Canada and Culture:
Can Current Cultural Policies be Sustained in the
Global Trade Regime?

by

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A Thesis Submitted in Conformity with the Requirements
for the Degree of Master of Laws,
Graduate Department of the Faculty of Law
University of Toronto

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Abstract

This thesis examines certain examples that are representative of the Canadian federal government's current framework supporting the Canadian cultural industries with a view to determining whether these policies can be maintained within the global trading regime. These policies are examined in light of the relevant provisions of the GATT, the GATS and the NAFTA, as well as the proposed Multilateral Agreement on Investment. Three cases are investigated including: the provisions of the agreement between Canada and the United States resolving the magazine dispute; the CBC proposals to the CRTC concerning the future of the CBC; and the recommendations regarding the Canadian film industry put forward by the Feature Film Advisory Committee. The investigation of these cases reveals that current Canadian cultural policies may be coming perilously close to violating Canada's commitments to trade under the international agreements. Prior to the analysis of the above cases, current policies and programs within the periodical publishing, film and video and public television broadcasting industries are examined so as to provide a context for the analysis of the above cases.
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# Table of Contents

**Foreword** .......................................................................................................................... 1

**Chapter 1 Canadian Culture**

1.1 Introduction .......................................................................................................................... 3
1.2 The Notion of Culture ........................................................................................................... 4
1.3 Contemporary Approach to the Classification of Cultural Activities ............................. 8
1.4 Canadian Federal Government Approach to Culture ...................................................... 11
1.5 The Canadian Cultural Industries ...................................................................................... 22
1.6 Canadian Culture and the United States .......................................................................... 25
1.7 Conclusion .......................................................................................................................... 29

**Chapter 2 Current Canadian Cultural Policy**

2.1 Introduction .......................................................................................................................... 30
2.2 Film and Video .................................................................................................................... 32
2.2.1 Introduction .................................................................................................................... 32
2.2.2 Telefilm Canada ............................................................................................................. 32
2.2.3 National Film Board of Canada ..................................................................................... 36
2.2.4 Canada Council for the Arts ....................................................................................... 39
2.2.5 Department of Canadian Heritage ................................................................................. 40

2.3 Television Broadcasting ..................................................................................................... 45
2.3.1 Introduction .................................................................................................................... 45
2.3.2 The Canadian Radio-television Telecommunications Commission (CRTC) .................... 46
2.3.3 Broadcasting Quotas ....................................................................................................... 49
2.3.4 Program Subsidies .......................................................................................................... 51
2.3.5 The Canadian Broadcasting Corporation (CBC) ............................................................ 58

2.4 Periodical Publishing ......................................................................................................... 64
2.4.1 Introduction .................................................................................................................... 64
2.4.2 Legislative Overview ...................................................................................................... 64
2.4.3 Income Tax Act, Section 19 .......................................................................................... 66
2.4.4 Investment Restrictions ................................................................................................. 68
2.4.5 Other Measures ............................................................................................................. 71
2.4.6 Bill C-55 and the U.S.-Canada Agreement Respecting Periodicals .............................. 72

2.5 Conclusion .......................................................................................................................... 75

**Chapter 3 The Treatment of Culture Under International Agreements**

3.1 Introduction .......................................................................................................................... 78
3.2 The NAFTA ......................................................................................................................... 79
Table of Contents – continued

3.3 The GATT and GATS .................................................................................. 85
  3.3.1 The GATT 1947 ................................................................................. 87
  3.3.2 The GATT 1994 and GATS ................................................................. 91
3.4 The Multilateral Agreement on Investment ................................................. 96
3.5 Conclusion ................................................................................................. 103

Chapter 4 Analysis of Current Canadian Cultural Policy Initiatives in the Context of International Agreements

4.1 Introduction ............................................................................................... 106
4.2 The CBC and the Future of Canadian Public Broadcasting ....................... 108
  4.2.1 Introduction ....................................................................................... 108
  4.2.2 Background ....................................................................................... 111
  4.2.3 The CBC Response to the CRTC’s Review of Canadian Television Policy ........................................................................... 115
  4.2.4 The CBC’s Strategic Plan .................................................................... 118
  4.2.5 Analysis of the CBC’s New Direction under the GATS ..................... 121
  4.2.6 Conclusion ......................................................................................... 124

4.3 The Feature Film Advisory Committee and Canadian Film ....................... 125
  4.3.1 Introduction ....................................................................................... 125
  4.3.2 Background ....................................................................................... 129
  4.3.3 The Recommendations of the Feature Film Advisory Committee .... 132
  4.3.4 Analysis of the Committee’s Recommendations under the GATS and an International Investment Agreement .............................................................. 135
  4.3.5 Conclusion ......................................................................................... 140

4.4 The Canada-U.S. Periodical Dispute ............................................................ 140
  4.4.1 Introduction ....................................................................................... 140
  4.4.2 Background ....................................................................................... 142
  4.4.3 The Canadian Legislation .................................................................... 146
  4.4.4 The Agreement on Periodicals and Bill C-55 ...................................... 154
  4.4.5 Analysis of the Agreement on Periodicals and Bill C-55 under GATT 1994 ................................................................. 157
  4.4.6 Conclusion ......................................................................................... 165

Chapter 5 Conclusion

Bibliography ........................................................................................................ 175

Articles (no stated author) .................................................................................... 175
Articles, Books and News Releases ..................................................................... 175
Statutes and Treaties ............................................................................................ 188
Cases and CRTC Decisions .................................................................................. 189
Foreword

Since the early part of this century, the Canadian government has sought to protect and enhance Canadian culture. Early on, the federal government recognized the potential threat from the U.S. entertainment machine, which produces entertainment products with the efficiency and mastery of a Japanese automobile manufacturer. 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 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.”

Since the middle part of this century, the Canadian government has been one of many governments to embrace the growing trend involving negotiation and implementation of international trading agreements. The new wave of multilateral and regional agreements began by focussing on reducing the protective barriers to trade in goods, but have since grown in scope to cover matters such as intellectual property rights, trade-related investment and trade in services. In addition, certain of these countries have determined their interests entail the further negotiation of additional, often regional, agreements with important trading partners.
Agreements such as the Canada-U.S. Free Trade Agreement and the North American Free Trade Agreement have sought to provide an exemption of sorts for Canada's cultural industries. However, other agreements like the General Agreement on Tariffs and Trade do not specifically address the cultural industries.¹ 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. For instance, with a new international agreement on investment believed to be imminent, there will be increasing pressure on Canada to liberalize portions of its protective policy network relating to foreign investment in the cultural industries. In addition, recent action by the U.S. has demonstrated that several of Canada's policies assisting the magazine sector are in violation of the General Agreement on Tariffs and Trade.² 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.

¹ This statement is to be qualified by noting that Article IV of the General Agreement on Tariffs and Trade, infra note 2, 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.

Chapter 1  Canadian Culture

...“culture” is not a state or condition only, but a process; as in agriculture or horticulture we mean not the condition of the land but the whole round of the farmer’s year, and all that he does in it; “culture,” then, is what remains of men’s past, working on their present, to shape their future.


1.1  Introduction

Prior to engaging in a discussion on the current state of the international trade and investment regime, or a debate on the optimal choice of policy instruments in the cultural industry sector, it will prove useful to examine the views and insights of various commentators regarding what is meant by Canadian culture. Of course, in order to discuss Canadian culture in particular, it will be necessary to briefly explore what is meant by the term, culture, in itself. It will then be possible to observe whether there are any dominant aspects or themes within Canadian culture. Also, it will be helpful to examine the term, cultural industry, as the origin of that phrase is of some interest in the context of the overall discussion.

It is difficult to provide a precise definition for the idea of culture. Sociologists and anthropologists have studied and grappled with the issue for many years, and it would be futile to attempt a comprehensive analysis of culture for the purposes of this thesis. Therefore, an examination of the intricacies and nuances of the definition of culture need not be undertaken here; rather, the better approach is to engage in a review of the observations of a number of commentators, and in this way, arrive at a suitable understanding of what is meant by culture, and then, in particular, what is meant by culture in the Canadian context.
Consequently, it is helpful to begin the review at the broad end of the spectrum with views regarding the interpretation of the notion of culture in a broad sense and then move to those elements of culture that have a particular importance in the Canadian context.

1.2 The Notion of Culture

In the anthropological sense, culture is said to consist of explicit and implicit patterns of behaviour acquired and transmitted by symbols constituting the distinctive achievement of human groups, including their embodiment in artifacts.\(^3\) The essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values; cultural systems may, on the one hand, be considered as products of action, on the other hand, conditioning elements of further action.\(^4\) Culture is therefore important to the ongoing sustainment of ideas and values in societies. Sociologists hold the cultural tradition to be one of the main conceptual components of the social system.\(^5\) They attach to culture a definition similar to the anthropological definition, in which culture is said to exist in those patterns relative to behaviour and the products of human action which may be inherited, that is, passed on from generation to generation independently of the biological genes.\(^6\) However, sociologists tend to focus on those elements of culture that define patterns of behaviour that in turn govern the actions of individuals.\(^7\) These elements are said to be susceptible of institutionalization, thereby forming components of the main structure of the

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\(^4\) Ibid.


\(^6\) Ibid.

\(^7\) Ibid. at 9.
social system itself. With institutions forming the structural “backbone” of social systems, a society’s culture would then essentially determine the configuration of its entire social system.

The components making up the concept of culture are quite varied. A number of social theorists have tried to make particular forms or processes the main dynamic in the historical process inherent in culture, such as ideas; religious beliefs and practices; forms of social organization; forms of technological control of the environment; or forms of intra-family relationships. However, anthropologists, in conceptualizing culture, have tended to take the view that it is best to not engage in a search for the factor capable of being lauded as determinate of culture; rather, they have fairly consistently sought to employ a concept that would avoid commitment to any single component for interpreting sociocultural life and would yet be broad and flexible enough to encompass all of the significant aspects of the life of human groups. Therefore, bearing in mind this reasoning, culture is said to be the embodiment of trends toward uniformity in the words, acts, and artifacts of human groups.

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8 *Ibid.* Parsons states that sociologists are concerned primarily with institutionalization, which he defines as the organization of action around sufficiently stable patterns so that it may be treated as structured from the point of view of the system.


10 In this respect, Kroeber and Kluckhohn provide the examples of Hegel, Weber, Comte, Marx, and Huntington, *supra* note 3 at 355.


In addition to existing within a combination of various determinants, culture may also be viewed as a process in which groups and individuals share and exchange ideas, perceptions, and experiences.\textsuperscript{14} It is the process whereby a society’s collective attitudes, goals and values, are formed and transmitted to succeeding generations.\textsuperscript{15} In this way, culture enables a group of people to exist together and to operate successfully in their particular situation, and persevere into the future.\textsuperscript{16} Therefore, although culture may be thought of as something that is internalized in individuals to whom it is passed on to, it is again something that becomes part of their environment through the medium of other individuals and of cultural products, which are created by individual persons and by groups of persons.\textsuperscript{17}

An additional aspect of culture to which importance is attached is the manner in which it is conveyed to the youth of a society. Kroeber and Kluckhohn liken culture to a personality and argue that just as a personality system acquires its characteristic features early on, so does a cultural system.\textsuperscript{18} They believe that the basic themes of a personality may be more unconscious, whereas the implicit configurations of a culture may be closer to conscious imagery and expressed more openly through observable forms of behaviour and


\textsuperscript{15} \textit{Ibid.}

\textsuperscript{16} \textit{Ibid.}

\textsuperscript{17} Kroeber and Kluckhohn, \textit{supra} note 3 at 367.

\textsuperscript{18} Kroeber and Kluckhohn, \textit{supra} note 3 at 359-60. The authors argue that, in part, what seems to give structure to personality is the incorporation of cultural forms; and underlying and expressing these forms are the basic meanings laid down beginning in early childhood.
expression. Many of the definitions of culture speak of *inheriting* culture, and, since individuals begin to form their cultural understandings early on in life, it is therefore important to incorporate in individuals the basic elements of cultural forms in childhood. Individuals acquire an understanding of cultural forms from society, which come to the individual, not by his or her own creative activity but as a legacy from the past, conveyed by formal or informal education. There are certain concerns that arise regarding a predominant or exclusive focus on the historical and it is therefore necessary to balance these interests with an appropriate focus on the future. Nevertheless, it would seem that without a solid grounding in the historical, the individual would not be in a position to formulate an adequate strategy for the future.

Certain commentators have taken the view that the definition of culture also often incorporates aspects of the defining characteristics of nationhood. This necessarily incorporates a number of other items into the definition of culture that are often used in defining the attributes of nationalism. For instance, emphasis is placed on the recognition of a number of characteristics that make individuals feel part of a collectivity: common

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22 With respect to nationalism and the perceived threat of American encroachment into Canada in a cultural and economic sense, see Grant, where he states, "But a nation does not remain a nation only because it has roots in the past. Memory is never enough to guarantee that a nation can articulate itself in the present. There must be a thrust of intention into the future. When the nation is the intimate neighbour of a dynamic empire, this necessity is even more obvious." George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Ottawa: Carleton University Press, 1988, orig. pub. 1965) at 12.

ethnicity, language, history, customs and religion are most often involved. In terms of the Canadian cultural experience, each of these elements involves diverse, as well as common elements. Canada is comprised of a multitude of ethnic groups; has two official languages (and many “unofficial” languages), incorporates different regional histories; and, although Christian faiths predominate, is home to a number of other religions as well. Therefore, it may be difficult to see how Canada can maintain a claim that the individuals within its society feel part of a collective. In this respect, the recurrent response of many Canadians is that, notwithstanding their many differences from each other, there appears to be a shared desire to differentiate themselves within the North American continent, which is all too often dominated by the United States. Of course, these efforts take different approaches, particularly in the case of French Canadians, who themselves share particular concerns regarding language.

1.3 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. Essentially, cultural activities may be grouped according to whether

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24 Mary Vipond uses these terms to describe the word “nation” as it is used within a European context. Vipond goes on to suggest that culture is rooted in the exchanges facilitated by languages, and, therefore, Canada’s language duality has led some to conclude that Canada has two cultures. Further, she postulates that regionalism and multiculturalism add another wrinkle to the definition of culture. Vipond, ibid. at x-xi.

25 See discussion below at section 1.6.

26 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-commercial. Mass cultural institutions remain of value to society, since they are public communication networks for unofficial culture. Crean, supra note 14 at 16.
or not the activity espouses an industrial strategy, as opposed to being purely cultural 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 Canadian culture 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,” namely films, videos, television and radio programs, books, magazines and sound recordings. Certain of these industries may be involved in both the manufacturing of explicitly cultural products and the electronic diffusion


George Woodcock distinguishes between the arts and the cultural industries, saying that “The 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.


Mary Vipond distinguishes between high culture, including art; literature; architecture; and classical music and popular culture. Vipond, supra note 23 at 101.

27 Of course it is possible for there to be some overlap 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.
of cultural programming. Essentially, cultural products or programs may be identified as those which directly express attitudes, opinions, ideas, values and artistic creativity; provide entertainment; and offer information and analysis concerning past and present. 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.

At this point it is useful to examine briefly the origin of the term, "cultural industry." The term originated in a work by Max Horkheimer and Theodor W. Adorno, 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. The authors believe that much of the so-called variety of the sectors within the culture industries is false in the sense that the supposed differentiations depended not so much on subject matter as on classifying, organizing and labelling consumers – "something is provided to all so that none may escape." The "mass-production" nature of

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29 Ibid. Audley states that culture can be expressed not just in works of art or entertainment, but in all forms of expression that reflect attitudes, opinions, values and ideas, and in information and analysis concerning the present as well as the past.

30 Adam, supra note 26 at 77.


32 Ibid. at 120. Horkheimer and Adorno also distinguish between the "culture industries" and true art, and say that there can be little doubt as to the true business and industrial nature of sectors such as motion pictures and radio.

33 Ibid. at 123.
the culture industries facilitates a comparison with other manufacturing industries such as automobiles, where marked differences among products are often slight.\(^{34}\) There are a number of somewhat disturbing contemporary truths to the observations advanced by the authors, notwithstanding the fact that over fifty years have elapsed since the original publication of their observations.\(^{35}\) Indeed, the extent to which the authors identify the power of the industry and its ability to segment the market by producing a plethora of products to satisfy virtually every consumer preference aptly depicts the U.S. entertainment industry of today. Concerns regarding the influence that this powerful industry may have on countries such as Canada have led to the formulation of specific government policy with respect to domestic culture.

1.4 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

\(^{34}\) *Ibid.* The authors state, "What connoisseurs discuss as good or bad points serve only to perpetuate the semblance of competition and range of choice. The same applies to the Warner Brothers and Metro Goldwyn Mayer productions. But even the differences between the more expensive and cheaper models put out by the same firm steadily diminish: for automobiles, there are such difference as the number of cylinders, cubic capacity, details of patented gadgets; and for films there are the number of stars, the extravagant use of technology, labor, and equipment, and the introduction of the latest psychological formulas."

\(^{35}\) *Ibid.* at 125. The authors state, "Not only are the hit songs, stars, and soap operas cyclically recurrent and rigidly invariable types, but the specific content of the entertainment itself is derived from them and only appears to change. The details are interchangeable. The short interval sequence which was effective in a hit song, the hero’s momentary fall from grace (which he accepts as good sport), the rough treatment which the beloved gets from the male star, the latter’s rugged defiance of the spoilt heiress, are, like all the other details, ready-made cliches to be slotted in anywhere; they never do anything more than fulfill the purpose allotted them in the overall plan."
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\textsuperscript{36} or the Investment Canada Act.\textsuperscript{37}

Finally, there have been myriad Commission, Task Force, and Committee Reports\textsuperscript{38} that have examined various aspects of Canadian cultural policy beginning with the Report of the Royal Commission on Radio Broadcasting (the Aird Commission)\textsuperscript{39} in 1929 and ending most recently with the Report of the Feature Film Advisory Committee in 1999.\textsuperscript{40} In dispensing policy advice, many of these reports have also attempted to define culture in Canada,\textsuperscript{41} and many times, once the recommendations of the Reports have been shaped and acted upon by

\textsuperscript{36} S.C. 1991, c. 11

\textsuperscript{37} R.S.C., 1985, c. 28 (1st Supp.)


\textsuperscript{40} 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].

\textsuperscript{41} In attempting to portray the various aspects to Canadian culture the Applebaum-Hebert Report, supra note 38 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 address the important role played by the federal government in shaping Canadian culture, supra note 38 at 15-34. The Report of the Massey-Lévesque Commission, supra note 38 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 38 at 144-56 and 352-64, along with several other chapters on matters concerning the Canadian universities.
governments, a policy shift or emphasis regarding certain aspects of 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. As the major source of funds for many organizations, the federal

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42 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 the following areas:

- museology;
- cultural and scientific heritage;
- arts;
- literature;
- libraries;
- culture and scientific leisure;
- cultural industries;
- media;
- telecommunication;
- cable television; and
- new age information technologies.


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 Gaétan 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
government is in a position not only to support Canadian culture, but to shape it as well.43 As previously identified, it is the contemporary view that there are essentially two categories that take shape within the overall notion of culture. It is therefore useful to examine, first, whether the federal government subscribes to a similar view and, second, to which constituencies within the cultural sector the government directs its emphasis. With respect to the latter inquiry, the primary focus will be on the financial appropriations of the government with respect to culture. By examining the federal government's budgetary policy choices, it is possible to understand how the government views Canadian culture.

The Canadian Heritage Portfolio was created in June 1993 to consolidate national policies and programs that maintain Canada's cultural sovereignty and promote Canadian identity.44 The Department of Canadian Heritage was later established when the Department 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.

43 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 that 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.

