by Telefilm. The creation of this new fund would make the federal government Canada's largest film producer. See Doug Saunders, "Ottawa plans \$100 million film fund" *The Globe and Mail* [National Edition] (14 September 1999) A4.

¹⁴⁶ *Ibid.*

¹⁴⁷ The Production Services Tax Credit was announced in July 1997 as a refundable credit of 11 per cent of salaries and wages paid to Canadian residents for services performed in Canada. It succeeded in drawing a significant number of foreign (primarily U.S.) productions to Canada; however, with the increased strength of the U.S. dollar vis-à-vis the Canadian dollar since late 1997, such a scheme was viewed as no longer necessary to attract U.S. producers to Canada, as the exchange rate differential alone amounts to significant savings over the course of a production in Canada.

¹⁴⁸ Feature Film Advisory Committee, *supra* note 17 at 9.

¹⁴⁹ *Ibid.*

¹⁵⁰ The Committee noted that in France broadcasters contributed in excess of 40 per cent of their overall budgets to the production of domestic feature films, *ibid.* at 17.

¹⁵¹ *Ibid.*

¹⁵² The Committee further endorsed having the CRTC structure other regulations that would both require and

The Committee also examined the problematic Canadian distribution sector and expressed support for the existing rules and policies under the *Investment Canada Act*, and also reaffirmed that Canadian films receiving public support should continue to be distributed in Canada by Canadian-owned and -controlled distributors. In order to strengthen the distribution sector, a majority of the Committee¹⁵³ recommended that the *Competition Act* be amended to prevent the tied sale of U.S. and Canadian distribution rights to non-proprietary films. The legislation would ensure that no person distributes a non-proprietary feature film in Canada if it or its affiliates is also distributing the same film in the U.S. unless the availability of separate Canadian rights has been made known and other distributors have had an equitable opportunity to bid on those Canadian-only rights.¹⁵⁴

3. Analysis of the Committee's Recommendations under the GATS and an International Investment Agreement

Certain of the recommendations are not likely to presently contravene any of the international agreements discussed in this article. The Committee's proposal that would require broadcasts of feature films in peak viewing periods is, in essence, an extension of the Canadian content provisions that seek to implement minimum quotas of Canadian programming on television and radio. In the present instance, however, the content is further restricted as it must consist of Canadian feature films. As previously noted, the GATS has application to the audio-visual sector, and in particular to the Canadian television quota system by requiring that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."¹⁵⁵ However, by reason of Canada's current exemptions under the GATS, the present system of quotas does not contravene any of Canada's current commitments under the GATS. However, the short-sightedness of such policies is again apparent, as countries continue to move toward dismantling the protective barriers in the audio-visual sector.

The proposal to alter the Production Services Tax Credit may actually appease certain entertainment industry groups in the U.S. by effectively making it less attractive for foreign producers to operate in Canada. This would be welcomed by the large contingent of tradespeople involved in the film production industry in California who are angered by Canada's policies that

encourage broadcasters to incorporate feature films into their broadcasts, *ibid.* at 18.

¹⁵³ In addition, Michael Donovan, a representative of the Canadian Film and Television Production Association, took the position that either quotas or tax-based incentives at the distribution and/or exhibition sectors could be given further consideration. Further, Michael Herman of MPTAC did believe that an adequate analysis of the legal, financial and political implications of the recommendation had been performed that would enable him to support the recommendation, *ibid.* at 19.

¹⁵⁴ *Ibid.*

¹⁵⁵ Article XVII:1, GATS, *supra* note 29.

have sought to attract foreign production business in the guise of Canadian cultural development.¹⁵⁶ It is of interest to note that the non-discrimination between Canadian and foreign producers that the tax credit advocated was viewed unfavourably in the U.S. With the proposed changes, the measure would become one that is directed exclusively to domestic producers, and therefore would have the potential to be challenged under Article XVII of the GATS, which requires members to adhere to the National Treatment principle. Therefore, even though the coverage of subsidization directed at production in Canada may well be narrowed, the tax credit shifts from being one of a non-discriminatory nature to one that discriminates in favour of Canadian producers and, like many of Canada's cultural protection measures, could be subject to challenge under the GATS. As previously noted, however, there are no present Canadian commitments in the audiovisual sector to adhere to the principles in the GATS, and therefore, the measure would not be subject to challenge at the present time.

The proposed new feature-film fund would support the production, distribution and exhibition sectors of the Canadian film industry. The creation of such a fund is yet another subsidy to Canadian producers; however, domestic subsidies tend to be regarded as the least offensive form of interference that countries take in order to protect domestic industries.¹⁵⁷ Although, the international agreements recognize this concept, there is a definite trend toward implementing a system of negotiations aimed at reducing and eliminating subsidization of domestic industry.¹⁵⁸ In this respect, the audiovisual industries are addressed by Article XV of the

¹⁵⁶ Presently, there are increasing signs of a subsidy war between Canada and the U.S. after the California state assembly approved a 10 per cent tax credit for wages and salaries paid by California producers to California film and television workers. Rory Leishman, "Hollywood strikes back over Canada's subsidies" *The National Post* [National edition] (21 August 1999) D5.

¹⁵⁷ Export subsidies, on the other hand, can have significant distortive effects on trade and are typically banned among members of free trade agreements.

¹⁵⁸ In addition to the agreements previously identified, the Agreement on Subsidies and Countervailing Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33, I.L.M. 44 (1994) [hereinafter Subsidies Agreement], provides for clearer and strengthened rules on the use of subsidies and countervailing measures. The rules include principles that determine whether an aid measure has a specific character; a formal categorization of practices into "prohibited" subsidies, aid measures considered acceptable but "actionable" and "non-actionable" subsidies. In addition, Article I of the Subsidies Agreement provides a definition of "subsidy" as follows:

For the purposes of this Agreement, a subsidy shall be deemed to exist if:

- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
 - (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
 - (iii) a government provides goods or services other than general infrastructure, or purchases goods;

GATS, which focuses on the issue of subsidies by recognizing that, in certain circumstances, subsidies may have distortive effects on trade in services. The Article requires that members enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such distortive effects. These negotiations will, at some point, focus on the mechanisms designed to finance the production and distribution of films.¹⁵⁹ Presently, though, Canadian commitments under the GATS do not prevent the federal government from lawfully pursuing the establishment of the film-fund subsidy to assist Canadian producers.

The Committee's proposals respecting distribution entail enacting legislation that would effectively separate the sale of U.S. and Canadian distribution rights to non-proprietary films. In the case of this proposal, concerns regarding the potential inconsistency of the measure with international trading commitments are replaced by the reality of the strength of the U.S. entertainment industry. The U.S. production and distribution companies successfully prevented similar measures from being enacted in 1987¹⁶⁰ and surely will do everything within their power to prevent the enactment of any measure that would erode their cartel currently in place in Canada. The proposed measures are essentially an extension of the present policy, which provides that foreign investors starting new businesses in Canada are only allowed to distribute proprietary films. While both measures would restrict foreign-owned distributors to distribution of proprietary films, the proposed measure does not purport to regulate investment *per se* and, therefore, would not infringe the national treatment provisions of any international agreement respecting investment. The present policies, however, would fall within the application of the National Treatment provision of the MAI, which would have required that each contracting party "accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, manage-

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

For a discussion of the Subsidies Agreement see Gilbert Gagné, "The WTO Subsidies Agreement Implications for NAFTA" (Ottawa: Centre for Trade Policy and Law, 1998).

¹⁵⁹ Cahn and Schimmel, *supra* note 103 at 301.

¹⁶⁰ In 1987, the Canadian Department of Communications sought to introduce legislation that would have limited the Hollywood distribution companies to distributing in Canada only those films to which they held proprietary rights. *Supra* notes 122 and 135 and surrounding text and Fraser, *supra* note 109 at 242-3.

ment, maintenance, use, enjoyment and sale or other disposition of investments.”¹⁶¹ Clearly, the Canadian policy on investment in the film distribution sector discriminates against foreign investors seeking to establish a distribution operation in Canada and then distribute, as PolyGram attempted in 1997-98, both proprietary and non-proprietary products.¹⁶² However, with the current lack of an international agreement on investment, such discriminatory policies continue to be viable and Canada continues to take advantage of this void in an attempt to protect Canadian distribution firms.

For the most part, the recommendations of the Feature Film Advisory Committee have not strayed from Canada’s traditional emphasis on the provision of subsidies to the production sector. One notable exception is the recommendation that the \$150 million Feature Film Fund emphasize marketing and promotion of Canadian feature films, in addition to production. Again, it is these types of initiatives that must be explored and refined if the Canadian government wishes to continue its role as guardian of the Canadian cultural industries, while at the same time respect its commitments under international trade agreements. By recognizing that promotion of worthy Canadian cultural products may lead to greater recognition by Canadians of such products, perhaps Canada’s cultural policies will begin the shift away from their traditional focus on production. In the film industry, a move towards decreasing production subsidies would mean there would be less opportunity in the future for foreign producers to press their governments to take action under the GATS and other international agreements. Unfortunately, the state of the Canadian-owned distribution sector remains precarious, with its main protection stemming from the policies under the *Investment Canada Act* restricting investment, which could conceivably be subject to future attack should plans by the international community to establish international investment measures modelled on the principles of MFN and National Treatment come to fruition.

III. The Canada-United States Periodical Dispute

On March 11, 1996, the Office of the United States Trade Representative (USTR) announced that the United States would invoke the dispute settlement procedures of the World Trade Organization (WTO), along with U.S. trade laws, to challenge certain Canadian measures respecting periodicals.¹⁶³ The USTR alleged that the measures unfairly protected Canada’s do-

¹⁶¹ MAI Text, supra note 30.

¹⁶² The Committee also expressed its support for the current policy prohibiting foreign takeovers of Canadian-controlled distribution firms and allowing foreign takeovers of foreign-owned firms only when investors agree to invest a portion of their Canadian earnings in developing Canadian culture. This policy also violates the National Treatment provision by preventing foreign investors from pursuing investments in Canadian-controlled distribution firms, and also by conditioning the take-over of foreign-owned firms with requirements to invest earnings in developing Canadian culture.

¹⁶³ A periodical is described as a printed publication that appears in consecutively numbered or dated issues, published under a common title, usually at regular intervals, not more than once every week, excluding special issues, and at least twice every year. It does not include a catalogue, a directory, a newsletter or a newspaper.

mestic magazine industry.¹⁶⁴ In its June 1997 decision,¹⁶⁵ the Appellate Body of the WTO essentially agreed with an earlier decision¹⁶⁶ of a Panel of the Dispute Settlement Body in holding that certain measures respecting periodicals maintained by Canada were inconsistent with Article XI and Article III of the GATT. The United States had argued that the measures prohibited or restricted the importation into Canada of certain periodicals. Canada has now enacted legislation¹⁶⁷ respecting advertising services supplied by foreign periodical publishers. Canada initially took the position that since the new legislation sought to regulate advertising services and did not purport to affect the import of magazines, it fell exclusively within the domain of those international trading laws governed by the GATS, and as such, Canada was not in violation of any of its obligations under international trading agreements.¹⁶⁸ The U.S., however, regarded the new legislation as simply a new prohibition on U.S. companies' ability to do business in Canada.¹⁶⁹ The U.S. took the position that the new legislation was as inconsistent with Canada's international trade obligations as the former discriminatory measures.¹⁷⁰ The U.S. had threatened trade retaliation in other sectors had Canada enacted the *Advertising Services Act* in its originally proposed form.¹⁷¹

See s.2, Foreign Publishers Advertising Services Act, *infra* note 167. A similar definition had been found in Tariff Item 9958, *infra* note 191 and surrounding text. The terms "periodical" and "magazine" may be used interchangeably throughout this article.

¹⁶⁴ United States Trade Representative, "USTR Kantor Announces Challenge Of Discriminatory Canadian Magazine Practices; Cites Clinton Administration Determination To Defend U.S. Industries" Press Release (11 March 1996). Available: <http://www.ustr.gov/releases/1996/03/96-23.html>

¹⁶⁵ World Trade Organization, Report of the Appellate Body on Canada – Certain Measures Respecting Periodicals, (30 June 1997) WT/DS31/AB/R. Available: <http://www.wto.org/wto/ddf/ep/public.html> [hereinafter the Appellate Body Report].

¹⁶⁶ World Trade Organization, Report of the Panel on Canada – Certain Measures Respecting Periodicals, (14 March 1997) WT/DS31/R. Available: <http://www.wto.org/wto/ddf/ep/public.html> [hereinafter the Panel Report].

¹⁶⁷ The Foreign Publishers Advertising Services Act, S.C. 1999, c.23 (formerly Bill C-55) creates an offence where foreign periodical publishers supply advertising services directed at the Canadian market to Canadian advertisers [hereinafter the Advertising Services Act]. The Advertising Services Act is discussed in greater detail in subsequent pages.

¹⁶⁸ This assertion is based on the premise that Canada did not offer and the U.S. did not obtain or pay for access to Canada's advertising services market in the negotiation of the GATS. Therefore, the argument is that Canada has no obligations and the U.S. has no rights vis-à-vis access to that market.

¹⁶⁹ United States Trade Representative, "Canada's Initiative On Magazines Looks Like Same Old Story" Press Release (29 July 1998). Available: <http://www.ustr.gov/releases/1998/07/index.html>.

¹⁷⁰ *Ibid.*

¹⁷¹ United States Trade Representative, "United States to Take Trade Action If Canada Enacts Magazine Legislation" Press Release (30 October 1998) Available: <http://www.ustr.gov/releases/1998/07/index.html>; Robert Fife, "United States Will Fight Back on Magazine Law" *The National Post* [Toronto Edition] (November 26, 1998) A7; Peter Morton, "U.S. targets steel, textiles as trade rift intensifies", *The National Post* [National Edition] (12 January 1999) A1; and Peter Morton, "U.S. 'called Canada's bluff' in magazine dispute" *The National Post* [National Edition] (7 April 1999) C1.

On May 26, 1999 Canadian and U.S. representatives announced that a compromise to the dispute had been reached.¹⁷² The agreement allows foreign periodicals limited access to the Canadian advertising market; yet should foreign periodicals violate the terms of the agreement, the sanctions contained within the *Advertising Services Act* would then apply. In order to determine whether the new legislation, like the predecessor legislation, may yet contravene Canada's international trading obligations under the GATT it is necessary to provide an historical context for the dispute, along with a brief examination of the periodical industry in Canada. Further, the previous measures that the WTO found to be inconsistent with Canada's GATT obligations need to be reviewed in the context of the Panel and Appellate Body decisions. Finally, the new agreement and legislation is analyzed in the context of the GATT and the GATS to determine whether it is in fact consistent with Canada's obligations under those agreements.

1. Background

The national character of periodicals led the Senate Committee on the Mass Media (the "Davey Committee")¹⁷³ in 1970 to focus attention on the role of the periodical industry as a genuinely national press playing a strong role in the development of the country.¹⁷⁴ Clearly, the federal government has adopted and maintained a policy approach consistent with the sentiments of the Davey Committee, and consequently, has placed a great deal of significance on the periodical industry for cultural reasons, as opposed to reasons of an exclusively industrial nature. Due in part to government intervention, the periodical industry in Canada has enjoyed relative success over recent years.

In 1996-97, over 1,100 Canadian publishers produced nearly 1,600 periodicals.¹⁷⁵ Competition in the industry occurs primarily within two markets – newsstands and home delivery. At newsstands, more than eighty per cent of the magazines available are foreign, and mainly American.¹⁷⁶ However, the home delivery market reveals a considerably different trend. According to Statistics Canada, in 1996-97 single copy sales of English language Canadian maga-

pute" The National Post [National Edition] (7 April 1999) C1.

¹⁷² Ian Jack, "Deal with U.S. averts trade war over magazines" The National Post [Toronto Edition] (26 May 1999) A1, A9. The Agreement is analyzed in greater detail in subsequent pages.