44 The Department is made up of 7 departmental agencies: the Canada Information Office, the Canadian Radio-television and Telecommunications Commission (an independent regulatory agency), the National Archives of Canada, the National Battlefields Commission, the National Film Board of Canada, the National Library of Canada and Status of Women Canada. In addition, the Department is home to ten Crown corporations: the Canada Council for the Arts, the Canadian Broadcasting Corporation, the Canadian Film Development Corporation (Telefilm Canada), the Canadian Race Relations Foundation, the Canadian Museum of Civilization (including the Canadian War Museum), the Canadian Museum of Nature, the National Gallery of Canada (including the Canadian Museum of Contemporary Photography), the National Museum of Science and Technology (including the National Aviation Museum and Agriculture Museum), the National Arts Centre and the National Capital Commission. See Department of Canadian Heritage at http://www.pch.gc.ca/mindep/english.htm.
of Canadian Heritage Act\(^{45}\) was proclaimed in July 1996. The Department has become responsible for all matters relating to Canadian heritage. Its mandate\(^{46}\) 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.\(^{47}\)

The Department's activities are grouped within three "Business Lines," of which the Cultural Development and Heritage Business Line\(^{48}\) is devoted to four "Product/Service

\(^{45}\) S.C. 1996, C-17.3.

\(^{46}\) 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

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(d) cultural heritage and industries, including performing arts, visual and audio-visual arts, publishing, sound recording, film, video and literature;

\(^{47}\) Ibid.

\(^{48}\) The remaining business lines are the Canadian Identity Business Line and the Corporate Management Business Line.

The Canadian Identity Program attempts to foster knowledge and appreciation of the institutions and achievements of Canadians, symbols of Canada and the values they represent, the country's linguistic duality and multicultural character, as well as the contribution made to Canada by Aboriginal peoples. The program also promotes civic participation and volunteerism, social justice, mutual understanding, human rights, the learning of both official languages, excellence in amateur sport and recognition of Canadian athletes, and the commemoration of national events as a means of strengthening and celebrating Canada. See Department of Canadian Heritage, infra note 64 at 44.
Lines,” namely, broadcasting; the cultural industries; arts; and heritage. Within the Cultural Development and Heritage Business Line, a distinction is made between the “industrial” and “non-industrial” cultural activities. Broadcasting and cultural industries are the responsibility of the Assistant Deputy Minister of Cultural Development, while arts and heritage are the responsibility of the Assistant Deputy Minister of Arts and Heritage. Within the Cultural Development area, three policy branches are devoted to different aspects of the cultural industries. Within the arts and heritage area two policy branches deliver services to the arts community. Therefore, in terms of the organizational structure of its primary cultural department, the Canadian government has seen fit to differentiate between industrial and non-industrial cultural activities. It is also clear that the government has decided to embrace Corporate Management provides advice as well as services and products to other sections of the Department that deal with planning and policy coordination; management of finances, human resources and information; communications and public affairs; corporate review; administrative support; and regional offices. In addition, it promotes the Department’s activities in collaboration with its agencies and crown corporations, as well as through active exchanges with other federal departments, the provinces and territories, and the international community. Corporate Management also coordinates Canada’s participation in international expositions related to the Department’s activities. Department of Canadian Heritage, infra note 64 at 60.


50 The Broadcasting Policy Branch is responsible for issues surrounding the development and operation of Canada’s broadcasting system. The Broadcasting Policy Branch develops policies, and monitors and advises on issues, which include Canadian content, access to services, multimedia and competition. The Branch also provides the Minister with policy advice pertaining to the Canadian Broadcasting Corporation (CBC) and the Canadian Radio-television and Telecommunications Commission (CRTC).

The Cultural Industries Branch develops policies and programs to strengthen Canada’s cultural industries and ensures access to Canadian films, videos, books, magazines and sound recordings. The Branch is also responsible for copyright policy, and advises the Minister on policies affecting Telefilm Canada and the National Film Board.

The Trade and Investment Branch develops policies and programs to help Canadian cultural industries export their products and services abroad.

51 The Arts Policy Branch develops national strategies and policies to assist Canadian artists and non-profit cultural organizations, and facilitates the development of the arts sector. It also advises the Minister on policies regarding the Canada Council for the Arts and the National Arts Centre.

The Heritage Branch promotes the preservation and public display of objects and collections reflecting our cultural, scientific and natural heritage. It also works closely with agencies and Crown Corporations such as the four national museums, the National Archives of Canada and the National Library of Canada.
the cultural industries as an equally important and necessary component of Canadian cultural heritage to be given similar priorities as the arts.

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. 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

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52 The Canadian Heritage Portfolio accounts for the majority of funding directed at the cultural sector; however, Industry Canada is also involved in the provision of resources through its Industry Sector Development Business Line, which attempts to help firms, including those producing cultural products, compete by providing assistance with respect matters including trade, investment, technology, human resource development and sustainable development. As well, the Department of Foreign Affairs and International Trade (DFAIT) provides a number of trade and marketing related services to organizations and firms within the cultural sector that may be interested in exporting their products. For instance, within the DFAIT, the Team Canada Market Research Centre prepares reports designed to make firms aware of topics such as market opportunities, trade barriers and industry contacts. Further, the Arts and Cultural Industries Promotion division of DFAIT deals directly with the promotion of Canadian culture abroad.

53 The Canadian Broadcasting Corporation will receive $903.9 million; the Canadian Radio-television and Telecommunications Commission (CRTC) will receive $5.9 million; the National Film Board will receive $59.5 million; and Telefilm Canada will receive $78.7 million. See Canadian Heritage, supra note 48 at 2. Available: http://www.pch.gc.ca/english.htm. See also Canadian Heritage Portfolio funding allocations chart, infra page 21.

54 The Canada Council for the Arts will receive $116.5 million; the Canadian Museum of Civilization will receive $46.3 million; the Canadian Museum of Nature will receive $20.5 million; the National Arts Centre will receive $21.5 million; the National Gallery of Canada will receive $32.5 million; and the National Museum of Science and Technology will receive $19.7 million. See Canadian Heritage, supra note 48 at 2. See also Canadian Heritage Portfolio funding allocations chart, infra page 21.

55 Of this amount, Arts and Heritage will receive $48.9; Cultural Development will receive $225.1; Canadian Identity will receive $486.5; Strategic Management will receive $25.6; and Corporate Services will receive $48.5. See Canadian Heritage, supra note 49 at 43. See also Canadian Heritage Portfolio funding allocations chart, infra page 20.
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. It is evident that the 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 that this spending is substantially more than that allocated to the more traditional arts organizations. It is also evident that of the funds allocated to the Department of Canadian Heritage by the overall Canadian Heritage Portfolio, the cultural industries account for a significant portion of these funds.

Of the Department of Canadian Heritage’s Business Lines, Cultural Development and Heritage would still appear to rank second, in terms of funding, to the Canadian Identity Business Line. However, when one considers the direct transfers made by the Canadian Heritage Portfolio to organizations such as CBC and Telefilm Canada, the funding provided to the Canadian Identity Business Line is less than half the amount allocated to the cultural industries. Even if one considers the direct transfers by the Canadian Heritage Portfolio to organizations that support activities similar to those maintained by the Canadian Identity Business Line, the figures continue to support the conclusion that the majority of funding is

56 The Arts component will receive $23.1 million, while the Heritage component will receive $25.8 million.

57 It could be argued that broadcasting is in fact a part of the cultural industries, at least for the purposes of speaking of funding allocations.

58 Cultural Development and Heritage will receive $274 million, of which allocations to the cultural industries will amount to $225.1 million, while Canadian Identity will receive $486.5 million. See Department of Canadian Heritage, supra note 49 at 43 and 46.

59 The Canadian Identity Business is described above, supra note 48.

60 It was previously determined that $1 048 million would flow directly from the Canadian Heritage Portfolio to organizations operating within the cultural industries, supra note 52. This amount combined with the $225.1 million, which the Cultural Development and Heritage Business Line will allocate to the cultural industries, means that the total funding allocated to the cultural industries will be $1 273.1 million.
directed to the cultural industries. The following chart details the spending allocations made by the Canadian Heritage Portfolio to the cultural industries and to arts organizations and other organizations concerned with promoting Canadian identity. It is evident from the chart that even when spending allocations to organizations that might be thought of as being generally supportive of Canadian identity activities are combined with allocations to non-industrial cultural organizations, the total allocations amount to only seventy-five per cent of the allocations to the cultural industries.

If we consider the following organizations as generally supportive of activities similarly supported by the Canadian Identity Business Line, the overall amount of funding allocated to “Canadian identity programs” would increase by $162.3 million to $648.8 million:

National Archives of Canada ($452 million); National Battlefields Commission ($8.4 million); National Capital Commission ($61.2 million); National Library of Canada ($30.4 million); and Status of Women Canada ($17.1 million).

Amounts not detailed on the chart include $107 million provided to the public service commission and $349.2 provided to Parks Canada. These amounts originate from the $2 758.1 million allocated to the Canadian Heritage Portfolio by the Government of Canada.
The amount of $86.5 million directed to museums includes: $19.7 million (National Museum of Science and Technology); $20.5 million (Canadian Museum of Nature); and $46.3 million (Canadian Museum of Civilization).
It is unfortunate that the allocation of funds to the organizations and activities concerned with promoting "Canadian identity" does not account for a greater share of the Canadian Heritage Portfolio's total funding allocations, since the activities of the Canadian Identity Business Line would seem to be more genuinely supportive of Canadian culture. The Canadian Identity Business Line is concerned with Canada's linguistic duality and multicultural character, sport, civic participation, as well as the institutions, symbols and achievements of Canadians. In its Performance Report for the period ending March 31, 1998, the Department of Canadian Heritage stated that an important measure of the cohesiveness and sustainability of a nation is the extent to which its citizens participate in the larger society, exercising the rights and responsibilities of citizenship. Citizen participation might include things such as the level of knowledge citizens have about their country, their society, and the rights and responsibilities they possess. In addition, other indicators of participation would include their actual participation in institutions such as the free press (reading newspapers and magazines), volunteer associations, religious congregations, schools and colleges, professional groups and community organizations.

The federal government appears committed to fostering citizen participation in the fashion described above, as part of its overall commitment to Canadian culture, and consequently, an additional dimension to Canadian culture becomes apparent. This

63 Department of Canadian Heritage, supra note 48.


65 Ibid.
dimension cannot be easily placed within either of the previously discussed industrial or non-industrial cultural forms. Rather, this dimension is based on the idea that the citizens of Canada have access to a multitude of opportunities, which are available, essentially, by virtue of the rights and freedoms the society has adopted and maintains. Indeed, for many people in Canada, this form of citizenship culture may be much more meaningful than either the industrial or non-industrial cultural forms. However, if it is presumed that for the purposes of defining Canadian culture the federal government allocates funds to those areas of the cultural landscape that it believes are key components in the preservation and enhancement of Canadian culture, then it becomes rather plain that the Canadian Heritage Portfolio positions the cultural industries in a very prominent place among the components of Canadian cultural heritage.

1.5 The Canadian Cultural Industries

The cultural industries have been given special attention by the federal government and, in some cases, provincial governments. Beginning in the early 1970s there has been an increasing fusion of industrial, economic and cultural policy. 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.68 The areas of

66 Ibid.

67 Ted Magder observes that 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 43 at 195.

68 Dowler, supra note 26 at 341.
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.69

Within the Canadian film and video sector there has developed an extensive network of programs and policies aimed at cultural development, which attempt to encourage artists to pursue projects of a Canadian nature. It is easiest to classify the various programs in terms of where they originate. These programs originate from several main sources, namely, Telefilm Canada; the National Film Board of Canada; the Canada Council for the Arts; and the Department of Canadian Heritage. At present there are no quotas in place that would impose a minimum level of Canadian films at either the distribution or exhibition levels.70

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

69 Ibid.

70 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 40 at 19. The recommendations of the advisory committee have yet to be acted upon by the federal government.
of restrictions on programming content. Similarly, the policies regarding radio-broadcasting focus on Canadian content provisions. Canadian content quotas for radio are based on the broadcast of a minimum number of musical selections to be aired during the official broadcast day (6:00 a.m. to midnight).

Accompanying the Canadian content quotas on radio is the direct support provided to the creators in the sound recording industry. Radio stations support Canada's music industry through talent development programs and royalty payments, but the primary support program for the sound recording industry is the Sound Recording Development Program (SRDP). The SRDP is intended to strengthen the Canadian sound recording industry by offering assistance for the production, distribution and marketing of Canadian content music products. Assistance is provided for record and video production, business development, marketing and touring. The program is administered by FACTOR MusicAction Canada\textsuperscript{71} on behalf of the Department of Canadian Heritage and by the Canada Council for the Arts.\textsuperscript{72}

In 1996-97, the Canadian book publishing industry published 11,400 new French and English titles; 71\% were by Canadian authors.\textsuperscript{73} The Department of Canadian Heritage develops, implements, and maintains publishing policies and programs in support of books to attempt to create a stronger publishing industry in Canada. The book publishing industry is

\textsuperscript{71}This entity is a private sector consortium composed of FACTOR (Foundation to Assist Canadian Talent on Records), which provides support to the English segment of the Canadian sound recording industry, and MusicAction, its counterpart for the French segment of the industry.


supported by various direct assistance programs and regulatory measures, dating back to the 1970s.\textsuperscript{74} This support is intended to assist Canadian-owned and controlled firms to expand, and to enable them to produce and distribute Canadian authored books.

In recognition of the role 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 a Canadian magazine industry. Long-standing government policies have focussed on two areas: 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.\textsuperscript{75} The Department of Canadian Heritage also develops, implements and maintains publishing policies and programs in support of small community newspapers.

1.6 **Canadian Culture and the United States**

The fact that Canadians often define themselves in relation to the U.S. perhaps reflects the fact that 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

\textsuperscript{74} The Government of Canada established, in the 1970s, direct assistance programs such as the Block Grant Program at the Canada Council and the Book Publishing Industry Development Program (BPIDP) at what is now the Department of Canadian Heritage. The BPIDP provides aid to Canadian publishers and industry associations, as well as international marketing assistance. Department of Canadian Heritage, "Cultural Development," available: http://www.pch.gc.ca/culture/cult_ind/progs/books.htm.

\textsuperscript{75} In June 1997, the Appellate Body of the 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 GATT 1994. 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 in Chapter 4.
Canada is developing into a northern extension of the continental economy, and that the economic links will soon lead to even closer cultural links. 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.\textsuperscript{77} 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.\textsuperscript{78}

There are a number of theories that examine Canada’s situation in relation to the United States by incorporating as their foundation the fact that Canada and the United States share the same geographical continent. Still, the continental approach produces varied results. Some of those who employ this approach take the view that Canada’s position on the North American continent has made it indistinguishable in all important respects from its southern neighbour.\textsuperscript{79} Others take the view that geographical, economic, and institutional

\textsuperscript{76} Grant, \textit{supra} note 22 at 9.

\textsuperscript{77} 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, \textit{supra} note 22 at ix.

\textsuperscript{78} 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 \textit{The Culture of Contemporary Canada}, Julian Park, ed. (Ithaca, New York: Cornell University Press, 1957) 1 at 19.

determinants operating in the Canadian half of the continent have simultaneously contained elements of United States and continental influences in the shaping of a country with its own distinct character and existence.\textsuperscript{80} A third approach views the country as both a community compelled to operate within limits established by its proximity to a great power and as a state, which through judicious conduct of its affairs, is able to manage its relationship with its southern neighbour in ways that are far from being to its disadvantage.\textsuperscript{81}

Much has been made of how Canada has had to endure the seemingly endless onslaught of American entertainment products.\textsuperscript{82} The effectiveness with which American products are produced, marketed and distributed in the entertainment sectors\textsuperscript{83} has made competition by Canadians in the Canadian market in these sectors extremely difficult. Some would argue that Canada was essentially forced to take a defensive position in this regard and

\begin{flushleft}
\textit{Mind} (Montréal & Kingston: McGill-Queen's University Press, 1994) at 4. See also William Watson, \textit{Globalization and the Meaning of Canadian Life} (Toronto: University of Toronto Press Incorporated, 1998) at 131-42 for a discussion of Canadian and American similarities and how these similarities form the basis for the view taken by much of the world that Canadians are largely indistinguishable from Americans.


\textsuperscript{81} John W. Holmes, \textit{Life with Uncle: The Canadian-American Relationship} (Toronto: University of Toronto Press, 1981); William T.R. Fox, \textit{A Continent Apart: The United States and Canada in World Politics} (Toronto, University of Toronto Press, 1985); and Charles F. Foran, \textit{Forgotten Partnership: U.S.-Canada Relations Today} (Baltimore: Johns Hopkins University Press, 1984) and the other works referred to in Smith, \textit{ibid}.

\textsuperscript{82} See generally Allan Smith, \textit{ibid}. For instance see Anthony Smith, \textit{The Geopolitics of Information: How Western Culture Dominates the World} (London: Faber and Faber, 1980) at 37-8, where Smith discusses the pervasiveness of the entertainment industry.

\textsuperscript{83} 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, \textit{The Entertainment Economy} (New York: Random House, 1999).
adopt measures that would assist the Canadian industries in making their voices heard in Canada amidst the clamour emanating from south of the border.\textsuperscript{84} But, does exposure to American culture cause Canadians to substitute American values for their own? Do the attitudes and values expressed through the media become the attitudes and values of the audience? Does communication mean that persuasion, attitudinal change, behaviour modification, and socialization result through the transmission of information?\textsuperscript{85} It certainly does not seem conceivable that a Canadian may be stripped of his or her culture by simply tuning into \textit{ER} instead of \textit{Traders} each week on television. It has been suggested, however, that television, for instance, conditions the viewer in a subtle and often insidious way, creating heroes, myths, and role models, conditioning attitudes to history, traditions, and institutions.\textsuperscript{86} Yet this view is disputed by those who argue that audiences do not passively consume foreign culture.\textsuperscript{87} The only solid conclusion to be drawn is an acknowledgment of

\textsuperscript{84} For instance, see Audley, \textit{supra} note 28 at xxi, where he refers to the underlying assumptions of his study to be essentially the same as those stated by the Canadian Institute for Economic Policy in its 1981 submission to the Federal Cultural Policy Review Committee:

\begin{itemize}
  \item That Canada has no alternative but to strengthen its domestic cultural industries;
  \item That public policy for achieving this purpose should and must reflect a primary concern with cultural objectives; and
  \item That comprehensive and innovative policies for achieving these goals are urgently needed.
\end{itemize}


\textsuperscript{86} Magder refers to a lecture presented by Peter A. Hermdorf at the Stratford Festival Lecture Series, 19 August, 1984. See Magder, \textit{supra} note 43 at 45. Furthermore, Harold Innis has argued that any civilization may be understood as a function of its principal medium of communication, (which, arguably, television has become for those living in the late twentieth century) and that such media act as the primary determinants of institutional, cultural and social formation. See Harold Innis, \textit{Empire and Communications} (Toronto: University of Toronto Press, 1950); and Harold Innis, \textit{The Bias of Communication} (Toronto: University of Toronto Press, 1951).

\textsuperscript{87} Magder states that, “...recent media scholarship has come to general agreement around the following point: audiences do not passively receive media messages; rather, they ‘negotiate’ and interpret them in various ways. Audiences are active, and the meaning of any media text ultimately resides in the interaction between text and reader. ... In other words, whatever happens in the process of mediated communication, it is rarely, if ever, as simple as ‘message sent equals message received.’” Magder, \textit{supra} note 43 at 249.
the difficulty involved in determining what exactly goes on in the minds of readers, viewers or listeners when they consume foreign (or domestic) entertainment or cultural products.

1.7 Conclusion

Culture is a subject not easily broached. Culture can mean many varying social actions including aesthetic arts; government institutions; technical processes; stories; social conduct; or, production and preparation of food. It can also mean countless other things. It can be transmitted in numerous ways and is valuable to every person in every society in the world. The task of identifying what is meant by Canadian culture is equally is problematic. Yet, it is possible to point to three divisions in contemporary Canadian culture within which many of the modern cultural activities can be placed. First, Canada holds the traditional arts as an important aspect of its culture. In addition, Canada also identifies certain popular cultural activities to which an industrial mandate is also affixed. Finally, Canada recognizes the importance of cultural activities relating to citizenship participation. These three categories will be useful in the forthcoming discussion relating to the external pressures experienced by Canada in its struggle to maintain and enhance its cultural heritage.
Chapter 2  Current Canadian Cultural Policy

The construction of the road was the result of the direction of energy to the conquest of geographic barriers. The effects of the road were measured to some extent by the changes in the strength and character of that civilization in the period following construction.