¹⁷³ Senate Committee on the Mass Media, Report (Ottawa: Minister of Supply and Services, 1981).

¹⁷⁴ Paul Audley, *Canada's Cultural Industries* (Toronto: James Lorimer & Company, 1983) at 54; and Keith Acheson and Christopher Maule, "International Agreements and the Cultural Industries" Revised version of paper for a workshop at the Center for Strategic and International Studies (CSIS), Washington, D.C., November 14, 1995 (Ottawa: The Centre for Trade Policy and Law, 1996) at 13.

¹⁷⁵ Statistics Canada, *Periodical Publishing, 1996/97* (Ottawa: Statistics Canada, 1998). Available: <http://www.statcan.ca/Daily/English/980914/d980914.htm#ART1>.

¹⁷⁶ Mandate Review Committee, *Making Our Voices Heard – Canadian Broadcasting and Film for the 21st Century* (Ottawa: Minister of Supply and Services, 1996) at 32. Available: <http://www.pch.gc.ca/culture/brdcstng/pubs/juneau/anglais/chap2/ch2s1.htm> [hereinafter *Making Our Voices Heard*].

zines accounted for \$26.6 million, while subscription sales accounted for \$176.8 million.¹⁷⁷ This suggests that the large majority of the Canadian industry's products reach the consumer not through newsstand sales, but through home delivery. This inference is important when one considers that over three-quarters of all magazines read regularly by Canadians are delivered into their homes through subscriptions and controlled circulation.¹⁷⁸ In fact, combined per-issue circulation of the top twenty Canadian magazines outnumbered the top twenty U.S. magazines in Canada in 1993 by a factor of nearly five to one.¹⁷⁹

A further characteristic of the industry that is worthy of note concerns the revenue and cost structures experienced by the Canadian publishers in the industry. Sales of advertising space accounted for roughly two-thirds of revenues in 1996-97 for Canadian English-language¹⁸⁰ magazines, while revenues from subscription and single-copy sales *together* accounted for less than half that amount.¹⁸¹ Therefore, even though the total number of Canadian magazines sold may be rather impressive, the sales do not translate into significant revenues for producers, as the sales price is not the primary source of income. In addition, the unit cost of producing a magazine is higher in Canada than in the U.S. As a share of total revenue, U.S. publishing costs are significantly lower for editorial, production and printing, and administration and general expenses.¹⁸² This cost structure allows U.S. producers to experience a healthier before-tax profit than the Canadian publishers. Consequently, the rationale for the cultural policy decisions of the government becomes plainer when one considers these structural peculiarities of the industry.

Like other of Canada's cultural industries, periodical publishing has been the subject of a significant degree of technological change throughout the 1980s and 1990s. In certain respects, it was technological advancements that led to the dispute over *Sports Illustrated's* Canadian edition. *Sports Illustrated Canada* was printed in Canada but contained primarily U.S. editorial copy

¹⁷⁷ Statistics Canada, *supra* note 175.

¹⁷⁸ Ninety-four per cent of the magazines delivered into homes through subscriptions and controlled circulation are Canadian-owned publications. See Ronald G. Atkey, "Canadian Cultural Industries Exemption from NAFTA – Its Parameters" (1997) 23 *Canada-U.S. L. Journal* 177 at 181.

¹⁷⁹ Lon Dubinsky, "Periodical Publishing" in *The Cultural Industries in Canada*, Michael Dorland, ed. (Toronto: James Lorimer & Co., 1996) 35 at 45.

¹⁸⁰ There is a noticeable difference between English-language and French-language magazine publishing in Canada in this respect. The revenue from advertising sales in French-language magazines averaged less than half of revenues for French titles during the survey period. See Statistics Canada, *supra* note 175.

¹⁸¹ Statistics Canada, *ibid.*

¹⁸² The Task Force on the Canadian Magazine Industry, commissioned by the federal government, found that the reason for the cost differences could be attributed to the U.S. realizing significant economies of scale through larger print runs. See *A Question of Balance*, *supra* note 15 at 5. The Task Force was chaired by J. Patrick O'Callaghan and Roger Tassé, with advisory members including representatives from the publishing industry, consumer and advertiser groups, and legal and journalism professionals. The Task Force released an interim report in May, 1993 and a final report in March, 1994. Certain recommendations of the Report are discussed further in the subsequent pages.

which was transmitted electronically from the U.S. Electronic transmission of editorial content from the U.S. to Canada meant the non-application of the measures in existence at that time that had been put in place to protect the Canadian magazine industry. Tariff Code 9958 had been designed to prevent the importation of printed copies, but would not apply to electronic transmission of a magazine's content.¹⁸³

Time Canada announced plans to launch a split-run¹⁸⁴ edition of *Sports Illustrated* in Canada in January 1993. *Sports Illustrated Canada* would contain nearly the same editorial content as that found in the U.S. edition, but with Canadian advertising content.¹⁸⁵ It is important to note that the Canadian edition of *Sports Illustrated* was launched only after receiving approval from two government departments, Investment Canada in 1990, and Revenue Canada in 1993.¹⁸⁶ Nevertheless, the government became dissatisfied with the prospect of *Sports Illustrated* operating a Canadian edition and in the spring of 1993 proceeded to establish The Task Force on the Canadian Magazine Industry in order to identify potential policy options.

The 1994 Report of the Task Force¹⁸⁷ included a proposal to impose an 80 per cent tax on the advertising content of those magazines distributed in Canada that contained advertisements directed at Canadians and editorial content that was substantially the same as the corresponding issues of the magazine that contained advertisements that were not primarily directed at Canadians.¹⁸⁸ The Report also included a recommendation to continue the existing arrangements for *Time* and *Reader's Digest* and to permit *Sports Illustrated* to be exempt for seven issues per year.¹⁸⁹

¹⁸³ Tariff Code 9958, as well, did not extend to apply to the transmission of copy by film from the U.S. into Canada for printing in Canada. The Canadian edition of TIME had been printed since 1976 in exactly this manner.

¹⁸⁴ From the Canadian perspective, a split-run is the Canadian edition of a foreign magazine that contains a minimal amount of local content but, at the same time, is capable of attracting large amounts of Canadian advertising dollars.

¹⁸⁵ The issue in dispute was actually the competition between split-run editions of U.S.-based magazines and Canadian magazines for the limited advertising revenues in the Canadian market. The concern was that the popular U.S.-based magazines would draw the advertising revenue away from Canadian magazine publishers, further weakening the Canadian magazine industry.

¹⁸⁶ This fact has led certain commentators to speculate that the subsequent taxation measures imposed by the Canadian government were the result of intense lobbying by Canadian magazine industry representatives, who actually conceived of and drafted the measure. See Jennifer J. Fong, "The Cultural Industries Exemption from NAFTA – Another Canadian Perspective" (1997) 23 Canada-U.S. L. Journal 201 at 206.

¹⁸⁷ A Question of Balance, *supra* note 15.

¹⁸⁸ A magazine would be considered to be "substantially the same" if it was more than 20 per cent the same. *Ibid.* at 65.

¹⁸⁹ There had been seven issues of *Sports Illustrated Canada* published in the year preceding the Report.

2. The Canadian Legislation

a) Historical Overview

In 1965, section 19 of the *Income Tax Act*¹⁹⁰ and Tariff Code 9958¹⁹¹ implemented the recommendations of the Royal Commission on National Development in the Arts, Letters and Sciences (Massey Commission, 1951)¹⁹² and the Royal Commission on Publications (O'Leary Commission, 1961).¹⁹³ For advertisements directed at the Canadian market, Section 19 allowed Canadian advertisers a tax deduction for the costs of advertising in Canadian periodicals. Tariff Item 9958 prohibited the importation of split-run magazines. *Time* and *Reader's Digest* were allowed exemptions under the legislation. However, in 1976, the government amended section 19 of the *Income Tax Act* and removed the grandfathering provision,¹⁹⁴ yet both *Time* and *Reader's Digest* were able to find ways essentially to circumvent the effects of the new legislation.¹⁹⁵

In addition to the above measures, since the incorporation of Canada Post in 1981, the Government of Canada has provided funding to the corporation to support special rates of postage for eligible publications through the Publications Distribution Assistance Program.¹⁹⁶ A

¹⁹⁰ R.S.C. 1985, c.1 (5th Supp.); brought into force March 1, 1994.