Many strands, both material and spiritual, hold this country together; Time and “America’s Funniest Home Videos” cannot destroy it.


2.1  Introduction

The previous chapter provided a conceptual overview of the notion of culture, categorizing it into three separate, but not necessarily distinct, forms. One of these forms, which incorporates the industrial aspect of culture, has become an increasingly important presence in Canadian society’s perceptions of the overall sense of its culture, and as such it has garnered governments’ support to maintain and enhance its presence in the cultural realm. Federal government policy in this area 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 those within the two other categories of cultural forms. The primary “cultural industries” include films and video; radio and television
programs; sound recordings; books, newspapers and magazines. 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.

As noted in the previous chapter, 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
- Other Legislative Measures

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. The discussion will be confined to the most significant and integral of the programs and policies within three sectors of the cultural industries, namely film and video; periodical publishing; and public television broadcasting. The purpose of this approach is to inform the reader of the extent of

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88 The internet, along with related technologies involving convergence, is surfacing as a supplementary and complementary aspect to several of the cultural industries.
government involvement in these sectors, while at the same time providing an introduction for the case study analyses in Chapter 4. The case study analyses will focus on recent government initiatives in each of the three sectors. These particular sectors have been selected for discussion because each is currently 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. Therefore, the analysis of the government’s policies, programs and other measures in this chapter will be confined to those that are operating in each of these sectors.

2.2 Film and Video

2.2.1 Introduction

Within the Canadian film and video sector there has developed an extensive network of programs and policies aimed at cultural development, many of which specifically encourage artists to pursue projects of a “distinctly Canadian nature.” It is easiest to classify the various programs in terms of where they originate. These points of origin include the following main sources: Telefilm Canada; the National Film Board of Canada; the Canada Council for the Arts; and the Department of Canadian Heritage.

2.2.2 Telefilm Canada

Telefilm Canada is a federal agency dedicated primarily to the development and promotion of the Canadian film and television industries. Most of Telefilm's clients are independent producers, who approach Telefilm with potential projects. Telefilm also provides assistance to Canadian distribution and export companies, as well as a number of
Canadian festivals. Telefilm further supports complementary commercial activities in production and distribution, as well as the promotion and marketing of Canadian productions, their dubbing and subtitling, and the participation of Canadians in international film events through a variety of funds and programs.89

Telefilm Canada originated as the Canadian Film Development Corporation (CFDC), which was established by the federal government in 1967.90 At that time, it was given a $10 million budget to support the Canadian feature film industry. CFDC’s annual budget was progressively increased such that by 1976 it was operating with a $25 million budget.91 In 1983, the CFDC began the administration of the Canadian Broadcast Program Development Fund.92 At the time, foreign productions represented a significant percentage of English language television viewing in Canada, with dramatic programming revealing the most startling numbers.93 In 1984, CFDC was renamed Telefilm Canada (“Telefilm”). In 1986,  

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91 Telefilm had been operating with a $109 million budget in 1995-96, however, this amount was cut to $92.4 million in 1996-97 and to $81.1 in 1997-98. See President of the Treasury Board, Annual Report to Parliament, Crown Corporations and Other Corporate Interests of Canada 1998 (Ottawa: 1999) at 73.

92 The Canadian Broadcast Program Development Fund would eventually amalgamate with the Cable Production Fund to form the Canada Television and Cable Production Fund, which was then renamed the Canadian Television Fund (CTF).


| Percentage distribution of television viewing time by origin and type of program, Fall 1982 |
|---------------------------------------------|-----------------|-----------------|
| Type of program | English stations | French stations |
| | Canadian program | Foreign program | Canadian program | Foreign program |
| Drama | .8 | 40.3 | 5.7 | 36.0 |
| | [… | [… | [… | [… |
| Total | 26.7 | 73.7 | 59.1 | 40.9 |
the Feature Film Fund\textsuperscript{94} was introduced to support the work of Canadian filmmakers, and in 1988, the Feature Film Distribution Fund\textsuperscript{95} was established to offer Canadian distribution companies a line of credit to attempt to ensure market access for Canadian films.\textsuperscript{96}

Telefilm administers a number of key programs relied upon by film-related businesses, which include production, distribution and marketing firms. Essentially, this network of programs functions as subsidies to these firms and others at virtually every level of the film-making process. The major programs include the Loan Guarantee Program;\textsuperscript{97} the Production Revenue Sharing Program;\textsuperscript{98} the Versioning Assistance Fund;\textsuperscript{99} and the Canadian

\textsuperscript{94}The Feature Film Fund was created to promote the production and theatrical distribution of dramatic films with a high level of Canadian content. Telefilm may finance up to 49 per cent of a project’s production budget, but it will normally invest no more than $1.5 million. Telefilm’s participation may take the form of equity investment, secured loans or non-interest-bearing advances. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 4-5.

\textsuperscript{95}The Feature Film Distribution Fund provides distribution companies, which have demonstrated a consistent volume of activity and an ongoing commitment to distribute Canadian theatrical feature films, with assistance for acquisition, marketing and corporate development activities. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 5.


\textsuperscript{97}Created in 1994, the Loan Guarantee Program is designed to provide Canadian financial institutions with loan guarantees of loan applications submitted by Canadian production, distribution and foreign sales companies. Telefilm supplies an evaluation of the risks associated with each project. The total amount of Telefilm’s guarantees outstanding at any one time will not exceed $25 million. The Loan Guarantee Program is intended primarily for small and medium-sized companies that would otherwise be unable to obtain loans in the private sector. The program is directed essentially toward production, distribution and foreign sales projects or corporate development of eligible companies. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 5.

\textsuperscript{98}The Production Revenue Sharing Program was introduced in 1990 to reward production companies that provide Telefilm Canada with an above-average rate of return on its investments. The Program allows eligible production companies to obtain 50 per cent of the revenues earned by Telefilm from its investments for use as a development advance or as a complement to the production financing of projects in which Telefilm is participating. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 5-6.

\textsuperscript{99}The Versioning Assistance Fund is available to distribution and foreign sales companies in the form of an interest-free advance. Telefilm financially assists with up to 100 per cent of the costs of dubbing or subtitling in one or both of Canada’s two official languages for Canadian productions aimed at foreign and domestic markets and foreign productions for Canadian markets. Telefilm then recovers 40 per cent of its participation in the
Production Marketing Assistance Fund. Telefilm also provides funds to Canadian festivals and coordinates Canadian participation in international festivals and other international events. Telefilm had been criticized for its tendency of concentrating its program spending in Toronto and Montreal. In an effort to appease regional interests, Telefilm has committed itself to decentralizing its organizational structure and devoting more funding to regional production. 

Telefilm has yet to meet with economic success losing $150.4 million in 1997/98 alone, the largest loss among all federal crown corporations. Those who focus on the costs of dubbing or subtitling of a feature film, and 50 per cent in the case of a television program. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 6.

100 The Canadian Production Marketing Assistance Fund seeks to promote Canadian works and facilitates their access to professional marketing techniques. Telefilm participates financially in the marketing strategies of eligible Canadian distributors and foreign sales companies. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 6.

101 The projects must provide a prominent position to Canadian films at the Canadian festivals, as well as encourage the promotion and marketing of Canadian productions in the target territory. The amount of Telefilm’s subsidy will be based on a number of factors, including how well the event meets the objectives of the Fund. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 7.

102 Telefilm pays the costs associated with submission of films to festivals and shipping materials and covers the travel expenses of filmmakers whose works are selected for official competition or for an important category in a major festival. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 7. Telefilm also takes responsibility for administering all international agreements governing official co-productions on behalf of the Government of Canada. The official co-production agreements signed between Canada and 52 other countries enable Canadian and foreign producers to pool their resources in order to co-produce films and television programs that have national production status in each of the countries involved. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 6.


104 Dafoe, ibid.

105 Telefilm also lost $136.4 million in 1996/97. See President of the Treasury Board, supra note 91 at 73. Telefilm, records its investments in movies and TV shows not as assets but as straight expenses, in recognition of the high-risk nature of making films and television programs in Canada. See Alan Toulin, “More film funding damned by critics” The National Post [National Edition] (22 January 1999) C6. Danny Chalifour,
bottom line take the view that the box office returns in Canada do not justify putting additional tax dollars into the Canadian film industry. Commercial film-makers have met with some success, but it is generally the case that this success is achieved by directing productions to international audiences.

2.2.3 National Film Board of Canada

The National Film Board of Canada (NFB) is a producer and distributor of Canadian audiovisual materials rather than a funding agency. The NFB was originally created by an Act of Parliament in 1939. The NFB's current legislative mandate is to promote the production and distribution of audiovisual works that interpret Canada to Canadians and to other nations. In its mission statement, the Board expresses its mandate as follows:

The National Film Board of Canada enriches Canadian society through the production and distribution of audio-visual works which: provoke discussion and debate on important topics; explore the creative potential of the audio-visual media; and

Telefilm's director of finance and administration, acknowledged that the purpose of Telefilm is for government to take the losses nobody else is willing to take, but that it would be unfair to compare the Telefilm to other Crown corporations, many of which have a mandate to be commercially successful. See Alan Toulin, "Home-grown films cost taxpayers $150M" The National Post [Toronto Edition] (17 December 1998) A7.

The criticism stemmed from a recommendation contained in the report of the Feature Film Advisory Committee that recommended tax breaks and direct subsidies as a way of expanding the Canadian movie business. Toulin, "More film funding damned by critics," ibid. The report recommended a $150 million increase in funding to foster the development of small-budget Canadian feature films. See Murray Whyte, "Report urges money for filmmakers" The National Post [National Edition] (22 January 1999) B3. The recommendations in the report will be discussed further in Chapter 4.

Companies like Atlantis Films Ltd., Alliance Films (now merged) and Cinar Films Inc. are often cited as examples of successful Canadian filmmakers. Regarding the success of Cinar's shares on the NASDAQ stock market, see Paul Bagnell, "Cinar climbs as PBS seen airing a fourth show" The National Post [Toronto Edition] (8 June 1999) D1, D3.


National Film Act, 1939, S.C. 1939, c. 20.

National Film Act, R.S.C. 1985, c. N-7, s. 9, as amended.
achieve recognition by Canadians and others for excellence, relevance and innovation.\textsuperscript{111}

The NFB is split into an English Program and a French Program, which both function essentially as subsidies to the film industry, with support being provided to projects deemed suitable under the NFB’s mandate. In this respect the financial support from the NFB is tied to suitability of the project, and therefore it could not be said that the NFB provides outright subsidies to the industry. Nevertheless, the support provided by the NFB encourages production of films that would otherwise be unlikely to be financed. The English Program assists independent filmmakers through the Filmmaker Assistance Program (FAP)\textsuperscript{112} and Aboriginal Filmmaking Program.\textsuperscript{113} The French Program assists filmmakers through the Aide au cinéma indépendant;\textsuperscript{114} Cinéaste Autochtone;\textsuperscript{115} and Cinéaste Recherché(e).\textsuperscript{116} A

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{111} \textit{A Guide to Federal Programs for the Film and Video Sector, supra} note 90 at 10.
\item \textsuperscript{112} FAP offers assistance for the production of films from all over Canada. FAP is available exclusively to emerging filmmakers in the production of documentaries, short dramas and animation films. Generally, FAP offers assistance toward the cost of equipment rentals, film stock, processing, printing and post-production services, with any internal NFB services being calculated as part of the FAP funding. See \textit{A Guide to Federal Programs for the Film and Video Sector, supra} note 90 at 11.
\item \textsuperscript{113} The NFB provides $1 million annually to be used exclusively for NFB productions or co-productions with independent Aboriginal filmmakers. The Program aims to provide Aboriginal filmmakers with more equitable opportunities to make films, with the main focus on documentary productions. See \textit{A Guide to Federal Programs for the Film and Video Sector, supra} note 90 at 11.
\item \textsuperscript{114} The Aide au cinéma indépendant (ACIC), which is essentially the French version of FAP, encourages the development of the next generation of French-language filmmakers. See \textit{A Guide to Federal Programs for the Film and Video Sector, supra} note 90 at 11.
\item \textsuperscript{115} The NFB’s French Program offers the opportunity for a French-speaking Aboriginal person to make his or her first film, with the support of a professional team including an experienced NFB filmmaker. See \textit{A Guide to Federal Programs for the Film and Video Sector, supra} note 90 at 11-12.
\item \textsuperscript{116} Cinéaste Recherché(e) is a one-year internship program that allows the successful candidate to direct his/her first animated film. See \textit{A Guide to Federal Programs for the Film and Video Sector, supra} note 90 at 12.
\end{itemize}
\end{footnotesize}
co-production policy applies to both the English and French Programs, with selection of suitable projects based on whether the productions satisfy the NFB mandate.

Despite somewhat of a renaissance in the early 1990s, in recent years, the NFB has encountered a number of difficulties. The quality and appropriateness of its productions have been increasingly brought into question. This criticism appears to originate from the growing belief that such films are the inevitable results of a system that is influenced to a great extent by vociferous fringe groups. In the era of budgetary restraint the NFB was also not immune to cutbacks, and in recent years the NFB has experienced cuts to funding from the federal government to the extent of $35 million, leading some commentators to question whether the NFB’s role needs to be redefined given these new constraints. There is speculation that the federal government will seek to redirect funding from the NFB to the more vibrant private feature film industry. The lack of public outcry over the cuts to the NFB’s funding leads one to believe that the NFB may indeed be out of touch with Canada’s cultural needs and that such needs may be better served by the private feature film industry.

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117 Under the Co-Production Policy, the NFB participates in co-productions by contributing creatively to a film’s editorial content and by providing financial and technical resources. The NFB also negotiates appropriate Canadian and/or international distribution rights. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 10.

118 Since the appearance of specialty channels in 1987, the NFB began to use some of these channels, along with the established ones, as a supplement to its traditional distribution system in an effort to promote awareness of its work among Canadians. See Canadian Press, “NFB finds new life on small screen” The Globe and Mail [Metro Edition] (12 September 1992) C5.


122 Ibid.
2.2.4 Canada Council for the Arts

The Canada Council is an independent, arm's length organization, which was created by the federal government in 1957 to foster and promote the arts. The creation of the Canada Council was one of the recommendations contained in the 1951 Massey-Lévesque Report. Again by way of direct and indirect subsidies, the Council provides grants and services to professional Canadian artists and arts organizations.

The programs administered by the Canada Council are directed toward artists who have committed themselves professionally to the making of art. The programs include a variety of grants to artists in a number of different fields. Recently, the Canada Council

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123 Canada Council Act, S.C. 1957, c. 3.

124 Massey-Lévesque Report, supra note 38 at 377-82.

125 Grants to Individual Artists in Media Arts assist independent video artists, film artists, or new media and audio artists. The grants are intended to support artistic expression through innovation and experimentation with form, content or technology in a variety of genres. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 13.

Grants for First Productions in Media Arts supports emerging media artists' first independent professional film, video, audio or new media productions by providing up to $16,000 to pay eligible production costs. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 14.

Travel Grants for Individual Media Artists are available in amounts up to $1,000 and are intended to assist independent media artists to travel with their works to festivals or exhibition venues, or on occasions important to their professional development. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 14.

Project Grants to Production Organizations for Media Arts Development subsidizes projects initiated by Canadian non-profit, artist-run organizations that are intended to provide opportunities for the production of independent media artworks by Canadian artists. The program provides up to $20,000 to successful applicants to cover production expenses. The grants may also be used to provide direct financial support to artists. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 14.

Presentation, Circulation and Distribution Project Grants assist non-profit Canadian arts organizations, festivals and groups to undertake short-term projects. The program is aimed at projects that present independent Canadian media artworks in a critical context to audiences via curated events, festivals, touring exhibitions, and other such venues. These grants contribute to costs such as programmers, curators and artists fees, rental of films and videos, and marketing costs. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 15.
was criticized for providing funding assistance to a soft-porn film. The Council has stated that it will review its rules governing grants to independent films.

2.2.5 Department of Canadian Heritage

As discussed previously in Chapter 1, the Department of Canadian Heritage is responsible for a number of the policies and programs respecting the cultural industries. It administers a number of programs designed to provide financial assistance to the film and video sector.

Canadian Film or Video Production Tax Credit

Within the Cultural Industries Branch, the Canadian Audio-Visual Certification Office (CAVCO) administers the Canadian Film or Video Production Tax Credit (CPTC). The CPTC is a fully refundable tax credit for eligible films and videos produced and owned

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An Annual Assistance for Programming assists Canadian non-profit, artist-run organizations that present independent Canadian media artworks to the public through an ongoing annual program of presentation. These grants contribute to the direct costs of research, presentation, curatorial text and audience development. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 15.

Annual Assistance to Distribution Organizations provides subsidies to Canadian non-profit, artist-run media arts distribution organizations, which assist Canadian artists who are producing independent film, video, new media and audio artworks. The assistance covers the costs of distribution activities and services (including acquisition), promotional activities and services and administration. See A Guide to Federal Programs for the Film and Video Sector, supra note 90 at 16.


127 Ibid.

128 Support of the Canadian Film or Video Production Tax Credit Program is recognized by a new screen credit, the Canada Wordmark Screen Credit in the tail credits of productions.
by qualified taxable Canadian corporations. The tax credit could provide assistance for up to 12 per cent of the cost of a production, net of assistance.

The CPTC encourages the employment of Canadian creative personnel since in order for a production to qualify as Canadian content for tax credit purposes through CAVCO, the production must meet certain criteria for key creative personnel and project costs. The cost criteria for a Canadian content production states that not less than 75 per cent of the costs paid to persons for services provided related to the film or video must be paid to Canadians. This amount does not include fees paid to the producer and the key creative personnel, which are both subject to special requirements. Furthermore, not less than 75 per cent of the aggregate cost of post-production and laboratory work, processing and final preparation must be incurred in Canada. The tax credit schemes operated by the federal

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129 The CPTC is available at a rate of 25 per cent of eligible salaries and wages expended after 1994; however, eligible salaries and wages qualifying for the tax credit may not exceed 48 per cent of the cost of the production, net of assistance.

130 First, the producer (or the individual who controls and is the central decision-maker of the visual production from beginning to end) must be Canadian. Furthermore, a production must receive 6 out of the following 10 points for Canadians in key creative positions:

- Director - 2 points
- Screenwriter - 2 points
- Lead Performer - 1 point
- Second Lead Performer - 1 point
- Director of Photography - 1 point
- Picture Editor - 1 point
- Music Composer - 1 point
- Art Director - 1 point

In addition, either the position of screenwriter or director must be filled by a Canadian. It is also mandatory that either the lead or second lead performer be Canadian.

131 Ibid.
government have quickly become the second-largest source of public funding for film and TV.132

**Film or Video Production Services Tax Credit**

In July 1997, the federal government announced a new program in support of film and video production in Canada, with administrative support to be provided by CAVCO.133 The Film or Video Production Services Tax Credit (PSTC) is not to be confused with the Canadian Film or Video Production Tax Credit, which was previously discussed. The PSTC is a mechanism designed to encourage the employment of Canadians by a taxable Canadian or a foreign-owned corporation with a permanent establishment in Canada.134 The activities of the corporation must be primarily film or video production or production services. The program therefore attempts to make Canada a more attractive place for foreign film and video production, and in this sense has been met with some controversy, since it in effect provides Canadian taxpayer subsidies to foreign productions.135 The Report of the Feature Film Advisory Committee, released in January 1999, contained a recommendation to restrict

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133 The PSTC may not be claimed where the Canadian Film or Video Production Tax Credit has been claimed.

134 The tax credit is equal to 11 per cent of salary and wages, paid to Canadian residents, or taxable Canadian corporations for amounts paid to employees who are Canadian residents, for services provided to certain productions in Canada. The refundable tax credit has no cap on the amount that can be claimed. The total cost incurred for the production must exceed $1 million. In the case of series, the total cost must exceed $100,000 ($200,000) per one-half hour (one hour) episode.

access of the tax credit to "Canadian feature film producers producing Canadian feature films for theatrical release."\textsuperscript{136}

**Cultural Industries Development Fund**

The Cultural Industries Development Fund provides subsidies to entrepreneurs working in film and video production, as well as other sectors of the cultural industries. Its objective is to support Canadian cultural production by providing a range of financial services, especially term loans to Canadian-owned cultural businesses. The Fund is sponsored by the Department of Canadian Heritage, but administered by the Business Development Bank of Canada. Support offered by the Fund consists of loans ranging from $20,000 to $250,000 for working capital, expansion projects and various other initiatives geared to long-term growth and viability.\textsuperscript{137}

**Canadian Studies Program - Film and Audio-Visual Learning Materials Development Program**

The Department of Canadian Heritage is also responsible for the Canadian Studies Program, which was established in 1984 with the mandate to encourage Canadians to learn about Canada. The program administers five funding components designed to support the development of a variety of learning materials, for use at any educational level, or for the general public, in specific content areas considered to be underdeveloped or neglected in the field of Canadian studies. One of the funding components is Film and Audio-Visual

\textsuperscript{136} Report of the Feature Film Advisory Committee, supra note 40 at 9.

\textsuperscript{137} These funds are accessible by a minimum 75 per cent Canadian-owned company that has been in business for at least two years — or operated by persons with prior pertinent industry experience. A firm must also have adequate financial resources to ensure payment of all debts and loans assumed by the company.
Learning Materials Development Program, which provides support for up to 50 per cent of the preparation and production costs of film, audio and audiovisual learning materials.\textsuperscript{138}

**Canadian Independent Film and Video Fund**

The Canadian Independent Film and Video Fund (CIFVF) is a national private sector non-profit organization established in 1991. A large portion of the funding for the CIFVF originally came from the federal government; however, the Fund was able to continue with private funding\textsuperscript{139} when government funding was significantly reduced.\textsuperscript{140} The CIFVF attempts to foster the development and production of informational, educational and documentary films and videos. The CIFVF provides financial assistance to independent producers for the development and production of English and French films and videos in a variety of subject areas using the formats of documentary, docu-drama, drama and animation.\textsuperscript{141}

\textsuperscript{138} The program provides funding to national voluntary organizations, Canadian film companies, provincial and territorial departments or organizations, educational institutions or individual Canadians.

\textsuperscript{139} Examples of private sector firms that have provided funding to the CIFVF include the Stentor alliance of Canadian telecommunications companies; Fundy Communications Inc.; and Star Choice Television Network.

\textsuperscript{140} The NFB's chairperson, Joan Pennefeather, presented the option of having the CIFVF continue with private funding at the CRTC hearings in 1993. See Harvey Enchin, "Cable TV blasted at CRTC hearings" *The Globe and Mail* [Metro Edition] (2 March 1993) B1.

\textsuperscript{141} To ensure that production in both official languages is promoted through the Fund, at least one-third of the Fund's money assists original French-language productions. The Fund also attempts to ensure regional parity by devoting one-fifth of its funds to each of the following regions: Atlantic and Northern Canada, British Columbia, the Prairies, Ontario and Quebec.
An eligible film, video or series must be bound primarily for certain viewer markets\textsuperscript{142} in order to qualify for funding under the CIFVF.\textsuperscript{143} A project must achieve Canadian content status, with no less than eight points, according to the CAVCO guidelines.\textsuperscript{144} As well, certain other conditions must be met in order to qualify for funding.\textsuperscript{145}

2.3 Television Broadcasting

2.3.1 Introduction

Cultural policy with respect to the broadcasting sector essentially reflects a dichotomy between programs designed to encourage the production of Canadian shows to air on television or radio and regulation stipulating the amount of programming aired on Canadian television or radio stations which must be of a Canadian nature. The Department of Canadian Heritage’s Broadcasting Policy and Innovation Branch attempts to ensure the sustainable development and operation of Canada’s broadcasting system. The Branch develops policies, proposes legislation, and monitors and advises on issues such as Canadian content, access to services, multimedia and competition. The Branch also provides the Minister with policy advice pertaining to the Canadian Broadcasting

\textsuperscript{142} These markets include educational or specialty television; business; education (kindergarten to university level); health; libraries; community groups; and cultural or social services.

\textsuperscript{143} The Fund provides a grant for up to 49 per cent of the direct costs of a budget for a development or production project. For development, the Fund may contribute up to a maximum of 49 per cent of the development budget or $10,000, whichever is lower. Similarly, in relation to production, the Fund may contribute up to a maximum of 49 per cent of the production costs or $50,000.

\textsuperscript{144} CTF Guidelines, infra note 181 and surrounding text.

\textsuperscript{145} The applicant to the CIFVF must be the producer of the project. This individual must be a Canadian citizen or permanent resident. As well, the production company or the non-profit production organization must be Canadian-owned and controlled.
Corporation (CBC) and the Canadian Radio-television and Telecommunications Commission (CRTC).\footnote{Department of Canadian Heritage, \textit{supra} note 64 at 23.}

### 2.3.2 The Canadian Radio-television Telecommunications Commission (CRTC)

In 1976 the \textit{Canadian Radio-television and Telecommunications Commission Act}\footnote{S.C. 1974-75-76, c. 49.} was proclaimed establishing the CRTC. At that time, the legislation also called for the transfer of responsibility for regulating the federally chartered telecommunications carriers from the Canadian Transport Commission to the CRTC. The Commission is an independent agency with administrative and quasi-judicial authority, operating at "arms length" from government and reporting directly to Parliament through the Minister of Canadian Heritage.\footnote{CRTC, \textit{A Short History of Broadcasting Regulation in Canada and the CRTC}. Available: http://www.crtc.gc.ca/ENG/INFO_SHT/g15e.htm.} 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 derives its regulatory authority over broadcasting from the \textit{Broadcasting Act}.\footnote{S.C. 1991, c. 11.} Its telecommunications regulatory powers are derived primarily from the \textit{Telecommunications Act},\footnote{S.C. 1993, c. 38.} along with various other acts of Parliament, created for specific telecommunications companies.\footnote{Such special acts explicitly make specified activities or functions of those companies subject to the authority of the CRTC. These include the Bell Canada Act, the Telesat Canada Reorganization and Divestiture Act, and the Teleglobe Canada Reorganization and Divestiture Act. See CRTC, \textit{Guide to the CRTC}, Available: http://www.crtc.gc.ca/ENG/BACKGRND/guide_e.htm.} 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. The CRTC also regulates over 85 telecommunications common carriers, including all major Canadian telephone companies and satellite service providers.

In the area of broadcasting, the CRTC is responsible for implementing the policies outlined in section 3 of the Broadcasting Act. These policies call for, among other things, Canadian ownership and control of a comprehensive national broadcasting system, offering a variety of programming of high standard and opportunities for the public to be exposed to differing views on matters of concern. It also states that Canadians are entitled to a range of broadcasting services in English and French, as resources become available.

The CRTC is responsible for granting, renewing, or approving changes to the licences of the traditional television stations and networks, pay-TV or specialty services. In recent years, the CRTC has licensed a number of new Canadian specialty and pay-TV services to

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153 Ibid.

154 In the area of telecommunications, the Commission's role is to regulate telecommunications in Canada with a view to implementing the policy set out in section 7 of the Telecommunications Act. This involves attentiveness to both consumers' and Canadian telecommunications carriers' interests. The Commission must ensure that rates, where regulated, are just and reasonable, and that carriers do not unjustly discriminate between customers.

155 S. 3(1)(a), Broadcasting Act

156 S. 3(1)(d), Broadcasting Act

157 S. 3(2)(b), Broadcasting Act
increase the Canadian presence on televisions. With respect to radio services, the CRTC attempts to ensure that a variety of music and information is available throughout Canada. In addition, the CRTC monitors radio and television broadcasters' compliance with Canadian content regulations. Recently, the CRTC publicly acknowledged that it would in no way attempt regulation of the internet.\textsuperscript{158} With the CRTC refraining from regulation in new media areas, one must question how much longer the existing level of regulation can continue in other media, such as television and radio.\textsuperscript{159} At present, the CRTC monitors the Canadian content quotas for radio\textsuperscript{160} and television stations.\textsuperscript{161}

The television industry does not have the variety of subsidy support, as does the film industry. In this respect there is not the wide array of institutional support available; rather, there are a few central programs that have been established and are administered by key

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\textsuperscript{158} The CRTC stated that even though much of the material currently available on the internet would fall within the definition of broadcasting under the \textit{Broadcasting Act}, such material will be exempt from regulation by the CRTC. The CRTC cited a number of reasons for this policy direction, including the Commission's belief that regulation of the internet would not further the objectives of the \textit{Broadcasting Act}, and that the internet functions as a complement, rather than substitute, for traditional broadcasting. In addition, the Commission noted the prominent Canadian presence already on the internet. See CRTC, News Release, "CRTC Won't Regulate The Internet" (17 May 1999) Available: http://www.crtc.gc.ca/ENG/NEWS/RELEASES/1999/R990517e.htm.

\textsuperscript{159} By not regulating this new media form, the commission may have provided an opportunity for two parallel forms of broadcasting to emerge in Canada — one over the traditional airwaves and the other over computer lines. Certainly, traditional broadcasters will argue that they are being subjected to regulation that doesn't allow them to compete effectively with internet broadcasters. See Robert Cribb, "CRTC turns from cultural cop to promoter" \textit{The Toronto Star} [Final edition] (22 May 1999) E1.

\textsuperscript{160} In January 1999, the Canadian content quota of popular music selections on commercial radio was raised to 35 per cent. See \textit{Radio Regulations}, SOR/86-982, 98-597, s. 2.2(8). As well, 65 per cent of vocal music selections broadcast on French-language radio stations must be in French. See \textit{Radio Regulations}, SOR/86-982, 98-597, s. 2.2(5).

\textsuperscript{161} The Regulations address regular, ethnic and remote broadcast stations; pay television stations; and specialty services stations.
agencies. However, what the Canadian television industry lacks by way of variety of subsidy support programs, it gains back by way of quota restrictions on programming content.

2.3.3 Broadcasting Quotas

For the most part, the requirements for television broadcasting are based on programming quotas established by the *Television Broadcasting Regulations, 1987*. These regulations ensure that private television licensees achieve a yearly Canadian content level of at least 60 per cent overall, measured over the broadcast day, and 50 per cent between 6 p.m. and midnight. Pay television, specialty and pay-per-view services have varying Canadian content requirements set by conditions of licence. These requirements depend on a number of factors, including the nature of the service and the types and availability of programming offered, and are reviewed by the CRTC at the time of licence renewal. As a public broadcaster, the CBC must ensure that at least 60 per cent of its program schedule consists of Canadian productions. To qualify as Canadian content, a program is evaluated using criteria based on the producer and key creative personnel used, as well as the

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162 SOR/87-49.

163 *Television Broadcasting Regulations, 1987*, SOR/87-49, s. 4(6). There are other special provisions in section 4 that address ethnic and remote broadcast stations.


165 The CRTC derives its authority to set such quotas from the general wording of section 3 of the *Broadcasting Act* which requires among other things that the Canadian broadcasting system encourage the development of Canadian expression and that public, private and community broadcasters must contribute to the creation and presentation of Canadian programming. Electronic mail message from Lise Plouffe, Manager Client Services, CRTC (14 June 1999).


168 The CRTC uses a point system very similar to the one used by CAVCO in order to determine the relative importance to attach to personnel involved in production. In the case of the CRTC; however, the production is
amounts paid to Canadians for services provided to make the program, amounts spent on post production, and amounts spent in Canada on lab processing.169

Certain aspects of the quota regulations are not supported by all observers. Some observers dispute the practice of simulcasting170 arguing that the purpose is to bolster Canadian broadcasters' advertising revenues allowing them to show the less profitable

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In CRTC, Public Notice CRTC 1984-94, the CRTC adopted the Capital Cost Allowance (CCA) point system and criteria, which was at the time, applied by the Canadian Film and Videotape Certification Office of the Department of Communications (CFVCO) for feature film productions, as the basis for its definition of a Canadian program. CRTC, Public Notice CRTC 1987-28 and CRTC, Public Notice CRTC 1988-105 elaborated on limited aspects of the definition of "Canadian program", namely co-productions and animations respectively.

In CRTC, Public Notice CRTC 1998-59 (19 June 1998), the CRTC proposed an examination of the current definition of a Canadian program and invited comments on the issue. In CRTC, Public Notice CRTC 1998-44 (6 May 1998), entitled "Canadian Television Policy Review," the Commission announced a separate proceeding to examine a wide range of issues related to its current policies and regulations respecting conventional over-the-air, pay, and specialty television services. The CRTC has stated that it will announce the determinations it reaches with respect to the definition of a Canadian program when it publishes its findings of its larger review of Canadian television policy.

170 In 1976, the CRTC began to allow Canadian television stations to take advantage of simulcasting, or "simultaneous substitution," which allowed Canadian stations to siphon advertising revenues from U.S. border stations by simultaneously airing the programs featured on the U.S. stations. Cable service providers would then substitute the Canadian broadcaster's advertising in place of the American advertising. The FTA and the NAFTA have had a limited affect on the practice of simulcasting, to the extent of the agreement between Canada and the United States in Article 2006 of the FTA to provide copyright protection to owners of programs broadcast by distant stations and retransmitted by cable companies, by guaranteeing a "right of equitable and non-discriminatory remuneration" for certain retransmissions. Therefore, the practice of simulcasting by the cable companies continues, albeit to a less profitable extent, to this day. See Broadcast Distribution
Canadian programming that the quota regulations require. It is argued that this practice also creates an overwhelming commercial incentive to show U.S. programming at the same time as it is being shown in the United States, producing diametrical results to the diversity the CRTC presumably wants.\textsuperscript{171} Still others observe that the quota system has in fact contributed to the exodus of talented Canadian artists to the U.S., where success or failure can be made without navigating a bureaucratic quagmire of quotas and subsidies.\textsuperscript{172}

2.3.4 Program Subsidies

Seeking to comply with the legislation, television broadcasters demand Canadian programming in order to fill their schedules with the appropriate mix of programming. The demand by broadcasters prompts the development and production of Canadian programming. Meanwhile, the programs and policies currently in place form a solid core of financial support available to the television programming production and development. The centrepiece of the policy framework is the Canadian Television Fund (CTF).\textsuperscript{173}


\textsuperscript{173} In addition to the CTF, the Northern Distribution Program, approved by Treasury Board in 1988, provides financial assistance for the operation of a northern satellite distribution system, and delivers a mixture of northern and aboriginal programming. As well, TV5 international, a worldwide French-language television network, includes TV5 Québec-Canada, which is available on certain cable networks. The governments of France, Switzerland, Belgium, Quebec and Canada provide the requisite funding.
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. The CTCPF combined the Cable Production Fund and the Canadian Broadcast Program Development Fund along with a contribution from the Department of Canadian Heritage 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 of the CTF include increasing the amount of Canadian programming available to Canadians, while at the same time enhancing the industry's

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174 The Cable Production Fund was established in February 1994 by the Canadian Radio-television and Telecommunications Commission (the "CRTC") following a proposal from the Canadian cable industry.

175 In 1983, Telefilm’s mandate was expanded to include the financing of Canadian television programming and as such, Telefilm was given responsibility for administering the newly created Canadian Broadcast Program Development Fund.

176 The $200 million per year funding allocation available through the Canadian Television Fund is derived from the following sources:
- 1998 Federal Budget commitment - $100 million;
- Telefilm Canada - $50 million; and
- Private-sector television industry - $50 million.

capacity to produce and distribute domestic television programs. In addition, the CTF seeks to create employment and growth in the sector, and has become very popular among producers, with demand often exceeding the amount of money available. The CTF is responsible for two complementary programs – the Licence Fee Program and the Equity Investment Program. The Licence Fee Program (the “LFP”) is administered by what was formerly the Cable Production Fund. The Equity Investment Program (the “EIP”) is administered by Telefilm Canada.

CTF Guidelines

In December 1998, the CTF released a revised set of guidelines for both the LFP and EIP and stated that these guidelines would allow the CTF to support “only those projects which are based on a Canadian point-of-view and reflect Canadian themes, stories and events.” Essentially, under the new guidelines, the CTF will be looking for television production proposals that favour Canadian themes and stories, in addition to employing Canadian talent. Pursuant to the new rules, a TV show or movie will only be eligible for taxpayer funding if it “speaks to Canadians about, and reflects, Canadian themes and subject


179 Ibid.

180 In 1999 the CTF received 559 applications, requesting about $325-million in funding; the CTF’s total budget is $198.6-million, with roughly equal amounts for both the EIP and LFP. See Shannon Kari, “Fighting for dollars” The National Post [National Edition] (14 April 1999) B9.


matter."\textsuperscript{183} However, the CTF makes no attempt in its guidelines to define the phrase.\textsuperscript{184}

The CTF reaffirmed its support for programming in certain underrepresented categories, as determined by the CRTC, including children’s, variety, drama and performing arts, as well as documentaries.\textsuperscript{185} The CBC expressed concern regarding certain aspects of the report, most notably the intention to eliminate the CBC’s annual $100 million reserve.\textsuperscript{186}

The CTF will be seeking to harmonize the LFP and EIP such that the two programs operate with common objectives and one set of guidelines; however, the EIP will remain centred around cost recovery\textsuperscript{187} while the LFP will remain market driven.\textsuperscript{188} In addition, the

\textsuperscript{183} CTF Guidelines, supra note 181 at 4.


\textsuperscript{185} Ibid.

\textsuperscript{186} CBC’s guaranteed Canadian Television Fund access was established to partially offset Ottawa’s $414 million cuts to its budget since 1995. Starting in 2000-01, CBC will have to compete for public funds for its independently produced programming alongside private broadcasters such as CTV and CanWest Global. See Antonia Zerbisias, “CBC faces funding threat” Toronto Star [Final edition] (12 December 1998) A3.

\textsuperscript{187} Telefilm exports television productions in order to promote Canadian culture abroad and in order to recover its expenditures on these productions and earns a large proportion of revenues from productions with significant foreign sales. The revenues are essential to enable Telefilm to be able to contribute its share of $50 million to the EIP, $35 million of which is from parliamentary appropriations and $15 million from Telefilm’s cost recovery revenues. An analysis of Telefilm’s cost recovery in television productions also reveals that recovery is higher for English-language productions than for French-language productions; is highest for children’s programming (including animation) and lowest for French-language variety programming. See Telefilm, Canadian Television Policy Review in response to Public Notice CRTC 1998-44, Part 2, Section 2.11-Recoupment. Available: http://www.telefilm.gc.ca/en/prod/crtc/crtc_15.htm.

\textsuperscript{188} Despite the LFP’s stated objective “to increase the broadcast presence of high-quality Canadian television programs in all regions of Canada,” in 1998-99 one third of the licensing fee grants went to Quebec. However, the programs produced in Quebec accounted for roughly one hundred more hours of broadcast time than the rest of Canada combined. Critics charge that funds that would have otherwise gone to other provinces are being diverted to the Quebec cultural industries. See Gloria Galloway, “Quebec in line for TV fund’s biggest share” The National Post [Toronto Edition] (31 May 1999) A1, A2.
CTF will discard the first-come first-served process under the LFP. Both LFP and EIP funds are split between English and French language productions, with approximately two-thirds of the financial resources available for English language productions and one-third for French language productions. Aboriginal-language productions meeting the requirements of the CTF are eligible for funding within these parameters, provided they are versioned into English or French.