¹⁹¹ Tariff Code 9958 was found in Schedule VII of the Customs Tariff. It had been put into effect by section 114 of the Customs Tariff which provided that "the importation into Canada of any goods enumerated or referred to in Schedule VII is prohibited." R.S.C. 1985, c. 41 (3rd Suppl.) as amended to 30 April 1996, s.114, Sch. VII, Item 9958, (1996 Customs Tariff: Departmental Consolidation) Ottawa: Minister of Supply & Services Canada, 1996.

¹⁹² The Massey-Lévesque Commission Report had proposed a twenty per cent tax on all advertising in split-run editions of foreign periodicals sold in Canada. See Massey-Lévesque Commission Report, supra note 15.

¹⁹³ The O'Leary Commission Report had recommended first that advertisers not be allowed to deduct expenditures for tax purposes for advertising directed at the Canadian market and placed in a foreign periodical, and second, that foreign periodicals containing advertising directed at the Canadian market be prevented from entering Canada. See O'Leary Commission Report, supra note 15.

¹⁹⁴ The government introduced Bill C-58, which provided that for advertising to be deductible for tax purposes, periodicals had to be at least seventy-five per cent Canadian-owned and contain content that was not substantially (i.e. not more than twenty per cent) the same as the issue of a periodical that was printed, edited or published outside Canada.

¹⁹⁵ Reader's Digest created a foundation in Canada that allowed it to qualify for seventy-five per cent Canadian ownership, and since its format was to provide a digest of previously published works it was allowed to recycle editorial material in its Canadian edition. *Time* closed its Canadian bureau in 1976, however it continued to sell advertising in Canada at a reduced rate to Canadian advertisers so that on an after-tax basis it competed with advertising in Canadian periodicals. *Time* Canada's advertising revenues initially fell, but within two years the revenues had recovered to their previous level. As well, *Time* continued to print in Canada the copies that it sold there by shipping the editorial content on film to the printing press, since Tariff Item 9958 applied only to the physical periodicals. See Acheson and Maule, supra note 174 at 13.

¹⁹⁶ The Program, which the government touted as promoting Canadian culture, provided funding through Canada Post to eligible Canadian publications, including periodicals, mailed in Canada for delivery in Canada. The three categories of publications postal rates that were the subject of the U.S-Canada dispute included: the "funded" publications rates; the commercial "Canadian" publications rates; and commercial "International"

further legislative initiative was set in motion after Time Canada Inc. announced its plans to print a split-run edition of *Sports Illustrated*. The government amended the *Excise Tax Act* and the *Income Tax Act* imposing an excise tax at the rate of 80 per cent of the value of all advertisements contained in a split-run edition distributed in Canada.¹⁹⁷

The U.S. made complaints with respect to three measures; however, it did not challenge the measure contained in section 19 of the *Income Tax Act*. Those measures that were challenged included the following:

- (i) Tariff Code 9958 - Import Prohibition;
- (ii) Part V.I of the *Excise Tax Act*; and
- (iii) Funded and Commercial Postal Rates.

b) *The Panel and Appellate Body Decisions*

The Panel decided against Canada on all of the measures contested by the United States, but for one measure concerning the postal subsidy.¹⁹⁸ However, the Appellate Body reversed the Panel's decision in part and decided against Canada on all issues.

(i) The Tariff Code

Tariff Code 9958 was a prohibition on imports of special edition periodicals, including split-run or regional editions that contained advertisements primarily directed to a market in Canada and that did not appear in identical form in all editions of an issue distributed in that periodical's country of origin. The Panel found that Tariff Code 9958 was an import prohibition, although it applied to split-run editions of periodicals, which are distinguished by their advertising content directed at the Canadian market. The debate then became whether or not

publications rates. The first two categories applied to periodicals published and printed in Canada. "Funded" rates are rates that essentially are subsidized by the government; commercial rates are for publications ineligible for "funded" rates. "Canadian" rates are commercial rates available to Canadian publications and "International" commercial rates apply to all foreign publications mailed in Canada. In January 1990, the government announced plans to gradually phase out the Program and replace it with a system of direct funding to eligible publications; however, in 1996 the government announced a three year extension of the program.

¹⁹⁷ Part V.1 of the *Excise Tax Act*, An Act to Amend the *Excise Tax Act* and the *Income Tax Act*, S.C. 1995, c. 46.

¹⁹⁸ The Panel found that the application by Canada Post of lower "commercial Canadian" postal rates to domestically-produced periodicals than to imported periodicals, including additional discount options available only to domestic periodicals, was inconsistent with Article III:4 of the GATT; however, the Panel found that the maintenance of the "funded" rate scheme was justified under Article III:8(b) of the GATT.

there was a possible defence against the application of Article XI:1.¹⁹⁹ Canada argued that it was entitled to the measure under Article XX(d),²⁰⁰ as it was "necessary to secure compliance with other GATT-consistent legislation."²⁰¹

The Panel, however, was of the opinion that the measure secured "the attainment of the objectives" of section 19 of the *Income Tax Act* (to channel advertising to Canadian magazines) but was not "necessary to secure compliance" with the measure.²⁰² The Panel found that Tariff Code 9958 was an import prohibition and held this to be inconsistent with Article XI, and unsustainable under Article XX. Canada did not appeal this finding of the Panel to the Appellate Body.

(ii) The Excise Tax

Both the Panel and Appellate Body Decisions found that Part V.1 of the *Excise Tax Act* was intended to complement and render effective the import ban of Tariff Code 9958.²⁰³ The Appellate Body reasoned that as a companion to the import ban, Part V.1 of the *Excise Tax Act* had the same objective and purpose as Tariff Code 9958 and, therefore, should be analyzed in the same manner.²⁰⁴

Essentially, Canada argued that the 80 per cent excise tax was a measure to tax the advertising in split-run magazines, and as such was a tax on a service, not a good, and that Article III:2, first sentence was inapplicable in such a case.²⁰⁵ However, the Panel was "not fully con-

¹⁹⁹ Article XI:1 reads in relevant part as follows:

"No prohibitions or restrictions other than duties, taxes or other charges ... shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member]...."

²⁰⁰ The relevant part of Article XX of the GATT reads as follows:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures:

[...]

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;"

²⁰¹ The reference to "other GATT-consistent legislation" was to section 19 of the *Income Tax Act*.

²⁰² Panel Report, supra note 166, para. 5.10.

²⁰³ Panel Report, supra note 166, paras. 3.25 and 3.26; Appellate Body Report, supra note 165, at 17.

²⁰⁴ Appellate Body Report, *ibid*.

²⁰⁵ Canada made the specific argument that under its interpretation of the word "indirectly" in Article III:2, the Article did not apply to this measure.

vinced by Canada's characterization of the excise tax as a measure intended to regulate trade in advertising services, in view of the fact that there [was] no comparable regulation on advertisements through other media and the fact that the tax [was] imposed on a 'per issue' basis."²⁰⁶ The Panel found that the GATT did indeed apply to Canada's excise tax, and found that the tax was inconsistent with the National Treatment obligations under Article III:2, first sentence.