Licence Fee Program

The LFP is modelled on the old Cable Production Fund. The program continues to receive a large part of its funding from private industry broadcast distribution undertakings, which include Canada’s cable, direct-to-home satellite, and telecommunications companies. The funding from the LFP receives special treatment by Revenue Canada and is not treated as assistance for income tax purposes. The primary

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189 The process had led to mix-ups in 1998 wherein certain higher-profile television programs were initially denied funding when it was realized that all of the LFP’s funds had already been allocated before providing funding to the higher-profile productions. See Doug Saunders, “TV production industry lines up for the loot” The Globe and Mail [Metro Edition] (15 April 1998) A1; Doug Saunders, “Chaos in the culture industry” The Globe and Mail [Metro Edition] (25 April 1998) A1; and Graham Fraser, “TV drama funding patched up” The Globe and Mail [Metro Edition] (23 April 1998) A1.

190 The allocation is calculated according to the original language of the production and excludes international treaty co-productions and Aboriginal-language productions. See CTF Guidelines, supra note 181 at 7.

191 Ibid. at 6.

192 To date, since the inception of the LFP, the Canadian cable industry has provided slightly more than $130 million. Ibid.

193 These contributions are determined in accordance with a formula linked to the revenues of the contributing broadcast distribution companies. Since the revenues of broadcast distribution undertakings vary, the exact amount of LFP’s budget cannot be predicted with certainty. The method by which broadcast distribution undertakings contribute to the LFP may be subject to CRTC amendment. The balance of LFP’s budget is comprised of funds provided by Canadian Heritage, in accordance with the terms of a Contribution Agreement. Ibid.

194 In an open letter dated July 22, 1998 from Garry Toth, Executive Director Canada Television and Cable Production Fund—Licence Fee Program, it was indicated that in a letter from the Finance Minister, officials
objectives of the LFP are consistent with those of the CTF seeking to support distinctively Canadian programming in English, French and Aboriginal languages and to enhance the capacity of the broadcast sector in producing and distributing television programs, while also creating increased employment within the sector.\textsuperscript{195}

**Equity Investment Program**

The EIP is based on the old Canadian Broadcast Program Development Fund. The EIP finances the production of Canadian television programs and feature films through a direct cash investment. This cash investment results in undivided copyright ownership interest in all versions of the production and in the resultant benefits. The EIP’s administrator, Telefilm Canada, may take an equity participation of up to 49 per cent of an eligible production.\textsuperscript{196} The EIP also contributes toward the development costs of Canadian television programs through advances.\textsuperscript{197} The EIP has several additional goals that reflect Telefilm’s involvement in the EIP’s administration and therefore shape further requirements that productions must meet.\textsuperscript{198}

\footnotesize{\textsuperscript{195}CTF, supra note 178.}

\footnotesize{\textsuperscript{196}In certain cases the EIP may participate in a production through a loan, advance or contribution. See *A Guide to Federal Programs for the Film and Video Sector*, supra note 90 at 3.}

\footnotesize{\textsuperscript{197}Ibid.}

\footnotesize{\textsuperscript{198}Telefilm’s additional objectives include:
- increasing the market share of Canadian television productions, theatrical feature films and multimedia productions, in Canada and abroad;
- increasing support for small and medium-sized companies;
- ensuring equitable access to resources for regional production in both official languages;
- expanding international business opportunities for Canadian production and distribution companies; and
- increasing recoupment of its investments.}
A television production must meet four essential requirements before it is submitted for consideration to either the LFP or EIP. First, the project must reflect Canadian themes and subject matter. Second, the project must have received ten out of ten points (or the maximum applicable points) as determined by the CTF using the CAVCO scale. Third, the underlying rights must be owned and developed in a meaningful way by Canadians throughout the life of the project. Generally, the project may not be based on foreign works. Fourth, the project must be shot and set primarily in Canada. In addition to the basic eligibility requirements, productions must meet further requirements depending upon their classification. As well, the applicant itself must be a Canadian-controlled corporation as defined in the tax credit regulations to the Income Tax Act.

The CTF Guidelines also make certain provisions regarding funding directed to the CBC/SRC. In 1999-2000, productions licensed by the CBC/SRC may access up to 38 per cent of the LFP funds available for television programming, excluding official co-productions and Aboriginal-language productions. The remaining 62 per cent will be available for productions licensed by private conventional, pay, pay-per-view, specialty or educational broadcasters. Subject to demand, between 45 and 55 per cent of EIP television programming resources (excluding those dedicated to Aboriginal-language productions) will

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199 The funds under the LFP or EIP may be accessed by both independent production companies and broadcaster-affiliated production companies. Each must be a Canadian-controlled corporation as defined in the tax credit regulations to the Income Tax Act. The LFP dispenses not more than one-third of its resources to broadcaster-affiliated production companies. A production company is not eligible for the EIP if it is directly or indirectly owned or controlled by a broadcaster, or by the owner of a broadcaster.

200 The classifications include international official co-productions; drama; documentary; feature films; children's; Aboriginal language productions; and variety programming. Further detail on the essential requirements and exceptions is provided in separate modules of the guidelines for each of the classifications. See CTF Guidelines, supra note 181.
be available each year to independent producers with a broadcast licence agreement from the CBC/SRC, with the goal of achieving, on a commitment basis, an approximate average of 50 per cent over the current three year cycle of the CTF (1998-99 to 2000-01). The remaining EIP funds will be available for productions with a broadcast licence agreement from a private conventional, pay, pay-per-view, specialty or educational broadcaster.

2.3.6 The Canadian Broadcasting Corporation (CBC)

In addition to the various funding initiatives provided by the federal government on the production side, funding is also provided for distribution to the national public broadcaster, the CBC. The CBC was established by the federal government in 1936, with two primary objectives: to offset the increased American programming heard over the airwaves and to respond to the needs of the people of Canada. The CBC is a crown corporation employing roughly 10,000 people, and is governed by the 1991 Broadcasting Act and subject to regulations of the CRTC. The CBC must report each year on its operations to

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201 Ibid. at 6.
202 Ibid. at 6.

203 The conviction that Canada has to have a public broadcasting system, providing a strong voice for Canadians in their own country, goes back to 1929, when a the Aird Commission tabled its report. The Aird Commission was driven by concerns that have persisted to the present day. Moved by the rapid expansion of American network radio, the flow of American programming across the border, and the fear that “Canada was fast becoming a mere satellite of American broadcasting,” the Aird Commission concluded that a publicly owned broadcasting system had to be created. It was believed that only a public broadcaster could guarantee that a reasonable amount of Canadian programming would be available. See 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/brcstng/pubs/juneau/anglais/chap2/ch2s1.htm [hereinafter Making Our Voices Heard].

204 Making Our Voices Heard, ibid. at 32-3.
Parliament, through the Minister of Canadian Heritage. The Board of Directors consists of 12 members, and is appointed by the Governor in Council.\footnote{\textit{s.36, Broadcasting Act.}}

The CBC is financed mainly by public funds. In 1996-97, the CBC received $818.3 million in parliamentary appropriations. In 1997-98, the CBC received $769 million, a reduction of 17.7 per cent over the previous year.\footnote{The funding received by the Corporation for its ongoing operations had been reduced by $151.5 million from the previous year. This reduction is composed of the funding reductions as announced by the federal government, and the one-time repayment (with interest) of $56.7 million for the repayable advance received by the Corporation in 1995-1996 for downsizing costs. See CBC, \textit{CBC Annual Report 1997-98} (Ottawa: 1998) at 5. Available: http://www.cbc.radio-canada.ca/hmen/6_2.htm.} For the period 1997-98, the CBC devoted 43 per cent of these funds to English television; 15.7 per cent to English radio; 28.9 per cent to French television; 10.6 per cent to French radio; and 1.8 per cent to corporate management.\footnote{CBC \textit{Annual Report 1997-98}, \textit{ibid.}} The CBC receives supplementary revenues primarily from commercial advertising on its television networks. In 1997-98 it received $525.3 million from other revenue sources,\footnote{$383.3$ million from advertising and program sales; $87.4$ million from specialty services; and $54.6$ million from miscellaneous sources. See \textit{CBC Annual Report 1997-98, ibid. at 54.} $383.3$ million from advertising and program sales; $87.4$ million from specialty services; and $54.6$ million from miscellaneous sources. See \textit{CBC Annual Report 1997-98, ibid. at 54.}} which was an increase from the $503.8 million received in 1996-97.\footnote{CBC \textit{Annual Report 1997-98, ibid.}} In 1996-97, approximately 98.6 per cent of CBC's operating expenditures was devoted to program production and distribution. The Corporation's dependency on funding from the government has continued to decrease, such that 32.7 per cent of expenditures are now funded from net revenues, which consists mainly of advertising revenue. As such, its level of operations is now more dependent on the economic and other fluctuations in the market.
Private broadcasters and other industry experts have publicly suggested that further changes are needed to programming, scheduling, advertising and personnel, and to the overall manner in which the CBC carries out its mandate. Some have gone further to suggest that the CBC should no longer be funded by government, but rather through voluntary subscription fees, sponsorships, specific program grants, and donations, because at present the CBC uses government funds to compete with the private sector broadcasters for high-cost sports events and other U.S. programs.

The mandate of the CBC is outlined in the 1991 Broadcasting Act, which states that:

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;

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,

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212 Izzy Asper, chairman of private broadcaster CanWest Global Communications, stated that the CBC should adopt a PBS-type system of funding, and should broadcast only programming which would not otherwise be aired and not be allowed to sell advertising space. See Barbara Shecter, “Time to end CBC’s status, rival says” The National Post [Toronto Edition] (18 May 1999) A4.

213 s.3(1)(l), Broadcasting Act.
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.\textsuperscript{214}

In keeping with its public nature, the CBC schedules programming by taking into account public service considerations. It attempts to offer public affairs journalism that is cognizant of the needs of the various regions, and that may not be available from the private sector.

The television services\textsuperscript{215} are provided through two core national television networks, CBC Television in English, and La Télévision de Radio-Canada in French, which both feature a variety of general and special interest programs. In addition, the CBC also operates two self-supporting specialty cable television services, CBC Newsworld in English and Le Réseau de l'information (RDI) in French which feature news and information programs 24 hours a day. The CBC also operates two specialty television channels distributed by satellite-to-home throughout the United States.\textsuperscript{216}

\textsuperscript{214} s.3(1)(m), \textit{Broadcasting Act}.

\textsuperscript{215} The CBC's radio services include: four national radio networks, CBC Radio One and CBC Radio Two in English and La Radio de Radio-Canada and La Chaîne culturelle FM in French, and radio and television services for Canada's North in English, French and eight aboriginal languages. CBC also provides, on behalf of the Government of Canada, an international short-wave radio service, Radio Canada International, which broadcasts in seven languages.

\textsuperscript{216} The CBC has formed an alliance with Power Broadcasting to deliver Newsworld International, a 24-hour news and information service; and Trio, a family entertainment channel, featuring programs from the CBC and other Canadian producers.
CBC television followed an entirely different course from its radio counterpart.\(^{217}\) The differences in evolution arose due to a number of exogenous factors. For the first 20 years of its existence, CBC was the only television service for significant parts of the population and, at the time, felt obliged to carry a wide cross-section of American programs in its schedules.\(^{218}\) Moreover, the CBC maintains a somewhat precarious position vis à vis its affiliates, which operate on a commercial basis and, therefore, seek a commercially attractive schedule. Finally, as TV costs increased, the federal government actively encouraged the CBC to attract additional advertising revenue to reduce the need for direct government funding.\(^{219}\)

Funding fluctuations have also imposed additional pressures on the CBC. Over the past ten years, government appropriations to the CBC fell further and further behind the consumer price index, and the buying power of the appropriations dropped by more than 23 per cent.\(^{220}\) The CBC responded by increasing commercial revenues dramatically between

\(^{217}\) CBC radio had been serving Canadians for more than 15 years when CBC television began broadcasting. It is deeply rooted in the regions of the country. The CBC adopted very different policies for radio as compared to television. English and French CBC radio remained very distinct from commercial radio, and adapted very skilfully to the changing environment. Their programs do not resemble those of private radio. They are non-commercial. Their programming flows from a public service mandate, and not from a series of choices based on commercial considerations. The networks and their stations are publicly owned, and they can reach their listeners without having to make commercial compromises (as is the case with CBC television privately owned affiliates). Finally, they are national, not only because they reach all parts of the country, but also because they have deep roots in communities across Canada. Some commentators have questioned whether CBC television ought to adopt an organizational model similar to that of CBC radio; see Hugh Winsor, “A ghostly approach to the CBC’s future” The Globe and Mail [Metro edition] (26 May 1999) A4; and Doug Saunders, “CBC’s format too similar to private stations” The Globe and Mail [Metro edition] (26 May 1999) A4.

\(^{218}\) Making Our Voices Heard, supra note 203 at 36.

\(^{219}\) Ibid at 36-7.

the mid 1980s and the early 1990s — until the recession and increased competition took their
toll — and its advertising revenues levelled off. CBC television has always relied on
advertising revenue, and over time, it became an important means for the corporation to
balance its annual budget. The combination of government cutbacks, increased competition
and a difficult economy forced CBC television into a more commercial posture, and this has
had a significant effect on its program schedules.\footnote{Ibid. It has meant more American programs in its daytime schedule for the English network; more
entertainment and sports on both networks; less emphasis on children’s programming (on English television);
and a general reluctance to take risks with minority programming of any kind. This has turned the CBC into a
hybrid, functioning somewhere between the private and public sectors.}

As CBC's partnership with Canadian independent producers has developed over past
decades, CBC has moved much of its entertainment production to the growing independent
sector. This strategy accompanied the increasing “Canadianization” of the CBC's prime-time
television schedules. However, the all-Canadian strategy will only work if there are enough
high-quality drama and comedy programs to attract viewers. The CBC has credited the CTF
in being instrumental in ensuring that CBC television has been able to maintain enough
Canadian programming for its schedule.\footnote{Over the past few years, the CBC has had to downsize its operations to deal with major reductions in
government funding. Once the downsizing process is completed, CBC will receive some $800 million a year in
public appropriations. See CBC, “CBC at a Glance,” available: http://cbc.radio-canada.ca/htmen/3_1.htm.} The creation of the CTF in 1996 offset a portion
of the loss of direct government funding in recent years by increasing the amount of money
available to independent producers working with the CBC.\footnote{In its 1997-98 Annual Report, the CBC claims that the Television Production Fund alone has been
fundamental in allowing the Corporation to improve the quality, quantity and regional representation of its
Canadian programming. See CBC Annual Report 1997-98, supra note 206 at 49.} With the recent restructuring
of the CTF, the CBC is once again facing a situation of a decreased level of funding.
2.4 Periodical Publishing

2.4.1 Introduction

Historically, the Canadian periodical industry has been perceived as an industry with a primarily national emphasis, as opposed to the locally focused Canadian newspaper industry. Canadian periodicals cover a wide variety of topics including news, politics, sports, trades and professions, and geography. The national character of periodicals led the Senate Committee on the Mass Media (the "Davey Committee") 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. 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.

2.4.2 Legislative Overview

Over the years, Canada has established a number of protective measures with respect to periodicals. Recently, the U.S. successfully challenged several of these measures and, as such, the policy framework that addresses the periodical sector is in a state of transformation.

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224 Recently, however, city and regional periodicals have emerged (for instance: Toronto Life or Western Living), which cater primarily to a specific, localized readership. In addition, periodicals targeted toward a specific market segment (sport and fitness, computer, interior design etc.) have become increasingly prominent; however, these can still maintain a national focus. See Lon Dubinsky, "Periodical Publishing" in The Cultural Industries in Canada, Michael Dorland, ed. (Toronto: James Lorimer & Company, 1996) 35 at 37.


at present. It will still prove useful to briefly examine the provisions that had been in place prior to the new agreement reached by the U.S. and Canada, along with the resulting Canadian legislative modifications that will govern the industry into the next century.

Long-standing government policies have focused on two areas: distribution and advertising. Canada's support for the periodical industry goes back over 100 years, beginning with the creation of a postal subsidy, which recognized the difficulties associated with distributing magazines to a relatively small domestic market over a large geographic area. Since the 1960s, Canada has used tariff and excise tax measures to ensure that the limited Canadian advertising market supports the creation of original (i.e. Canadian) editorial content, claiming that advertising revenues are the crucial element in ensuring the economic viability of the Canadian magazine industry.

In 1965, section 19 of the Income Tax Act\textsuperscript{227} and Tariff Code 9958\textsuperscript{228} were implemented. 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. \textit{Time} and \textit{Reader's Digest}, which were already operating in Canada at the time, were allowed exemptions under the legislation. However, in 1976, the government amended section 19 and removed the

\textsuperscript{227} R.S.C. 1985, c.1 (5\textsuperscript{th} Supp.).

\textsuperscript{228} 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).
grandfathering provision. Yet both *Time* and *Reader's Digest* were able to find ways to essentially circumvent the effects of the new legislation.

2.4.3 *Income Tax Act, Section 19*

Presently, section 19 of the *Income Tax Act* provides for tax deductions with respect to the advertisements placed in Canadian magazines by Canadian-based advertisers, as well as eligibility requirements to receive such deductions. This measure is intended to ensure the production of original content in Canadian periodicals. The Canadian periodicals must meet the detailed definitions of "Canadian issue" and "Canadian newspaper or

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229 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.

230 *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 226 at 13.

231 As a result of the recent agreement between Canada and the U.S. respecting periodicals, certain aspects of section 19 will be altered. This aspect of the agreement is discussed in greater detail in Chapter 4.

232 Subsection 19(1) currently provides:

In computing income, no deduction shall be made in respect of an otherwise deductible outlay or expense of a taxpayer for advertising space in an issue of a newspaper or periodical for an advertisement directed primarily to a market in Canada unless

(a) the issue is a Canadian issue of a Canadian newspaper or periodical dated after 1975; or

(b) the issue is an issue of a newspaper or periodical dated after December 31, 1988 that would be a Canadian issue of a Canadian newspaper or periodical except that

(i) its type has been wholly set in the United States or has been partly set in the United States with the remainder having been set in Canada, or

(ii) it has been wholly printed in the United States or has been partly printed in the United States with the remainder having been printed in Canada.
The periodicals must be 75 per cent Canadian-owned and must carry at least 80 per cent original content. Section 19 restricts the deductibility of advertising expenses to domestic publications, which has the effect of nearly doubling the after-tax cost of similarly priced advertisements in foreign periodicals.\(^\text{234}\)

The Task Force on Canadian Magazine Industry’s report noted that “while initially effective, section 19 has become less and less a factor in advertising decisions.”\(^\text{235}\)

Furthermore, the Task Force’s report noted that despite the limited effectiveness of the provision, there was a continuing problem with respect to the lack of knowledge and awareness of the provision within the advertising industry.\(^\text{236}\) To counter this lack of awareness, the Task Force recommended revisions to the section that would require publishers of periodicals to file an information return containing details on the ownership and content of their magazine titles.\(^\text{237}\) Despite these shortcomings, there has been a great deal of support for the section 19 provision from industry observers.

\(^{233}\) Subsection 19(5) provides lengthy definitions of these terms. Essentially, for a periodical to qualify as a “Canadian issue” it must be printed, edited by resident Canadians and published in Canada. It also must have its type set in Canada. Further, the editorial content of the periodical must not be “substantially the same” (which has been taken to mean greater than 20 per cent the same) as the contents of a periodical that was printed, edited or published outside Canada. For a periodical to qualify as a “Canadian periodical”, the person holding the exclusive right to produce or publish its issues must be either a Canadian citizen; a municipal, provincial or federal government, or representative thereof; or a partnership, association or corporation, any of which must meet various standards regarding their memberships, boards and/or corporate structures.

\(^{234}\) In 1993, a full page colour advertisement in a Canadian issue of Sports Illustrated cost $6,500 ($11,100 when tax implications were factored in) compared to $25,400 for a similar advertisement in Maclean’s, or $13,000 in Saturday Night. See Harvey Enchin, “Magazine Davids need a better slingshot” The Globe and Mail [Metro Edition] (21 January 1993) B1.

\(^{235}\) The report noted that both publishers and advertising agencies were of this view. See A Question of Balance, supra note 38 at 44.

\(^{236}\) The Task Force recommended that the federal government “take steps to raise awareness of the provisions of section 19 in the industry.” See A Question of Balance, ibid. at 67-8.