The Appellate Body's examination of Part V.1 concluded that by its very structure and design, it was an excise tax that was applied on a good - a split-run edition of a periodical - on a "per issue" basis.²⁰⁷ It was the publisher, or in the absence of a publisher resident in Canada, the distributor, the printer or the wholesaler, who was liable to pay the tax, not the advertiser.²⁰⁸ The Appellate Body focused on the applicability of Article III:2, second sentence.²⁰⁹ Canada maintained that split-run periodicals were not "directly competitive or substitutable" for periodicals with editorial content developed for the Canadian market.²¹⁰ Canada contended that although the split-run periodicals may have been substitutable advertising vehicles, they were not competitive or substitutable information vehicles.²¹¹ However, the Appellate Body disagreed and concluded that imported split-run periodicals and domestic non-split-run periodicals were directly competitive or substitutable products in so far as they were part of the same segment of the Canadian market for periodicals.²¹²

(iii) The Postal Subsidy

Canada Post Corporation ("Canada Post") had applied reduced ("funded") postal rates, funded by the Department of Canadian Heritage, to certain periodicals published in Canada. The United States claimed that the postal rate assistance provided through the Publications Distribution Assistance Program was a violation of Canada's obligations under the GATT, because the subsidy was not directly payable to the publisher of Canadian magazines as required by Article III:8(b).²¹³ The United States claimed that this provision was not applicable in the immediate case because the payment of subsidies by the Department of Canadian Heritage was not made directly to Canadian publishers, but rather to Canada Post.

²⁰⁶ Panel Report, *supra* note 166 para. 5.15.

²⁰⁷ Appellate Body Report, *supra* note 165 at 17.

²⁰⁸ See An Act to Amend the Excise Tax Act and the Income Tax Act, S.C. 1995, c. 46, s. 35(1).

²⁰⁹ The Appellate Body found that the Panel's reasoning was flawed in its analysis of the applicability of Article III:2, first sentence. See Appellate Body Report, *supra* note 165 at 21.

²¹⁰ Panel Report, *supra* note 166, para. 3.113; and Appellate Body Report, *ibid.* at 24.

²¹¹ *Ibid.*

²¹² Appellate Body Report, *supra* note 165 at 27.

²¹³ Article III:8(b) of the GATT states that "[t]he provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article."

The Panel decided that if, as maintained by the United States, Canada Post was a government agency, the payment of funds from Canadian Heritage to Canada Post was merely an internal transfer of resources, and the payment of the subsidy was made directly to Canadian publishers, and therefore, the measure was allowable.²¹⁴ The Appellate Body, however, concluded that the Panel incorrectly interpreted Article III:8(b) and held that Canada's "funded" postal rates scheme for periodicals was not justifiable under the provision. The Appellate Body examined the text of Article III:8(b), and found that the phrase, "including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products" provided a non-exhaustive list of the types of subsidies covered by Article III:8(b) of the GATT. The Appellate Body referred to the Panel decision in *United States – Malt Beverages*,²¹⁵ which had addressed the issue of whether a reduction in the federal excise tax on beer constituted a "payment of subsidies" within the meaning of Article III:8(b). The Appellate Body held that there was no reason to distinguish a reduction of tax rates on a product from a reduction in transportation or postal rates. The Appellate Body noted that an examination of the text, context, and object and purpose of Article III:8(b) suggested that it was intended to exempt from the obligations of Article III only the payment of subsidies which involve the expenditure of revenue by a government, limiting the permissible producer subsidies to "payments" after taxes have been collected or payments otherwise consistent with Article III.²¹⁶

(iv) The Commercial Postal Rates

Postal rates applied to Canadian periodicals not eligible for the "funded" rates ("commercial Canadian" rates) are lower than those applied to imported periodicals ("international" rates). The Panel had to determine whether the fact that Canada Post applied the commercial Canadian rates or the funded rates to Canadian periodicals, which are lower than the international rates applied to imported periodicals, constituted a violation of Article III:4.²¹⁷

The United States claimed that Canada Post's practice of charging domestic periodicals lower postal rates than imported periodicals was a violation of the National Treatment obligations under Article III:4. Canada's argument was essentially that since Canada Post is a Crown Corporation, with a legal personality distinct from the Canadian government, the commercial

²¹⁴ Panel Report, supra note 166, para. 3.194 and 3.211.

²¹⁵ Panel Report, adopted 19 June 1992, BISD 39S/206.

²¹⁶ Appellate Body Report, supra note 165 at 37.

²¹⁷ Article III:4 states that "[t]he products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to "like products" of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

Canadian or commercial international rates charged for the delivery of periodicals were established by Canada Post based on commercial and marketing practices and not influenced by government policy, and therefore did not qualify as "regulations" or "requirements" within the meaning of GATT Article III:4.²¹⁸

The Panel rejected Canada's argument, stating that "it [was] clear that Canada Post generally operate[d] under governmental instructions," and if the Canadian government considered Canada Post's pricing policy to be inappropriate, it could have instructed Canada Post to change the rates under its directive power based on Section 22 of the *Canada Post Corporation Act*.²¹⁹ Therefore, the scheme was inconsistent with Article III:4. This finding of the Panel was not appealed to the Appellate Body.

c) 3. *The Agreement on Periodicals and Bill C-55*

Canada's legislative response to the WTO Dispute Settlement Body's request that it bring those measures found to be inconsistent with the GATT into conformity with its obligations thereunder was the introduction of Bill C-55, which originally placed an outright prohibition on the supply of advertising services by foreign publishers that were directed at the Canadian market. With the successful negotiation of the Agreement on Periodicals between Canada and the U.S.,²²⁰ the prohibitions contained within the *Advertising Services Act* now act in a secondary capacity in policing Canada's periodical sector. The *Advertising Services Act* addresses advertising services supplied by foreign periodical publishers to Canadian advertisers. Subsection 3(1) of the Act states:

No foreign publisher shall supply advertising services directed at the Canadian market to a Canadian advertiser or a person acting on their behalf.

In addition to the above provision, the Act would also apply to a licensee of a foreign publisher²²¹ and any entity that is controlled, directly or indirectly, by non-Canadian persons²²² by deeming each to be a foreign publisher. These provisions have the effect of creating a broad definition of what is meant by a foreign publisher. Further, agents or representatives of a Canadian advertiser, or persons not dealing with a Canadian advertiser at arm's length (including related persons) would also be caught by the prohibition.²²³ These provisions have the effect of creating a broad definition of what is meant by a Canadian advertiser, and, taken together with

²¹⁸ Panel Report, supra note 166, para. 3.168; and see Panel Report, supra note 166, paras. 3.153 and 3.154 for a discussion of the meaning of the terms "regulations" and "requirements" found in Article III:4.

²¹⁹ Panel Report, *ibid.*, paras. 5.35 and 5.39.

²²⁰ Agreement on Periodicals, Department of Canadian Heritage: 1999. Available: <http://www.pch.gc.ca/bin/News.dll/>

²²¹ s. 3(2), Advertising Services Act, supra note 167.

²²² s. 3(3), *ibid.*

²²³ s. 3(5), (6) and (7), *ibid.*

those provisions defining the entities deemed to be foreign publishers, the result is a very broad prohibition on the sale of advertising services by foreign publishers to Canadian advertisers.

The legislation contains severe penalties should a breach of section 3 occur. Section 10 states:

- 10.(1) Every person who contravenes section 3 is guilty of an offence and liable
- (a) on summary conviction, to a fine of not more than \$20,000 for a first offence and to a fine of not more than \$50,000 for a subsequent offence;
 - or
 - (b) on conviction on indictment,
 - (i) in the case of a corporation, to a fine of not more than \$250,000, and
 - (ii) in the case of an individual, to a fine of not more than \$100,000.

As well, all members of those partnerships, trusts, joint ventures and non-profit corporations that fail to qualify as “Canadian,” are deemed non-Canadians for the purposes of prosecution under subsection 2(1),²²⁴ further broadening the application of the penalty provision in section 10. The legislation also provides that the Minister may issue a demand to a foreign publisher if the Minister believes that the foreign publisher has supplied, or will supply, advertising services in contravention of section 3.²²⁵ The demand may require the foreign publisher, *inter alia*, to stop supplying advertising services in contravention of section 3 or to show cause why no contravention of the Act has occurred or will occur.²²⁶

The Agreement on Periodicals called for modifications to be made to Bill C-55 and its accompanying regulations. Section 21.1 of the Act now exempts certain foreign publishers from the provisions of the Act, provided the publishers meet certain conditions respecting the supply of advertising services directed at the Canadian market. Essentially, foreign publishers may supply advertising services without any obligation to include Canadian editorial content in their publications, as long as their revenues generated by such supply do not exceed 12% of the revenues generated by the total supply of advertising services by means of any of those issues of the periodical published within 18 months of July 1, 1999, which is the day the Act came into force.²²⁷ Should the foreign publisher wish to exceed the legislated limits, section 21.2 of the

²²⁴ s. 3(4), *ibid.*

²²⁵ s. 7(1), *ibid.*

²²⁶ s. 7(2), *ibid.*

²²⁷ Following the initial 18 month period, foreign publishers may increase their percentage of advertising revenues to 15%, which is effective for another 18 month period. Once this three year “phase-in” period has ended, publishers may extract advertising revenues to the extent of 18 per cent of the revenues generated by the total supply of advertising services of the periodical. See section 21.1, Advertising Services Act, *supra* note

Act, together with the interpretation provisions of the Agreement on Periodicals, provide that the publisher would have to make an investment in periodical publishing as per the applicable provisions of the *Investment Canada Act*.²²⁸ The publisher would have to “create majority Canadian content and establish a new periodicals business in Canada.”²²⁹

4. *Analysis of the Agreement on Periodicals and Bill C-55 under the GATT*

The Agreement between Canada and the U.S. prevents the U.S. from taking action under U.S. trade legislation, the NAFTA, or at the WTO; however, other countries could challenge the Canadian measures before the WTO. Similarly, in several years time, the U.S. may begin to press for further access to the Canadian advertising services market,²³⁰ and therefore, the provisions of the legislation may yet come before the WTO. The provisions in the NAFTA respecting the potential introduction of retaliatory measures corresponding to the protection of Canadian cultural industries have been exempted by the Agreement on Periodicals from having any application to the *Advertising Services Act*. Therefore, there is no immediate application of the provisions of the NAFTA.²³¹ Similarly, there is no present application of the provisions of the GATS. If in the future Canada were to remove advertising services from its list of exemptions under the GATS, the principle of National Treatment present in Article XVII of the GATS would intercede and render the *Advertising Services Act* in violation of the GATS. But assuming Canada maintains its present list of exemptions under GATS, which includes advertising services, and that the Agreement on Periodicals continues to remain in effect into the future, the measures contained within the *Advertising Services Act* could conceivably only be challenged under the provisions contained within Article III:1 and III:4 and perhaps Article XI of the GATT.

167.

²²⁸ Pursuant to section 15(a) of the Investment Canada Act, an investment is reviewable under the provisions of the Act if the investment is related to Canada’s cultural heritage or national identity. The review focuses on whether the investment would result in a “net benefit” to Canadians. Pursuant to the Agreement on Periodicals, a net benefit review of new investments in the magazine industry will include “undertakings from foreign investors that result in a substantial level of original editorial content for the Canadian market contained in each periodical title.” Canada will use guidelines that call for “a majority of original editorial content for the Canadian market in each issue of each periodical title.”

²²⁹ The Agreement on Periodicals provides that acquisitions of Canadian publishers will not be permitted.

²³⁰ Pursuant to the Agreement on Periodicals, “Canada and the United States agree to consult annually upon request within 20 days on any matter relating to th[e] Agreement.” Agreement on Periodicals, supra note 220.

²³¹ There is the possibility that either Canada or the United States will withdraw from the Agreement on Periodicals. The Agreement states that “[i]f either party considers that the other party is not in compliance with th[e] Agreement, that party may withdraw from the Agreement by written notification to the other party. The Agreement shall become null and void 90 days after such notification and, at that time, the parties’ respective rights and obligations will return to those that existed immediately prior to the entry into force of th[e] Agreement.” See Agreement on Periodicals, supra note 220.

The following discussion will focus on whether these provisions of the GATT are applicable to the *Advertising Services Act* in its present form and whether the measures contained within this legislation violate Canada's obligations under the GATT. In order to facilitate the analysis, it will be helpful to consider the Panel and Appellate Body decisions, which have provided guidance with respect to the specific issues regarding: the interplay between the GATS and the GATT; the applicability of certain Articles under the GATT; and the nature of the competing products within the Canadian periodical market.

Are the Advertising Services Supplied by Publishers Governed by the GATT?

In drafting Bill C-55 with an exclusive and stated focus on advertising services, the federal government was obviously mindful of the Panel comments regarding the Panel's hesitation to characterize the measures under the *Excise Tax Act* as measures intended to regulate trade in advertising services.²³² Canada's argument that those measures were governed by the GATS as opposed to the GATT was not well received by the Panel or Appellate Body. Both the Panel and Appellate Body found that obligations under the GATT and the GATS can co-exist and that one does not override the other.²³³ Further, the Panel recognized that overlaps between the subject matter of disciplines in the GATT and in the GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities.²³⁴

On the one hand, the purpose of the *Advertising Services Act* would appear to be to prevent the penetration of the Canadian advertising market by publishers who sell their advertising services in association with split-run periodicals. The legislation would appear to pertain exclusively to the supply of a service, and as such, would be a measure that WTO members intended to be disciplined under the GATS. In its report, however, the Panel noted the following: that certain types of services such as transportation and distribution are recognized as a subject-matter of disciplines under Article III:4; that several adopted panel reports examined the issue of services in the context of GATT Article III; and also that advertising services have long been associated with the disciplines under GATT Article III.²³⁵ Therefore, with respect to *Advertising Services Act*, it seems probable that, as with certain of Canada's previous measures, both the GATT and the GATS could simultaneously apply.

It must be noted, however, that certain conceptual hurdles become apparent with respect to finding that the GATT may have application to the *Advertising Services Act*. Section 3 of the Act makes no attempt to conceal its application to those foreign publishers that may seek to supply advertising services to Canadian advertisers. The provision does not, however, place an

²³² Panel Report, *supra* note 166, para 5.15.

²³³ *Ibid.* at para. 5.17 and Appellate Body Report, *supra* note 165 at 18.

²³⁴ Panel Report, *ibid.* at para. 5.18. The Appellate Body did not believe it to be necessary for it to pronounce on the issue of whether there can be potential overlaps between the GATT and the GATS. Appellate Body Report, *ibid.* at 19.

²³⁵ Panel Report, *ibid.*

explicit prohibition or restriction on a physical good. Nor does the provision allow for a ready identification of “like products,” as stipulated by Article III:4. On its face, there is no discriminatory treatment between foreign and domestic goods. Therefore, it seems plausible to advance an argument that, notwithstanding the potential co-existence of the GATS and the GATT, the *Advertising Services Act* is simply outside the scope of the GATT.

Quantitative Restrictions – Article XI:1

Indeed, when examining the applicability of Article XI:1, questions regarding its applicability to the *Advertising Services Act* readily become apparent. Essentially, Article XI prohibits certain techniques for limiting the quantity of foreign goods that may be imported. However, nothing in the Act speaks to limiting imports of periodicals; rather, the measure is only concerned with foreign publishers providing advertising services, which are directed at the Canadian market, to Canadian advertisers. In the case of Tariff Code 9958, that measure clearly had been observed to operate as an import prohibition of a physical good, with direct effects on periodicals as they crossed the border, resulting in the finding of a violation of Article XI.²³⁶ Notwithstanding the wording of Article XI barring “prohibitions or restrictions [...] whether made effective through quotas, import or export licences or other measures,” unless the indirect effects of the legislation on imported split-run magazines are taken into account, the argument that Article XI:1 applies to the *Advertising Services Act* is quite tenuous. It would seem that Article III, which bans the use of a wide range of measures that can affect the internal marketing, and consequently the importation, of foreign goods,²³⁷ would serve as the more relevant focal point.

National Treatment – Article III:4

The principle of National Treatment contained within Article III of the GATT addresses situations in which a contracting party adopts internal or domestic policies designed to favour its domestic producers *vis-à-vis* foreign producers of a given product. Article III:4 provides that the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to “like products” of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. Article III prohibits the use of any form of non-tariff barrier to afford protection to domestic production.²³⁸ This non-discrimination principle is supported by an explicit ban on the use of such measures in a

²³⁶ Panel and Appellate Body Reports, *supra* note 234.