\(^{237}\) Ibid. at 66.
It has been suggested that structural measures like section 19 are a far more effective way of directing funds into the periodical sector than direct subsidization of the industry.\textsuperscript{238} Instead of providing direct grants from the government treasury to periodical publishers, the government essentially engenders a similar end result by making it more financially attractive for advertisers to advertise in Canadian periodicals, thus drawing larger advertising revenues to the Canadian periodicals. However, advertisers would be better off financially were this manipulation of the advertising services market to cease, as they would then gain the benefits of unhindered competition among Canadian and U.S. advertising service providers.

2.4.4 Investment Restrictions

Presently,\textsuperscript{239} the Investment Canada Act\textsuperscript{240} makes special provision for investments concerning cultural businesses, including periodicals.\textsuperscript{241} The Act regulates new or expanding businesses of foreign-controlled investors in certain sectors in Canada by requiring that an investor provide notice of the investment to Investment Canada.\textsuperscript{242} Investment Canada will

\textsuperscript{238} Paul Audley has argued that tax measures, such as section 19, along with an increased use of loan guarantees, are more cost effective policy choices than pure subsidization. See “Copps plans ‘private’ culture session” The Globe and Mail [Metro Edition] (23 January 1997) C1.

\textsuperscript{239} As a result of the recent agreement between Canada and the U.S. respecting periodicals, foreign investment restrictions will be loosened. This aspect of the agreement is discussed in greater detail in Chapter 4.

\textsuperscript{240} R.S.C, 1985, c. 28 (1st Supp.), as amended [hereinafter Investment Canada Act].

\textsuperscript{241} Section 14.1(6) defines “cultural business” to include periodicals as follows:

"cultural business" means a Canadian business that carries on any of the following activities, namely, (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers,

[...]

\textsuperscript{242} Section 11, Investment Canada Act.
then determine whether the investment is worthy of further review.243 The Related-Business Guidelines set out departmental policies regarding the criteria used to determine the whether businesses may be deemed related, as well as definitions of an "expanding business" and an "existing business."244

In July 1993, the government amended the Guidelines under the Act.245 Under the present Guidelines, where a business publishes or distributes periodicals, an investment by a non-Canadian to, directly or indirectly, publish, distribute or sell a magazine or periodical in Canada, is deemed to be a new Canadian business and is subject to notification pursuant to section 11 of the Act rather than deemed to be an expansion of an existing business.246 This is the case whether or not the non-Canadian, directly or indirectly, already publishes, distributes or sells, in print or in machine readable form, another magazine or periodical in Canada or the same magazine or periodical in Canada from another country. The investment may then be reviewed pursuant to section 15.

243 Section 12, Investment Canada Act.

244 According to the Guidelines, the establishment of a new Canadian business which is either unrelated to a business presently carried on in Canada, or if related falls within a specific type of business activity that has been prescribed by regulation under Investment Canada Act as being related to Canada's cultural heritage or national identity, is subject to notification under section 11 of the Act at any time prior to implementation, or within 30 days thereafter. However, the expansion of an existing business, or the establishment of a related new Canadian business which is not within a type of business activity prescribed by regulation, is not subject to either the notification or review provisions of the Act. The Guidelines are available at http://investcan.ic.gc.ca/en_doc_g.htm.


A review under the Act considers the extent of Canadian participation in the venture along with the compatibility of the investment with national industrial, economic and cultural policies and the objectives thereof, but also emphasizes the effects of the investment on competition and other industrial factors and economic indicators. The Task Force was of the opinion that the Minister responsible for the Investment Canada Act should obtain the concurrence of the Minister of Canadian Heritage before issuing an opinion on the applicability or non-applicability of the Act or making other final decisions related to a proposed investment in the periodical publishing and distribution sector.

There has been some support for maintaining such investment restrictions, which may be partly a result of the fact that many major industrialized and developed countries have maintained restrictions of foreign investment in their cultural sector. It is believed that these restrictions on ownership directly influence the ability of Canadians to produce and distribute products reflecting a Canadian perspective. Yet it must also be questioned

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247 s. 20(b), Investment Canada Act.

248 s. 20(e), Investment Canada Act.

249 s.20(d) and s.20(f), Investment Canada Act.

250 s. 20(a) and 20(c), Investment Canada Act.

251 A Question of Balance, supra note 38 at 69-70. After the agreement between Canada and the U.S. was reached ending the dispute regarding periodicals, the Canadian federal government announced that it was transferring authority for review and approval of investments related to all cultural industries from the Minister responsible for the Investment Canada Act to the Minister of Canadian Heritage.


whether such policies do not simply deny Canadian cultural producers the access to additional sources of capital. The effectiveness of the ownership restrictions is dubious when one considers that even if ownership control rests in Canadian hands, there is no guarantee that the content being produced will be “distinctly Canadian.”

2.4.5 Other Measures

The Department of Canadian Heritage has provided funded postal rates to eligible Canadian publications through the Publications Assistance Program since 1996. The stated objective of the funding scheme is to encourage the wide and affordable dissemination of Canadian cultural products. Postal rates of eligible magazines are reduced by about 80 per cent. Eligibility focuses on Canadian ownership and control and Canadian production, as opposed to a strict criteria of carrying Canadian content. The program offsets the cost of mailing to a relatively small domestic market in a large geographic area and provides increased incentives for Canadian magazines to pursue subscription sales.

The Canadian government continues to provide support to literary and art magazines through the Canada Council for the Arts. As well, the Humanities and Social Sciences Federation of Canada provides assistance for the publication of works of advanced

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254 For example, Universal Studios Inc., formerly MCA Inc., of Universal City, CA is owned by Seagram Co. Ltd. of Montreal, yet its productions are not “distinctly Canadian.” Art Eggleton, past Minister for International Trade was critical of the government’s policies regarding foreign ownership restrictions, for reasons that included the fact that Canadian control provided no guarantee on Canadian content. See Terence Corcoran, “Eggleton sounds culture alarm” The Globe and Mail [Metro Edition] (29 January 1997) B2.

255 The agreement between Canada and the U.S., discussed below, does not affect the Publications Assistance Program.

256 In 1996, it was estimated that the Canada Council provided annually about $2 million in grants to periodicals and to some of their representative associations. See “Canada’s magazines read up on trade law” The Globe and Mail [Metro Edition] (16 September 1996) A18.
scholarship which will make an important contribution to the advancement of knowledge, but which are unlikely to be self-supporting. The Cultural Industries Development Fund, which is sponsored by the Department of Canadian Heritage and administered by the Business Development Bank of Canada, targets entrepreneurs working in book and magazine publishing and other cultural industries. The Fund supports Canadian cultural production by providing term loans.

2.4.6 Bill C-55 and the U.S.-Canada Agreement Respecting Periodicals

The U.S. made complaints to the World Trade Organization with respect to three of the above four principal measures maintained by Canada in support of its periodical industry. The U.S. did not challenge the measure contained within section 19 of the Income Tax Act. The U.S. challenge eventually proved successful with the Appellate Body of the WTO essentially agreeing with its position. \(^{257}\) Canada then tabled new legislation, in the form of Bill C-55, respecting advertising services supplied by foreign periodical publishers. Bill C-55 created an offence for cases in which foreign periodical publishers were to supply advertising services directed at the Canadian market to Canadian advertisers. The U.S. threatened retaliatory trade measures in other industrial sectors in response to the Canadian legislation. \(^{258}\) Despite a series of breakdowns in the negotiations, \(^{259}\) Canadian and U.S. trade

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\(^{257}\) The United States had argued that the measures prohibited or restricted the importation into Canada of certain periodicals and that this violated Canada’s obligations under GATT. The Panel’s decision differed in certain respects from that of the Appellate Body. Each of the Panel and Appellate Body decisions will be discussed to greater length in Chapter 4.

negotiators were eventually able to arrive at a compromise agreement,\textsuperscript{260} under which both sides have claimed victory.\textsuperscript{261}

Under the agreement,\textsuperscript{262} the U.S. has given Canada written assurances that it will not take any trade action either under the World Trade Organization (WTO) agreements, NAFTA or section 301 of the U.S. Trade Act in response to Bill C-55. In return, Canada will enact Bill C-55, the Foreign Publishers Advertising Services Act, with a series of amendments. Foreign publishers selling advertising services aimed primarily at the Canadian market will be allowed access to advertising revenues to the extent that they will be allowed to publish advertisements generating not more than 12 per cent of revenues generated by the total supply of advertising, on a per issue basis, effective at the time of the signing of the agreement. This allotment will increase to 15 per cent in eighteen months and to 18 per cent once three years have elapsed from the time of the signing of the agreement. A foreign publisher would be permitted to exceed these percentages if it were to create majority Canadian content and establish a new periodicals business in Canada.


\textsuperscript{262} The agreement, in the form of letters signed by Ambassador Raymond Chrétien and United States Trade Representative, Charlene Barshefsky, appears on the Department of Canadian Heritage website. Available: http://www.pch.gc.ca/bin/News.dll/View?Lang=E&Code=9NR031E.
Canada will also amend section 19 of the *Income Tax Act* such that Canadian advertisers will be allowed full deductibility of expenses incurred in advertising in foreign periodicals provided the periodicals produce at least 80 per cent original content. Advertisers will be allowed to deduct 50 per cent of the expenses incurred in placing advertisements in foreign periodicals that contain less than 80 per cent original content.

Canada will also alter certain procedures relating to foreign investment and ownership restrictions beginning by transferring authority for review and approval of investments related to all cultural industries from the Minister responsible for the *Investment Canada Act* to the Minister of Canadian Heritage. Canada will permit 51 per cent foreign equity in an enterprise, representing an increase from the current 25 per cent, within 90 days and will permit foreign investors to own 100 per cent of an enterprise after one year. The Department of Canadian Heritage will review new investments that result in ownership and control by a foreign investor under the *Investment Canada Act* "for net benefit to Canada" using guidelines that have yet to be finalized. The Department of Canadian Heritage's current version of the guidelines appears to augment the requirement of a review of investments for net benefit to Canada pursuant to Part IV of the *Investment Canada Act* by stipulating that "net benefit" will include, *inter alia*, undertakings by foreign investors that

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263 Canada will also amend the definition of "Canadian issue" in section 19(5) of the *Income Tax Act* to conform to the definition of original editorial content as set forth in this Agreement. Canada will further amend the definition of "Canadian issue" in section 19(5) to remove exclusions on issues of a periodical published under a licence granted by a person who produces or publishes issues of a periodical that are printed, edited or published outside Canada. *Ibid.*


265 The current guidelines suggest that all foreign investments will be reviewed consistent with the Related Business Guidelines of the *Investment Canada Act*, whereby an investment by a non-Canadian in a periodical title is deemed to be a new Canadian business and is subject to notification under the Act.
result in a majority of original editorial content for the Canadian market in each issue of each periodical title."266 Canada acknowledged that the United States accepted the terms of the agreement which stated that a net benefit review by Canada 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."267 Canada’s interpretation of “substantial level of original editorial content” apparently translates into a “majority” of original editorial content in the review of any new investment in the magazine industry.268

2.5 Conclusion

The policy instruments available to the federal government attempt to balance the objective of providing a place for Canadian films, public television programming or periodicals in their own domestic market while at the same time allowing a degree of foreign entry into the Canadian market. Clearly, the extensive subsidization within the film industry encourages production in that sector; yet, the statistical evidence demonstrates that the Canadian industry lags behind the other cultural industries in terms of its relative success in Canada. Notwithstanding the entrenched U.S. competition in the Canadian market in this

266 There will not be any subjective assessment of themes or subject matter to determine what is Canadian content. Stories, illustrations and photographs created by Canadians will count, regardless of subject, even if they appear in foreign editions. Content created by non-Canadians will count only if it was created for the Canadian edition and is not reproduced in other editions. See Department of Canadian Heritage, “Canada and United States Sign Agreement on Periodicals” News Release (4 June 1999). Available: http://www.pch.gc.ca/bin/News.dll/Recent?Lang=E.

267 Ibid.

268 The U.S. Trade Representative was unhappy to learn that Canada would interpret “substantial” Canadian content to be “majority” Canadian content. See Ian Jack, “Honeymoon is short for Canada-U.S. trade deal” The National Post [Toronto Edition] (27 May 1999) A1.
sector, there may be reason to replace the high level of subsidization by activating one of the other available policy instruments.

Canadian public television, although somewhat of a hybrid enterprise, also enjoys a high level of subsidization; and like the film industry, it appears to be struggling to find its place in the cultural arena. Indeed, new formats, new layouts, new programming, and new services have each taken a turn at becoming somewhat of an annual ritual at Canada’s public broadcaster. The CBC is subject to CRTC-imposed Canadian content quotas, but these quotas do not appear to be the cause of the present problems experienced by the CBC, given that the CBC has in recent years opted away from rebroadcasting U.S. primetime fare. Rather, the current problems relate to declining viewership and internal questioning of appropriate format. The latest proposals for changes by the CBC have been submitted to the CRTC and, depending upon how the proposals evolve in policy, the next few years could see substantial changes for Canada’s public broadcaster.

Like the public television sector, the periodical industry will soon begin to undergo significant changes; however, in the case of periodicals the changes and corresponding implementation dates are now known to the industry. With the dismantling of its set of protective barriers first by the WTO, and then the subsequent retreat of the federal government from the replacement measures contained in Bill C-55, the periodical industry will face increased foreign competition in the Canadian market. However, under the agreement, it will be three years before the Canadian publishers bear the maximum burden of lost advertising revenues agreed to by the Canadian government, allowing time for the
necessary competitive adjustments to occur. Also part of the agreement was the relaxation of foreign investment restrictions, which is perhaps disturbing to cultural nationalists in Canada, but which may also lead to increased opportunities in the industry for Canadian creators.

The policy instruments chosen by Canada in support of Canadian culture often offend foreign businesses that wish to enter the Canadian market in direct competition with the Canadian firms. Despite liberalization trends in global trading, countries such as Canada vehemently oppose any further dismantling of their protective barriers in the cultural sectors. The following chapter will examine the current international treatment respecting trade and investment in the cultural industries.
Chapter 3 International Agreements and Culture

I sympathize, therefore, with those who would minimize, rather than those who would maximize, economic entanglements among nations. Ideas, knowledge, science, hospitality, travel – these are the things which should of their nature be international. But let goods be homespun whenever it is reasonably and conveniently possible...


3.1 Introduction

The previous chapter examined representative examples of Canadian domestic cultural policy and sought to provide the reader with an appreciation of the nature and extent of the current policies, in terms of their classification within the various types of policy instruments – subsidies, quotas, investment restrictions and other legislation – as well as their operation within certain sectors of the cultural industries. The current chapter will shift to an international focus and examine certain international agreements that contain provisions directly or indirectly affecting Canada’s domestic cultural policies. In particular, the analysis will focus on how such agreements have addressed, or not addressed, cultural activities, as they have been described in Chapter 1. At the same time, the provisions contained in those agreements that have the most potential to affect Canadian domestic cultural policy will be identified. Finally, this identification of the provisions will facilitate the analyses of particular cultural policies in Chapter 4.

Currently, there are three agreements in place that have a direct effect on Canadian cultural policy – The North American Free Trade Agreement (NAFTA);\(^{269}\) the General

Agreement on Tariffs and Trade (GATT), and the General Agreement on Trade in Services (GATS). In addition, the recent international negotiations relating to a multilateral agreement on investment necessitates an examination of the provisions of the failed Multilateral Agreement on Investment (MAI), as 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 relevant provisions in each of the aforementioned agreements will be examined within the initial context of relevant background information on the agreements themselves.

3.2 The NAFTA

The GATT member countries have always had the right to form free trade areas and customs unions provided these conform to the rules that are set out in Article XXIV of the GATT. 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 Canada-U.S. Free Trade Agreement. Pursuant to Article 2106, the NAFTA carries over the

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270 Supra note 2.


cultural industries\textsuperscript{273} exemption that had been secured by Canada in the FTA. 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.\textsuperscript{273}

In the FTA, Article 2005 provided the cultural industries\textsuperscript{274} with an exemption from all provisions of the FTA, except where certain provisions of the FTA specifically provided otherwise.\textsuperscript{275} Article 2005 also provided as follows:

\textsuperscript{273}The definition of the "cultural industries" in the NAFTA remains largely unchanged from the definition contained in the FTA. The NAFTA defines "cultural industries" in Article 2107 as follows:

cultural industries means persons in any of the following activities:
(a) 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;
(b) the production, distribution, sale or exhibition of film or video recordings;
(c) the production, distribution, sale or exhibition of audio or video music recordings;
(d) the publication, distribution or sale of music in print or machine readable form; or
(e) radiocommunications 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.

\textsuperscript{274}Article 2012 of the FTA defined "cultural industry" as follows:

cultural industry means an enterprise engaged in any of the following activities:
a) 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,
b) the production, distribution, sale or exhibition of film or video recordings,
c) the production, distribution, sale or exhibition or audio or video music recordings,
d) the publication, distribution, or sale of music in print or machine readable form, or radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.

\textsuperscript{275}Exceptions to the cultural industries exemption are provided in the following provisions:
Article 401 provided for elimination of tariffs on certain goods, including entertainment or cultural goods;
Article 1607(4) modified Canada's policy with respect to foreign acquisitions of business enterprises in the cultural industries, providing that where a divestiture of such an enterprise is required, the Government of Canada is required to purchase the enterprise should a Canadian buyer not be found;
2. Notwithstanding any other provision of this Agreement, a party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

There are several other provisions contained in the FTA that deal directly with the cultural industries. In Article 2007, the FTA called for changes to section 19 of the Income Tax Act, seeking the repeal of those paragraphs of the provision that defined a Canadian issue of a newspaper or periodical for purposes of deduction from income of expenses of a taxpayer for advertising space, as one that is printed or typeset in Canada. In Article 2006, the FTA addresses retransmission rights of cable companies. Essentially, copyright holders are provided with certain rights regarding remuneration for retransmissions made to the public

Article 2006 required authorization of a copyright holder prior to certain retransmissions of the copyright holder's program; and

Article 2007 alters the definition of "non-Canadian" by no longer requiring the publication be typeset or printed in Canada, rather, the publication would have to be edited in Canada by individuals resident in Canada, and be published in Canada.

These provisions are discussed further in the following pages.

In discussing the measures which address situations not covered by the cultural industries exemption, William Northcote suggests that Article 2006 has had the most significant effect on the cultural industries, while Article 401, which strives to reduce import and export restrictions, has not affected the cultural industries to a great extent. William L. Northcote, "The Treatment of Culture and Cultural Industries Under the Canada-US Free Trade Agreement and in the European Community" (1992) 2 M.C.L.R. 27 at 34 and 46.

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These provisions are discussed further in the following pages.

The changes were implemented by s.133 of the Canada-United States Free Trade Implementation Act, S.C. 1988, c. 65. Section 133(1) removed the reference in s.19(1) to "non-Canadian" when referring to the limitations on allowable deductions for a taxpayer's expenses in advertising in a newspaper or periodical. Essentially, the modifications extended the allowable deductions of advertising expenses incurred by a taxpayer in advertising in newspapers or periodicals, which met the definition of "Canadian issue" in s.19(5)(a) but for the fact that the type had been set in the U.S. or that the newspaper or periodical had been printed in the U.S. Consequently, the original definitions contained in s.19(5), which were to be repealed, were retained and the "print-in-Canada" requirement, which was the subject of Article 2007 was altered to accommodate the U.S. concerns regarding the elimination of the restrictions on printing and typesetting in Canada only. Proceeding in this manner allowed Canada to make the U.S. the sole exception to the print-in-Canada requirement. However, in order to receive access to the deduction a taxpayer would still have to ensure that its advertisements were placed in a "Canadian newspaper or periodical", which was defined in terms of requiring at least 75% Canadian ownership. Essentially, Canada was able to sidestep the intent of Article 2007 by agreeing to eliminate the print-in-Canada requirements, but still requiring Canadian ownership as a condition to access to the advertising expense deduction under the Income Tax Act. With the recent agreement between Canada and the U.S. resolving the split-run periodical dispute, full deductibility will be provided, regardless of the nationality of ownership, for advertisements placed in periodicals that contain at least 80% original or Canadian content. The resolution of the periodical dispute is discussed in further detail in chapter 4.
where the original transmission is carried in distant signals intended for free over-the-air reception by the public. Finally, Article 1607(4) modified Canada's procedures respecting reviews of indirect acquisitions of businesses within any of the cultural industries. It was once the case that when the government disapproved of a business acquisition, it could force the divestiture of the business. However, under Article 1607(4) the Canadian government must offer to purchase the business from the United States investor at market value.

Certain cultural sectors are addressed in Chapter 17 of the NAFTA, which prescribes minimum standards of protection that must be in effect in each NAFTA country in respect of, among other things, copyright and sound recordings. Article 1703 sets out the National Treatment principle providing that no NAFTA country may require copyright holders to comply with formalities or conditions in order to be accorded national treatment. Articles 1705 and 1706 set out minimum standards for the protection of authors of literary works and producers of sound recordings. The NAFTA intellectual property provisions along with the TRIPS Agreement establish a parallel set of obligations dealing with the intellectual property subject matters in a somewhat different manner, with neither agreement making

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279 Article 1705(1) provides that each NAFTA country provide authors and their successors in interest those rights enumerated in the Berne Convention in respect of works covered by paragraph 1, including the right to authorize or prohibit: the importation of copies of the work made without the right holder's authorization; the first public distribution of the original and each copy of the work by sale, rental or otherwise; the communication of a work to the public; and the commercial rental of the original or a copy of a computer program. Article 1706(1) provides that each NAFTA country provide the producer of a sound recording the right to authorize or prohibit: the direct or indirect reproduction of the sound recording; the importation of copies of the sound recording made without the producer's authorization; the first public distribution of the original and each copy of the sound recording by sale, rental or otherwise; and the commercial rental of the original or a copy of the sound recording, except where expressly otherwise provided in a contract between the producer of the sound recording and the authors of the works fixed therein.

280 Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. Under the TRIPS Agreement, each WTO member is required to accord in its own territory the protection required by that Agreement to the intellectual property of the companies and natural persons of other members.
explicit reference to the other. The provisions in these agreements may have application to certain of the cultural industries, although only to the extent that the provisions address the granting of protection to owners and authors for their established works. Such intellectual property provisions do not address the issue of protection of the creative opportunities or processes necessary in the construction of such works. The provisions in these agreements could be said to offer "indirect protection" to certain sectors of the cultural industries, in that producers and artists would be assured of receiving intellectual property rights in other countries subscribing to the agreements, thereby presumably providing increased incentive for production and export of such works.

The focus of a discussion regarding the impact of the NAFTA on the cultural sectors lies in the cultural industries exemption provision. Both Canada and the United States offer differing interpretations of the cultural industries exemption provision, specifically on when retaliatory trade measures could be operative. Essentially, Canada takes the position that the NAFTA, by incorporating the FTA cultural industries exemption provision, applies to only those issues covered in the FTA with respect to cultural provisions. Therefore, according


282 Indeed, it is these creative opportunities or processes that many of Canada's cultural policies seek to encourage and protect.

283 Canada has interpreted the provision as ensuring that the NAFTA leaves unimpaired Canada's ability to pursue cultural objectives. Canada's understanding is that the cultural industries' exemption has been retained in the NAFTA and applies in respect of any Canadian cultural industry. Further, the U.S. right to retaliate is limited to measures inconsistent with the FTA, not the NAFTA, and therefore cannot be exercised with respect to new areas covered by the NAFTA such as intellectual property or investment. See Canadian Statement of Implementation, Canada Gazette, Part I, January 1, 1994 at 218-9.

See also John A. Ragosta, "The Cultural Industries Exemption From NAFTA – Its Parameters" (1997) 23 Canada-U.S. Law Journal 165 at 168-9. Ragosta states that Canada's interpretation of Article 2005(2) focuses on the phrase, "...that would be inconsistent with this Agreement..." and, therefore, only Canada's non-compliance with the explicit commitments outlined in the FTA would permit retaliation by the U.S. The U.S. interpretation contends that the U.S. may retaliate against any new measures affecting the cultural industries.
to the Canadian interpretation, any Canadian measure in dispute must be shown to be inconsistent with the FTA before the U.S. would be in a valid position to undertake retaliatory measures. The United States, however, takes the view that the FTA provisions respecting culture were simply transferred to the NAFTA, and therefore, the cultural industries can be protected but may be subject to retaliatory trade measures should the measures be inconsistent with the NAFTA. Therefore, the interpretations differ in the scope of the exemption provision. For example, intellectual property is not addressed by the FTA, yet is addressed by Chapter 17 of the NAFTA. Consequently, there is an uncertainty as to whether United States retaliatory measures would be permissible if a Canadian measure was aimed at protecting the cultural industries but also had the effect of discriminating against a United States intellectual property owner.

To date, however, there have been no interpretations by third party adjudicators regarding the extent of permitted retaliation under the provision. Consequently, the uncertainty regarding interpretation of the provision remains. Indeed, in the recent dispute regarding split-run periodicals, the United States had threatened trade retaliation to be targeted at certain industries outside the cultural industries stating that this would be consistent with the above provision; yet Canada was of the view that such retaliation

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284 For instance, in 1994 U.S.-owned Country Music Television (CMT) was pulled from the Canadian cable service because a similar Canadian-owned channel, New Country Network (NCN) began operation in Canada, and pursuant to CRTC policy if a Canadian applicant is found to be satisfactory, it will be licensed in preference to a foreign-owned service. In the dispute that ensued, the U.S. interpretation of the NAFTA was, first, that the cultural exemption did not apply because the CRTC action contravenes Chapter 11 of the NAFTA dealing with investment which was not exempted by the carryover of the exemption clause from the FTA to the NAFTA. Second, if the cultural exemption did apply, then it permitted retaliation by the U.S. Acheson and Maule, supra note 223 at 11. See also Andrew M. Carlson, "The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports," (1997) 6 Minnesota Journal of Global Trade 585.

would be inconsistent with the United States’ commitments under the NAFTA.\textsuperscript{286} It has been noted that this situation of “uncertainty” has perhaps served to avoid disputes regarding the cultural industries because a status quo has emerged around the provision that both Canada and the United States have been loathe to disrupt.\textsuperscript{287} Indeed the last-minute settlement in the dispute involving periodicals suggested that neither side favoured the prospect of the imposition of retaliatory trade measures. Still, the second provision contained within Article 2005 has led some commentators to question the virility of the cultural industries exemption. It has been noted that even by relying on the exemption, Canada is still not protected from retaliation by the U.S. and, therefore, there is in fact little actual protection for Canada’s cultural industries.\textsuperscript{288} Whether the protection of the cultural industries under the NAFTA provision is real or merely perceived, the fact is that during the past decade, there have been only a handful of disputes between Canada and the United States that focus on the cultural industries.\textsuperscript{289}

3.3 The GATT and GATS

After the Second World War, a desire among various nations to learn from past experiences and strive for closer trading links among nations engendered the eventual formation of the General Agreement on Tariffs and Trade. Although the nations may not


\textsuperscript{287} Ragosta, supra note 283 at 169.

\textsuperscript{288} Barry Appleton, Navigating NAFTA: A concise user’s guide to the North American Free Trade Agreement (Scarborough, Ontario: Carswell, 1994) at 191.

\textsuperscript{289} The disputes between Canada and the U.S. that have stemmed directly from Canada’s cultural policies include the CMT-NCN dispute, supra note 282, and the split-run periodical dispute, infra Chapter 4, section 4.4.
have been prepared to support an international trade organization (ITO), which would have had the mandate of overseeing negotiation and administration of a new multilateral world trading regime called for in the Havana Charter, the GATT was to serve as an interim agreement to cover the tariff concessions agreed upon by its twenty-three original signatories. These trading links among nations were to be founded on the key principles of Most-Favoured-Nation (MFN) and National Treatment.

Article I of the GATT operates on the principle that a nation granting trade concessions should afford treatment to any trading partner that is no less favourable than that it affords to its most favoured trading partner. The operation of such a principle means that when granting trade concessions nations would be obliged to treat all trading partners as equals, establishing a multilateral framework for trade liberalization. Article III of the GATT functions on the principle that a nation should afford treatment to products of import that is no less favourable than that which is afforded to its own like products. Therefore, under this principle a nation may not discriminate against imported products (beyond permitted tariffs) in favour of its own domestic products or producers when the products are of a similar nature.

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291 There are exceptions to this general principle, which are to be found in the GATT. The most significant of these exceptions is found in Article XXIV, which permits the formation of customs unions, regional trading blocs and free trade areas. For a discussion of this and the other exceptions to the MFN principle contained in the GATT, Trebilcock and Howse, ibid. at 27-8.

292 Under this principle it is important to examine not only the treatment of imported products, but the effects of such treatment as well, since often the treatment may appear to treat imported and domestic products in a similar fashion, but in fact imposes additional burdens on foreign exporters. For a further discussion of the National Treatment principle and its exceptions, see Trebilcock and Howse, ibid. at 29.
3.3.1 GATT 1947

The GATT, contains several provisions which, to varying degrees, provide for exemptions from the National Treatment principle. An important exception to Article III is contained in Article IV and relates to cinematograph films. Article IV is the only provision in the GATT that provides an express limitation on the flow of cultural products, namely motion pictures. Other provisions in the GATT that deal incidentally with cultural products include Article XX(f) and Article XIX.

Article XX lists general exceptions to the core GATT principles, with clause (f) allowing countries to impose measures for the protection of, among other things, national treasures of artistic value. The GATT, however, does not provide a definition of such items, and therefore it is uncertain whether protection of the cultural industries could be included within the protection of Article XX(f).

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293 The GATT 1947, as subsequently amended by decision of the GATT Contracting Parties, forms the basis of the GATT 1994 and the WTO Agreement includes the GATT 1994. However, for the sake of simplicity, all subsequent specific references to the original GATT provisions will be made by way of reference to the term, “GATT,” as opposed to “GATT 1947” or “GATT 1994.”

294 The Berne Convention for the Protection of Literary and artistic Works, September 9, 1886, as amended October 2, 1979, 828 U.N.T.S. 221, [hereinafter Berne Convention] provides copyright protection to certain categories of artistic works that would include products of the cultural industries. Article 2(1) of the Berne Convention states, “[t]he expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.” Therefore, an argument could be made that these works could be classified as “national treasures of artistic value” and therefore enjoy the protection offered by Article XX. This argument is advanced by Sandrine Cahn and Daniel Schimmel, “The Cultural Exception: Does it exist in GATT and GATS Frameworks?”
Article XIX addresses situations in which the survival of a domestic industry is threatened by the current trading environment. Countries are permitted to take emergency action on a temporary basis against certain imports, whereby they may impose trade restrictions on those imports affecting the domestic industry. Conceivably, the cultural industries could fall within the protection offered by this provision. However, in addition to the narrow scope of Article XIX, the Article also permits countries affected by such action to engage retaliatory measures in response to any new trade restrictions, and would therefore not be attractive to countries seeking protection for their cultural industries.

As previously mentioned, Article IV addresses only the motion picture industry. Essentially, Article IV allows countries to impose restrictions on film imports. Countries may establish domestic screen quotas for films, thereby ensuring that a set percentage of screen time is provided to films of national origin. Article IV(d), however, provides that such screen quotas are to be “subject to negotiation for their limitation, liberalization or elimination.”

Initial support for the exception contained within Article IV arose out of concern in several of the European nations over the harmful effects of American cultural imperialism. Since the end of the First World War, the United States government along with the Hollywood production companies coordinated efforts to secure access to foreign markets for

How does it affect or is it affected by the Agreement on TRIPS?” (1997) 15 Cardozo Arts and Entertainment Law Journal 281 at 284-5.

295 Article IV(d), GATT, supra note 2.

American films.\textsuperscript{297} The United States had, at the time of the original GATT negotiations, sought the removal of all restrictions on film trade. However, other nations involved in the GATT process believed that special treatment should be afforded to motion pictures because of this cultural medium’s unique capacity to diffuse political values.\textsuperscript{298} Furthermore, instead of incorporating tariffs into the GATT provision, they determined that quotas would provide a more effective means to achieve the protection of domestic film industries. Eventually, the United States withdrew its opposition to the provision based in part on the belief that the financial incentives of cinema exhibitors would cause them to resist screen quotas.\textsuperscript{299}

One question that has arisen with respect to the application of Article IV is whether it extends to television programs.\textsuperscript{300} 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 programs as being trade in goods;\textsuperscript{301} while the European view

\textsuperscript{297} It has been suggested that the United States government-motion picture industry alliance involved concerted efforts by both parties at establishing the United States in a hegemonic position in the motion picture industry worldwide and that the involvement of the United States government was part of a larger campaign aimed at disseminating American ideals to areas destabilized by the Second World War. 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 127-130.

\textsuperscript{298} Marc Maindrault, “Sécurité Juridique de la Spécificité Culturelle de L’Autdivisuel dans les Négociations du Cycle D’Uruguay” L’Audiovisuel et le GATT (Presses Univeristaires De France, 1995) at 107, as cited in Cahn and Schimmel, supra note 294 at 286-7.


\textsuperscript{300} A related question is whether the remainder of 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 Smith, supra note 292 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.

\textsuperscript{301} See for instance, American Multi-Cinema, Inc. v. City of Westminster, 910 P.2d 64 at 65-6 (Colo. Ct. App. 1995) in which the court concluded that transactions between distributors of motion pictures and movie theatres or television networks, in which distributors license the right to exhibit and broadcast films, constitute trade in
is that such trade constitutes trade in services. These views are consistent with the definitions of culture explored earlier in Chapter 1, whereby the United States views cultural products as being largely about entertainment and producing products in an industry in which it believes it has a comparative advantage. Therefore, it is easier to speak of such products in terms of goods. In contrast, countries such as Canada and those within the European Union view such cultural products more in terms of a less tangible expression of national identity, therefore facilitating their classification as a service. Even if trade in television programs was found to constitute trade in goods, the references in the Article to “exhibition of cinematograph films” in a “theatre” suggests that it was not intended to include the screening of motion pictures on television. The distinction between whether trade in television programs constitutes trade in a good or a service becomes important when one considers the desire of the United States to address restrictions on television programming under the GATT framework. Not surprisingly, the Europeans sought negotiations on this issue within the framework of GATS, which is where the negotiations would eventually occur.

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303 While the European Directive suggests that trade in television programs constitutes trade in services, the European Court of Justice (ECJ), along with the customs administrations of the European Union, would appear to hold the view that such trade is better classified as trade in goods. The customs administrations apply tariffs to the international sale of videotapes containing television programs. See Cahn and Schimmel, supra note 294 at 287. The ECJ implicitly held that rules governing trade in goods would apply to trade in television programs stating that while “a television signal must...be regarded as provisions of services, trade in material, sound recordings, films apparatus, and other products used for the diffusion of television signals is subject to the rules relating to the freedom of movement for goods.” See Case 155/73, Ex Parte Giuseppe Sacchi, 1974 E.C.R. 409 at 426 (1974) as referred to in Smith, supra note 296.
3.3.2 **GATT 1994 and GATS**

The Uruguay Round of multilateral trade negotiations was launched formally in September 1986 at a meeting of trade Ministers in Puna 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 Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

One of the major achievements of the Uruguay Round was the creation of a General Agreement on Trade in Services. The GATS establishes rules and disciplines for policies affecting access to service markets, greatly extending the coverage of the multilateral trading system. The GATS consists both of general principles and tangible rules that apply widely to measures affecting trade in services as well as specific commitments on national treatment and market access. As with the GATT, the MFN and National Treatment principles are

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304 The Declaration set agricultural trade issues as highest on the list, but also proposed to cover a number of new issues including: trade in services and the trade-related aspects of the protection of intellectual property. Frank Stone, *Canada, The GATT and the International Trading System*, 2d ed. (Montréal: The Institute for Research on Public Policy, 1992) at 222.

305 The Final Act of the Uruguay Round and the Marrakesh Agreement Establishing the World Trade Organization [hereinafter the WTO Agreement] were signed at the Marrakesh Ministerial Meeting. In addition, some delegations signed one or more of the four plurilateral agreements referred to in the WTO Agreement, which included: the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement; and the International Bovine Meat Agreement. The World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts* (Geneva: WTO, 1995) at 1.


307 Paragraph 1 of Article II states:
key provisions in the GATS, although they function in a less all-encompassing manner as in the GATT.\textsuperscript{308} The WTO Agreement includes the General Agreement on Tariffs and Trade 1994 [hereinafter the GATT 1994], which is based on the text of the original GATT 1947.

The audiovisual industries became subject to the treatment accorded all service sectors under the GATS.\textsuperscript{309} In the GATS, the negotiating countries did not agree to exempt culture from the agreement but they did allow countries the option of not subscribing to the MFN obligations, along with the option of subscribing to the national treatment.

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

Paragraph 1 of Article XVII states:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, 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.

\textsuperscript{308} The application of the MFN principle for each GATS member is subject to a negative list (GATS applies to all services except those listed by each member. The application of the National Treatment principle is determined by a “conditional” positive-list approach (applying only to sectors listed in a country’s schedule) and then only to measures not exempted. Hoekman, \textit{supra} note 306.

\textsuperscript{309} As defined in the Services Sectoral Classification List, Audiovisual services fall under \textit{Communication Services}. The six sub-categories and their further divisions are as follows:

- Motion picture and video tape production and distribution services;
  - Promotion or advertising services;
  - Motion picture or video tape production services;
  - Motion picture or video tape distribution services; and
  - Other services in connection with motion picture and video tape production and distribution.

- Motion picture projection service;
  - Motion picture projection services; and
  - Video tape projection services.

- Radio and television services;
  - Radio services;
  - Television services; and
  - Combined programme making and broadcasting services.

- Radio and television transmission services;
  - Television broadcast transmission services; and
  - Radio broadcast transmission services.

- Sound recording; and

- Other (could cover, for example, the contents of multimedia products).

obligations. As a result, Canada took an MFN exemption for its film and television coproductions and did not include any commitments for national treatment in the cultural sector. Therefore, Canada effectively withheld its cultural policies from the GATS disciplines and maintained its right to promote Canadian cultural services and suppliers.

At the end of the Uruguay Round of negotiations only thirteen countries made commitments in the audiovisual sector. A substantially larger number took MFN exemptions, Canada among them. As a result of accessions, the number of members making commitments has since risen to nineteen. Among the six sub-categories that compose audiovisual services, Motion Picture and Video Tape Production and Distribution Services has a total of seventeen specific commitments, followed by Motion Picture

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30 The signatories had the opportunity to enter MFN exemptions up until the GATS came into force in January 1995 with extended deadlines for financial services and telecommunications services sectors. All subsequent exemptions must accord with the rules set out in Article IX:3 of the WTO Agreement, requiring, inter alia, acceptance by at least a 75 per cent majority of the members. See Jeffrey Schott, The Uruguay Round – an assessment, Washington, D.C.: Institute for International Economics, 1994 at 101.

31 Canada is linked to over twenty countries by film and television co-production treaties. The participating countries in each treaty reciprocally obtain national status for meeting television content quotas and access to subsidized sources of funds to projects that satisfy the treaty requirements. MFN would make these privileges available to film and program producers of any country party to the GATS. Acheson and Maule, supra note 226 at 3.