²³⁷ *Lobster from Canada*, Final Report of the Panel (25 May 1990), 3 T.C.T. 8182, para. 7.8.2.

²³⁸ The non-tariff barriers would include all “laws, regulations, and requirements” affecting internal marketing of foreign products, GATT, *ibid.*, para. 7.1.2.

discriminatory manner against imported products, whether imposed on them either at the border or after they have entered the importing country.²³⁹ Further, the reference in Article III:4 to laws, regulations and requirements *affecting* the internal sale of imported products implies that the drafters intended to cover not only the laws and regulations that directly govern the conditions of sale or purchase, but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.²⁴⁰ By prohibiting foreign periodical publishers from supplying advertising services directed at the Canadian market to Canadian advertisers, section 3 does modify the conditions of competition between domestic non-split-run magazines and imported split-run magazines.

In order to determine conclusively whether there would be a violation of Article III:4 with respect to the *Advertising Services Act*, however, the following questions, which are similar to those addressed in the Panel and Appellate Body reports regarding Article III:2, need to be addressed:

- (a) Are imported split-run periodicals and domestic non-split-run periodicals “like products”?; and
- (b) Are imported split-run periodicals subject to internal treatment that is less favourable than that applied to domestic non-split-run periodicals?

The proper test in arriving at a determination of “like products” examines relevant factors including:

- (i) the product's end-uses in a given market;
- (ii) consumers' tastes and habits; and
- (iii) the product's properties, nature and quality.²⁴¹

For the purposes of the test, a comparison of imported split-run magazines and domestic non-split-run magazines needs to be undertaken to determine whether magazines belonging to each category could be considered to be “like products.” In light of the above test, the submissions provided by the United States as outlined in the Panel Report presented a compelling argument that a comparison between imported split-run periodicals and domestic non-split-run periodicals resulted in a finding that the two products were indeed “like products.”²⁴² The U.S.

²³⁹ *Ibid.*

²⁴⁰ *United States – Section 337 of the Tariff Act of 1930*, Report of the Panel (16 January 1989), (L/6439), reprinted in BISD 35S, para 5.10

²⁴¹ Both the Panel and Appellate Body Reports acknowledged the test for “like products” as found in World Trade Organization, *Report of the Appellate Body, Japan – Alcoholic Beverages*, (1 November, 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at 20. The Panel and Appellate Body Reports referred to the test in the context of Article III:2; however, the panel in *US –Standards for Gasoline* considered that similar factors were relevant to like product analyses under paragraphs III:2 and III:4, World Trade Organization, *Report of the Panel on United States –Standards for Reformulated and Conventional Gasoline*, (20 May 1996), WT/DS2/R, para. 6.8.

²⁴² The Appellate Body noted that the Panel's findings with respect to the issue of “like products” was not based

drew attention to a number of the characteristics of periodicals that supported its contention of similarities between the two products,²⁴³ whereas the Canadian submissions appeared to focus on the contention that the difference in editorial content of the two products necessarily precluded the products from being described as “like products.”²⁴⁴ As well, in response to Canada’s introduction of comparisons among *Time*, *Time Canada*, and *Maclean’s*, the United States offered evidence that the similarities between these products were so significant, including with respect to subject matter, that the two magazines (*Time Canada*, and *Maclean’s*) were recognized to be direct competitors by industry witnesses in testimony before a Canadian Senate committee.²⁴⁵

With respect to the second question, the purpose of section 3 is clearly directed at ending the existence of imported split-run magazines in Canada. By effectively prohibiting imported split-run magazines, section 3 provides less favourable treatment to imported split-runs than to like domestic non-split-runs. The section 3 prohibition on advertising services clearly affects the sale of foreign split-run magazines.

In addressing the above questions, one must be aware of the need to consider the purpose of Article III:1, which is to act as a guide to understanding and interpreting the specific obligations contained in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs.²⁴⁶ Article III:1 articulates a general principle that internal measures should not be applied so as to afford

on the evidence before it, in particular, the copies of *Time*, *Time Canada*, and *Maclean’s* presented by Canada, and the magazines, *Pulp & Paper* and *Pulp & Paper Canada* presented by the United States. Therefore, the Appellate Body felt constrained to reverse the legal findings and conclusions of the Panel with respect to the issue of “like products” under Article III:2. Appellate Body Report, *supra* note 165 at 22.

²⁴³ The United States noted that the type, texture, colour, thickness, and even the perfume, of the paper can be important factors to market appeal. The dimensions of the magazine, the manner in which its pages are bound, the typesetting, and the appearance of the ink, can also be significant. The type, appearance, and frequency of advertisements may be a factor in a consumer's purchasing decision as well. Readers may purchase a magazine in part for the information its advertisements contain about where and how to purchase products or services locally. All of these attributes - including editorial content - combine to form an overall package that a consumer may or may not be attracted to. Panel Report, *supra* note 166, para. 3.78.

²⁴⁴ Canada argued that a magazine is nothing without its content, which was what defined the end-use and the value of a magazine to its readers. Treating content as “one attribute among many” as the United States would say, would tend to sweep all or at least very broad classes of magazines into the same category. Panel Report, *ibid.*, para. 3.75.

²⁴⁵ The United States’ assertion was taken from the testimony of officials of the Canadian Magazine Publishers Association given before a Senate Committee. See Senate of Canada, “Proceedings of the Standing Senate Committee on Banking, Trade and Commerce,” Issue no. 49 (30 November 1995) at 57, 64. Panel Report, *ibid.*, para 3.92.

²⁴⁶ *Japan – Alcoholic Beverages*, *supra* note 241 at 18

protection to domestic production.²⁴⁷ Further, the protective application of a measure can most often be discerned from the design, the architecture, and the structure of the measure.²⁴⁸ In the case of the *Advertising Services Act*, sections 3 and 10 operate so as to prevent foreign publishers from offering advertising services directed at the Canadian market to Canadian advertisers. This prohibition was designed to help sustain the existing level of advertising revenue for Canadian publishers within the Canadian periodical industry. The structure of section 3 is such that a very broad prohibition on the sale of advertising services by foreign publishers to Canadian advertisers is created. These factors suggest that, notwithstanding the exception provisions contained in sections 21.1 and 21.2 of the Act, the intention of the Act is clearly designed to channel advertising revenues to Canadian publishers, and thus to promote domestic production of periodicals with Canadian content.

Essentially, the purpose of the measures contained in the *Advertising Services Act* is protectionist, ensuring that only Canadian periodical producers capture all of the revenues associated with advertisements directed specifically at Canadian readers. The prohibition contained in section 3 is designed to disable foreign-based publishers from exercising the option of publishing a split-run edition of an existing periodical for the Canadian market. Notwithstanding the exception provisions contained in sections 21.1 and 21.2, the result of the measures is a disparate impact on imported split-run magazines in comparison to the domestic non-split-run magazines and a probable violation of Canada's obligations under the National Treatment provisions of the GATT.

III. Conclusion

Generations of Canadians have grown up watching Canadian television programs, listening to Canadian recordings on radio, and reading Canadian books and magazines. At the same time, Canadians have enjoyed consuming the entertainment products produced by the U.S. – so much so that successive federal governments have seen fit to restrict the flow of the American products crossing the border using a variety of policy instruments. The question then arises whether, without these controls in place, Canadians would opt freely for the Canadian products, which are often less glamorous and have less of a popular presence than their American counterparts, or whether they would allow themselves to be dominated by the American entertainment world. Perhaps the federal government should officially recognize that cultural industry subsidies encouraging production and broadcast quotas regulating content do little to alter Canadian consumers' tastes in choosing cultural products. If Canadian consumers wish to view television programs, they may well choose the well-made American dramatic programs, and they will do so despite the availability of Canadian imitations. At the same time, however, Canadian consumers may choose the Canadian programming if they discern it to be a quality product worthy of their attention. Similarly, if Canadian consumers wish to view a film, they will choose

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* at 29.

those films that most interest them and if these happen to be American films, as opposed to Canadian films, the most the federal government should do through its industry production subsidies is to ensure that there is an emphasis on quality, as opposed to overall quantity, of the films produced. Indeed the current recommendations of the Feature Film Advisory Committee envision focusing government funding on marketing of only the high quality Canadian film products, and in this manner, the policy would assist the Canadian broadcasting and film sectors without infringing on Canadian consumers' freedom to choose entertainment products. At the same time, however, the federal government continues to fund and otherwise support the cultural industries in the guise of protecting Canadian culture.

Investment in the cultural industries for the sake of preserving Canadian culture is increasingly becoming a questionable use of public funds, and this is therefore becoming one factor that will push the federal government to reconsider its current cultural investment policies; however, an additional factor that will impel Canada to reconsider how it supports these industries is the increasing pressure from international agreements and international trading partners, particularly the U.S., towards prohibiting unequal treatment of foreign and domestic products. The Canadian film industry has always met with intense competition from the U.S. film industry. Pursuant to the most recent Advisory Committee recommendations, it is proposed that subsidization of the Canadian film industry should continue. Pressure is mounting from outside the country's borders to eliminate such subsidies as demonstrated by the directional focus of recent initiatives involving international agreements. The GATS aims to extend the general principles overseeing the GATT to trade in services, including MFN, National Treatment and Free Market Access. The direction indicated by the current arrangements under the GATS is toward the eventual inclusion of the audiovisual sector within the application of these core GATS principles.

Presently, Canada has opted to make no commitments in the audiovisual sector to adhere to the principles in the GATS. Yet all countries will undergo pressure to eventually inscribe all services in their schedule of specific commitments under the GATS. By not committing to such an inscription at this time, Canada is, in effect, buying time for the industries in the audiovisual sector. However, policy choices that are not offensive to Canadian commitments under international trade agreements must be increasingly sought out. To this end, the Advisory Committee recommended there be an increased emphasis on marketing and promotion of Canadian films. Yet the focus of the recent recommendations has for the most part simply proposed continuing the subsidization of production in the film industry, and has not offered any further proposals with respect to policies that would be consistent with the eventual inclusion of the audiovisual sector within the GATS.

The recommendations respecting distribution in the film industry build on an existing policy under the *Investment Canada Act*, for which the Committee expressed continued support, restricting foreign investors starting new businesses in Canada to distribution of their own films, i.e. proprietary films. The present policy would fall within the application of a national treatment provision of any future international agreement on investment, and would be in violation of the provision. Currently, there is no international agreement on investment in place, and

Canada continues to operate its discriminatory investment policies in an attempt to protect Canadian distribution firms. The current proposals from the Committee respecting distribution entail enacting legislation that would effectively separate the sale of U.S. and Canadian distribution rights to films produced by independent production firms, i.e. non-proprietary films. These proposed measures, however, do not purport to regulate investment *per se* and, therefore, would not infringe the national treatment provisions of an international investment agreement. In this respect, the recommendations have sought to propose an approach to assist the film industry that would appear to be consistent with the future trade liberalizing trends within the international agreements. Yet given the entrenched position of the U.S. distribution firms in Canada, the political will necessary to effect carriage of any legislation purporting to separate the sale of Canadian and U.S. distribution rights may be beyond the reach of the present, or indeed any future, Canadian federal government.

The recent proposed policy initiatives advanced by the CBC are, like the initiatives advanced in the film industry, a combination of a reliance on the traditional support measures, in this case content quotas, along with new approaches more consistent with international trading realities. The CBC's proposals call for more attention to be afforded to increasing the viewing of Canadian programs on English television. The CBC believes viewership can be increased by increasing production in the under-represented categories through policies that encourage Canadian broadcasters to devote an increasing amount of the money they spend annually on programming to production in those categories. Further, the CBC is also urging the CRTC to modify the current Canadian content quotas such that they focus on the under-represented categories. However, the current system of content quotas maintained by the CRTC will come under increasing pressure as the move continues toward adoption of the National Treatment principle in the audiovisual sector under the GATS. Therefore, any modifications to the current system of content quotas could only be viewed as a mere band-aid solution. Such initiatives may even demonstrate success in increasing viewership in the under-represented categories of programming in the short term, but any long-term initiatives must account for international trading realities when attempting to bolster the position of Canadian programming.

The CBC's proposed shift to a constellation model is an example of a new initiative that does not rely on antiquated industry support measures. The CBC is advocating that the approach be facilitated by the CRTC, which, through its authority to issue licences, would provide the regulatory approval to Canadian broadcasters seeking to broaden their operations on the constellation model. Whether the CRTC believes this initiative to have merit for the CBC and other broadcasters in Canada, is a separate, albeit important, issue; however, the important feature to be noted is that the constellation model would appear to have significant potential to enable the CBC to compete more effectively both in domestic and international markets, and yet remain in compliance with actual and potential international trading commitments. The attractiveness of the constellation model lies in the fact that adherence to it would attract minimal attention from the international trading agreements, yet there is potential for Canadian broadcasters to promote Canadian programming more effectively. Therefore, were Canadian broadcasters able to embrace this model, they would be in a better position to meet competition

from broadcasters in other countries, which will play an increasing role as the barriers in the audiovisual sector are dismantled in the years to come.

Like the audiovisual sector, the periodical publishing sector in Canada is undergoing significant changes as a result of international pressures. Canada was able to avert a trade war with the U.S. through an eleventh hour agreement providing limited access to the advertising services market. The Agreement on Periodicals mandated changes to Bill C-55 that provide limited access to the Canadian advertising services market and exempt certain foreign publishers from the provisions of the Act, provided the publishers meet certain conditions respecting the supply of advertising services directed at the Canadian market. Should a foreign publisher wish to exceed the legislated limits, the publisher would have to make an investment in periodical publishing pursuant to the *Investment Canada Act*. The procedures under the *Investment Canada Act* raise potential questions relating to the National Treatment principle and the treatment of international investors, but for the present time the procedures appear to be sustainable and the Agreement on Periodicals would appear to have brought to an end the long running dispute over periodicals between Canada and the U.S.

Yet the provocative legislation, best known as Bill C-55, has now been passed into law by the Parliament, with relatively few modifications to its substantive provisions. Section 3 of the Act is clearly directed at ending the existence of imported split-run magazines in Canada. In doing so, section 3 provides less favourable treatment to imported split-runs than to like domestic non-split-run periodicals. Indeed, section 3 together with section 10 operate so as to prevent foreign publishers from offering advertising services directed at the Canadian market to Canadian advertisers. Notwithstanding the provisions contained in sections 21.1 and 21.2 of the Act, which take into account the principles agreed to in the Agreement on Periodicals, the intention of the Act remains as one designed to channel advertising revenues to Canadian publishers, and thus to promote domestic production of periodicals with Canadian content. Essentially, the measures contained in the Act are at odds with the National Treatment provision under the GATT; however, with the U.S. satisfied with the current level of concessions, the measures should be able to avoid the scrutiny of the WTO, at least for the immediate future. The Agreement on Periodicals represents an effort to accommodate cultural concerns within the international trading realities now faced by Canada, and, while successful as a dispute settlement device, the Agreement does not offer any creative or innovative policy or legislative initiatives that will strengthen the Canadian periodical industry in future years.

The Canadian cultural industries have been given a prominent role in assisting in the preservation of Canada's culture. This role, along with the effectiveness of the products of the cultural industries in developing a viable Canadian culture, is increasingly being questioned; yet the federal government continues to direct a significant amount of funding to these industries. In order to ensure that this funding aids in the survival and success of the Canadian cultural industries, new policy initiatives must account for the realities and constraints imposed by international trading agreements and fashion new policies accordingly. Indeed some of the recent policy initiatives have demonstrated a move away from the traditional focus on protection of the cultural industries toward promotion of their products. Furthermore, certain initiatives seek to

improve competition within the industries by focussing on improving the opportunities for the Canadian firms to compete more effectively with their international counterparts. Only by taking such an approach can the Canadian cultural industries strive to decrease their vulnerability to the effects of further liberalization of the global trade regime.