32 GATS, supra note 298 at “Final List of Article II (MFN) Exemptions,” GATS/EL/16 (15 April 1994) 94-1102.

33 The Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), supra note 73 at 24.

34 WTO Council for Trade in Services, Audiovisual Services Background Note, supra note 309 at para. 24.


36 Ibid.
Projection Services with ten. Only the Central African Republic and the United States have made commitments in all six sub-categories.\textsuperscript{317}

Although Canada's cultural industries are, for the time being, sheltered from the liberalizing principles of MFN and National Treatment contained within the GATS, this sheltered existence will not continue indefinitely. Indeed, Article II(2) of the GATS provides that a nation may be exempted from its obligations under the MFN principle outlined in Article II(1) provided it adheres to the conditions contained within the Annex on Article II Exemptions.\textsuperscript{318} Paragraph 6 of the Annex on Article II Exemptions states:

6. In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade-liberalizing rounds.

Therefore, there will be continuing pressure for liberalization in the audiovisual sector within this ten year period.\textsuperscript{319} In addition, paragraphs 3 and 4 of the Annex of Article II Exemptions outline a process of review whereby the Council for Trade in Services is to review all exemptions granted for a period of more than five years\textsuperscript{320} by examining whether the conditions that created the need for the exemption still prevail.\textsuperscript{321} Presently, it does not

\textsuperscript{317} New Zealand has commitments in five sub-categories (i.e. all except sound recording), Panama and Gambia in four, and Hong Kong and Japan in three. Background Note, \textit{supra} note 309 at para. 26.

\textsuperscript{318} GATS, \textit{supra} note 271, Article II, paragraph 2.

\textsuperscript{319} See Trebilcock and Howse, \textit{supra} note 290 at 283.

\textsuperscript{320} Paragraph 3 of the Annex on Article II Exemptions states:

3. The Council for Trade in Services shall review all exemptions granted for a period of more than five years. The first such review shall take place no more than five years after the entry into force of the WTO Agreement.

\textsuperscript{321} Paragraph 4 of the Annex on Article II Exemptions states:

4. The Council for Trade in Services in a review shall:

(a) examine whether the conditions which created the need for the exemption still prevail; and

(b) determine the date of any further review.
appear that the Council for Trade in Services will have the authority to suspend or nullify exemptions, yet the established process of review of the exemptions will serve to focus attention on the eventual withdrawal of such exemptions.\(^{322}\)

Pursuant to the National Treatment principle contained in Article XVII of the GATS, Canada would be obliged to offer treatment to foreign audiovisual services and service providers that is no less favourable than that afforded to domestic audiovisual services and service providers. There is speculation that this could mean that subsidies from agencies, such as Telefilm, to domestic audiovisual producers and distributors would violate Article XVII. Similarly, the application of the market access provision in Article XVI could mean that Canada's rules for carriage of different signals on cable and limits on foreign ownership of broadcasters and cable service providers would be subject to a number of rules relating to access to the Canadian market.\(^{323}\)

As previously discussed, currently Canada is among those countries that have not included the audiovisual sector on their schedules of commitment for national treatment or market access. However, similar to the movement toward eliminating exemptions under Article II, members will be under pressure to achieve a progressively higher level of liberalization with respect to the market access provisions under Article XVI and the National Treatment principle under Article XVII. Pursuant to Article XIX, members are to

\(^{322}\) However, there is no obligation to relinquish MFN exemptions at the end of the ten year period. See Schott, supra note 310 at 101.

\(^{323}\) Acheson and Maule, supra note 226 at 3-4. Pursuant to paragraph 2 of Article XVI, there must be no limitations on the number of service providers allowed; the value of transactions or assets; the total output of the service; the number of persons employed; the organizational form a supplier can adopt; the extent of foreign shareholding; or the absolute value of foreign investment.
enter into successive rounds of negotiations beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter with a view to eliminating the adverse effects of measures that impede effective market access.324 Consequently, there will again be constant pressure to increase the general level of specific commitments undertaken by members under the GATS.325

3.4 The Multilateral Agreement on Investment (MAI)

In recent years, a number of initiatives have sought to address international investment. Chapter 11 of the NAFTA contains detailed provisions on investment that represent a codification of the most comprehensive measures governing investment, in a plurilateral or regional context, yet to come into force.326 The investment provisions in the NAFTA attempted to build on the approach taken in the FTA. Chapter 11 incorporates reservations and exceptions to the general principle of National Treatment and the right of establishment.327 However, with the cultural exemption clause of Annex 2106 applying

324 GATS, supra note 271, Article XIX, paragraph 1.

325 A country may qualify its commitments taken under both the National Treatment and market access provisions. A country's schedule considers four different ways for a service to be provided:

- by the service being sold abroad to the consumer;
- by the consumer travelling to the foreign service;
- by commercial presence; and
- by the service provider travelling to supply the service abroad.

A country may state that it is "unbound" for any of the four commitments, in effect exempting itself entirely from the commitment(s). Should a country include any commitment on its schedule, the country may still also include reservations on the extent to which the commitment applies, in effect qualifying the extent of the commitment. See Acheson and Maule, supra note 226 at 4.


327 The right of establishment provides a legal guarantee that investors from any one of the Parties to the agreement will be permitted to own business assets and operate in a productive capacity in the jurisdictions of the other Parties. The National Treatment obligation requires that once a foreign firm is established, it will not
equally to investment, any of Canada's measures relating to a cultural industry as defined in Article 2107 can be exempted from the obligations of Chapter 11. The WTO Agreement has also addressed international investment in the Agreement on Trade-Related Investment Measures,\(^{228}\) which is perhaps recognition of the inherently complementary relationship between trade and investment in the present world economy. The TRIMs Agreement, however, is limited to a narrow range of trade-related investment measures affecting goods only, in effect clarifying provisions of the GATT that address the elimination of quantitative restrictions as well as national treatment obligations.\(^{229}\) The Organization for Economic Cooperation and Development (OECD) often cites the rapid growth of foreign investment, both in terms of portfolio investment\(^{330}\) and foreign direct investment (FDI)\(^{331}\) as the

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suffer discrimination under the host countries' laws \textit{vis-à-vis} domestic firms. Trebilcock and Howse, \textit{supra} note 290 at 353.

\(^{228}\) \textit{Agreement on Trade-Related Investment Measures}, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 44 (1994) [hereinafter TRIMs Agreement]. The TRIMs Agreement prohibits certain types of requirements on investors, in particular local content and trade-balancing requirements. It provides for a transition period for the phasing-out of such requirements that were pre-existing when the agreement came into force. The Agreement also provides for a review by 2000 that will consider if the Agreement should be complemented with provisions on investment policy and competition policy.

\(^{229}\) Ivan Bernier, "Cultural Goods and Services in International Trade Law" in The Culture/Trade Quandary, Dennis Browne, ed. (Ottawa: Centre for Trade Policy and Law, 1998) 108 at 135. Bernier points out that the TRIMs Agreement may be used to challenge investment measures related to trade in cultural goods that are inconsistent with the obligation of national treatment of Article III:4, or with the obligation of general elimination of quantitative restrictions of Article XI:1, of the GATT 1994. Further, investment measures concerning cultural goods that would be particularly vulnerable to an attack under the TRIMs agreement are those that incorporate performance requirements, found for instance in the Investment Canada Act and its accompanying regulations. The provisions speak of the Minister being satisfied that the investment is of "net benefit to Canadians" by taking into account such factors as the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, and on the use of parts, components and services in Canada and exports from Canada.

\(^{330}\) Portfolio investment is the purchase by an individual, company, or financial institution of interest bearing overseas securities. It involves a transfer of mere money capital. The aim of such investment is to acquire financial asset which will yield an annual flow of income and/or which can be sold at a future date for a higher price than at which it was bought, thus realizing a financial gain. See Nigel Grimwade, \textit{International Trade: New Patterns of Trade, Production and Investment} (London: Routledge, 1989) at 144.

\(^{331}\) Foreign direct investment (FDI) is defined as an investment involving a long-term relationship and reflecting a lasting interest and control of a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor. Foreign direct investment implies the investor exerts a significant degree of influence on the management of the enterprise resident in the
rationale behind the move to address this area of global relations. Furthermore, the OECD has sought to persuade countries that a comprehensive multilateral agreement on investment is needed to enable the multilateral trading system to develop a modern and credible set of investment disciplines.

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. It would set clear, consistent and transparent rules on liberalization and investor protection, with dispute settlement, thereby underpinning the continued removal of barriers to market access and encouraging economic growth. It would be broader in scope than most bilateral investment treaties and would be open to all OECD members and the European Communities and to accession by non-OECD Member countries. The MAI would provide


336 For a discussion of the proposed process of accession, see Charles Bridge, "The Multilateral Agreement on Investment: Institutional Arrangements and Accession" in *Multilateral Agreement On Investment - State Of*
a benchmark against which potential investors would assess the openness and legal security offered by countries as investment locations.\textsuperscript{337} It had been hoped that this would, in turn, act as a spur to further liberalization; however, the acceptance and ratification of the MAI was not to be.

Opposition to the MAI arose at a grassroots level in many countries throughout the world. Aided by the internet, groups\textsuperscript{338} voicing opposition to the agreement were able to broadcast information instantly worldwide.\textsuperscript{339} On their websites and in other media, the groups relied on terms and examples that could be readily understood by the public.\textsuperscript{340} This contrasted with the approach taken by the OECD, which had overestimated the effectiveness of its communications strategy\textsuperscript{341} by relying heavily on reports compiling statistics on the benefits and effects of the MAI.\textsuperscript{342} The result was a public outcry of opposition to the agreement. However, there were other problems at the level of negotiations that also destabilized the negotiations. Canada, along with certain European countries, attempted to secure an exclusion of the cultural industries from the agreement.\textsuperscript{343} In addition to concerns


\textsuperscript{337} OECD, CIME/CMIT Report, \textit{supra} note 332.

\textsuperscript{338} In Canada, the Council of Canadians regularly posted information on the MAI process on its website, including a leaked draft version of the text of the MAI. See Madelaine Drohan, "How the Net killed the MAI" \textit{The Globe and Mail} [National Edition] (29 April 1998) A1, A12.

\textsuperscript{339} \textit{Ibid.}

\textsuperscript{340} \textit{Ibid.}


\textsuperscript{342} \textit{Ibid.}

\textsuperscript{343} The U.S. did not favour a general exception provision exempting the cultural sectors from the agreement. Canada was also seeking reservations for health care, social programs, education and programs for Aboriginal
regarding the environment and health care, the U.S. objected to the focus on its legislation dealing with investment in Cuba. Despite the OECD secretary-general’s assurances that the OECD was the best venue in which international investment liberalization could be discussed, on April 28, 1998 negotiations in the OECD were suspended, with the entire negotiation process to be reassigned to the WTO.

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 the years to come. Essentially, the MAI would have extended the MFN and National Treatment principles to international investment. Using the NAFTA investment provisions as a guide, the MFN and National Treatment principles already form the basis of many bilateral investment treaties that Canada has committed itself to. Canada has developed a formulaic approach to addressing cultural concerns in the bilateral investment treaties whereby each such agreement contains a specific


344 The U.S. Helms-Burton legislation penalizes foreign companies that are active in Cuba, and has received criticism from the EU, which had been seeking to resolve the issue through the negotiations. See Heather Scoffield, “Disagreements put global MAI talks at risk” The Globe and Mail [National Edition] (23 January 1998) B9.

345 Donald Johnston, secretary-general of the OECD cited the fact that the twenty-nine members of the OECD were the source for more than 80 per cent of the FDI as a reason for keeping the negotiations within the auspices of the OECD. See Drohan, “OECD fails to reach consensus on MAI”, supra note 341.


347 With nearly five times the number of members as the OECD and a more diverse membership, the WTO may be unable to achieve an agreement in a timely fashion.
provision excluding cultural industries from all elements of the agreement. Like the NAFTA approach, the MFN provision in the MAI would not have required a country to establish or maintain particular conditions of access for foreign investment; rather it would have required that those conditions of access be the same for all countries. Similarly, the National Treatment provision would not have required that foreign investment in a country be subject to particular treatment; rather it would have required that foreign and domestic investment be treated the same way. Although seemingly benign, the application of the

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Canada has entered into Foreign Investment Protection and Promotion Agreements (FIPAs) with a number of countries; the agreements are based on the NAFTA model. Canada's model FIPA, as mandated by Cabinet, contains a specific provision excluding cultural industries from all elements of the Agreement. Consequently, each of Canada's 18 FIPAs signed since 1995 includes such a provision. (The six FIPAs signed between 1989 and 1993 did not require a listing of specific exceptions since, under those Agreements, treatment of foreign investment was subject to domestic laws). The Canada-Uruguay FIPA, which came into force on June 2, 1999, contains such an exception in Annex I.III.4 that states:

4. Investments in cultural industries are exempt from the provisions of this Agreement. "Cultural industries" means natural persons or enterprises engaged in any of the following activities:
   
   (a) 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;
   
   (b) the production, distribution, sale or exhibition of film or video recordings;
   
   (c) the production, distribution, sale or exhibition of audio or video music recordings;
   
   (d) the publication, distribution, sale or exhibition of music in print or machine readable form; or
   
   (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.

The MFN provision of the MAI had been drafted as follows:

Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.


The National Treatment provision of the MAI had been drafted as follows:

Each Contracting Party shall 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, management, maintenance, use, enjoyment and sale or other disposition of investments.

See MAI Text, ibid.
provisions would have caused significant problems for certain of Canada’s cultural industries. For instance, various international agreements, including Canadian co-production agreements, make exceptions to the MFN principle and offer foreign firms of third countries preferential or even national treatment.\textsuperscript{351} Indeed, application of the MFN and National Treatment principles has the potential to affect investment in the cultural sectors in Canada in industries ranging from book publishing to film production. Yet despite the seemingly broad coverage these principles would entail, general and specific reservations could have been negotiated, similar to the general exception provision found in the NAFTA, and would have then formed an integral part of the MAI.

One such general reservation would have addressed culture. One delegation proposed a draft version of a cultural exception provision that would have attempted to protect cultural industries from the disciplines covered by the agreement. The proposed exception read as follows:

"Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity."	extsuperscript{352}

The provision was drafted widely so as to have application not solely to cultural industries; rather, the provision seeks to exempt all measures even if they address non-industrial cultural sectors, such as theatre, opera and dance. In addition, the provision was designed to function as a general exception provision, eliminating the need for each country to take a specific

\textsuperscript{351} MAI Text, \textit{ibid.} at 128.

\textsuperscript{352} \textit{Ibid.}
reservation for its cultural measures. By ensuring the protection of cultural measures in a general exception provision, the MAI’s provisions respecting standstill would not have applied to the cultural exception provision.\(^353\) In addition, the provisions in the MAI calling for a rollback of the existing measures detailed in country specific reservations would also not have been applicable to the general exception provision exempting the cultural measures.\(^354\) Consequently, many of the concerns regarding cultural sovereignty that surround the implementation of a MAI would be averted through the acceptance of a general exception provision similar to the one described above.

3.5 Conclusion

Each of the agreements described above contains measures that impact the cultural industries, and in the case of the MAI, have the potential to extend to non-industrial cultural sectors as well. The agreements, by their nature, overlap with each other in terms of the scope of certain of the provisions. As well, each has had to address concerns relating to culture, and each has done so in a unique fashion. The NAFTA provides a general exception provision for the cultural industries, while the MAI, in creating a similar provision, would

\(^{353}\) Pursuant to the standstill provisions, countries would detail in their reservations the nature and scope of all non-conforming measures, which would be exempted from the application of the overall agreement; however, new or more restrictive exceptions to the established minimum standard of treatment would be prohibited. In certain of the cultural sectors, the operation of such a provision could eventually erode the protections provided to the sector, since sectors using new technologies would not enjoy the benefits of the reservations. See OECD Directorate For Financial, Fiscal And Enterprise Affairs, Commentary to the MAI Negotiating Text (as of 24 April 1998), Paris: OECD, 1998 at 59. Available: http://www.oecd.org/da/ cmis/mai/negtext.htm [hereinafter Commentary to the MAI Text]. It was believed that such a situation would undermine the results of the Uruguay Round for the audio-visual sector, since upon completion of the Round, only three OECD members undertook specific commitments in the audio-visual sector. The other signatories - including the European Union and its Member States - did not agree to a standstill commitment with respect to mode 3 of the GATS (“establishment of a commercial presence”) in this sector. See MAI Negotiating Text, supra note 349 at 128.

\(^{354}\) The rollback provisions called for the reduction and eventual elimination of non-conforming measures to the MAI. Standstill forms the starting point for the operation of the rollback provisions, and over time the reservations may be agreed to be phased-out or may be subjected to trade-offs whereby one country agrees to remove certain reservations in exchange for another country doing the same. These new liberalization measures would be locked in so they could not be rescinded or nullified over time.
have exempted all culturally related measures. The GATT 1947 addresses only the film industry, and the GATS uses a negative option list for the audiovisual sector.

One can view the effect of each agreement on the cultural sectors, in terms of a continuum. The NAFTA, which contains a general exemption provision for the cultural industries offers the most in terms of protection of the cultural industries, notwithstanding the different interpretations of the agreement by each of Canada and the United States. At the opposite end of the spectrum to the treatment of the cultural industries under the NAFTA, is the treatment afforded under the GATS. Pursuant to the GATS, in which core principles of liberalization have been adopted by certain countries, liberalization of the audio-visual sector will occur over time as a result of pressure to do so from successive negotiating rounds. The provision respecting motion pictures contained in the GATT and the concerns it sought to address still have application today. At the same time, however, the same provision reflects the context of a very different period in history in terms of what the provision did not address, namely the other cultural sectors.

Each of the above agreements offers insight into how the nations of the world view the cultural or entertainment industries. Differing views on the meaning of culture and how the culture of a nation is conveyed to its citizens lay at the heart of the distinct positions taken by nations in the negotiation of international agreements that must address the cultural or entertainment industries. Countries such as Canada and many of those within the European Union have sought special treatment and protective measures for their cultural industries, while the U.S. continues to seek to dismantle the protective barriers of foreign countries that prohibit its highly successful entertainment industry from delivering more of its products to
consumers in foreign countries. The international agreements are essentially a compromise of these extreme positions and each agreement addresses the cultural industries to different extents. An understanding of the manner in which the agreements address culture is essential for the case studies of the next chapter which portray recent examples of cultural policy shifts that have and may soon occur in certain sectors of the cultural industries in Canada.
Chapter 4 Analysis of Current Canadian Policy Initiatives in the Context of International Agreements

Even supposing it has secured our longed-for sense of separateness from the Americans, our national belief that our government must be more interventionist than theirs often blinds us to the costs of intervention. If what is at stake really is national survival, then almost no cost is too high.... But if the nation is not at risk, then the effects of excessive government need to be scrutinized.


A society only articulates itself as a nation through some common intention among its people.

- George Grant, *Lament for a Nation* (Ottawa: Carleton University Press, 1988) at 68.

4.1 Introduction

The previous chapter examined several international agreements and the manner in which each one addresses the cultural sectors. The current chapter will focus on an analysis of three specific federal government policy initiatives that exemplify the classes of policy instruments identified earlier in Chapter 2. In that chapter it was posited that the government’s policy measures could be grouped within four broad categories, which include:

- Subsidies
- Quotas and Canadian Content Provisions
- Foreign Investment Restrictions and Canadian Ownership Provisions
- Other Legislative Measures

From within three sectors of the cultural industries, namely, film and video; periodical publishing; and public television broadcasting, recent policy initiatives may be identified, which illustrate the use of one or more of the above categories of policy instruments.

Essentially, the initiatives include: the provisions of the agreement between Canada and the United States resolving the dispute concerning periodicals, along with the relevant Canadian legislation; the CBC proposals to the 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 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, as well as any international reaction to the Canadian initiatives. Although there are a great number of examples that merit discussion in terms of their consistency with Canada’s commitments under various international agreements, 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. The examination then shifts to provide a discussion of the provisions of the international agreements that may have application to the particular sector and the effects these measures may have on the initiatives. The examination then concludes with an analysis of the probable future of the initiatives in light of any constraints imposed by any of the international agreements that may have application within the particular sector. Finally, employing the individual case studies as representative of the current policy regime, which seeks to protect and promote Canadian culture, the question of whether the application of commitments under the international agreements is consistent with the current policy regime will be discussed. If the direction of the current policy regime is irreconcilably divergent from the direction of the international commitments, Canada may have to alter the focus of its current policy initiatives that seek to promote the cultural industries, and this may have significant effects on the promotion of Canadian culture in general.
4.2 The CBC and the Future of Canadian Public Broadcasting

4.2.1 Introduction

On May 21, 1999 the CRTC handed down its much-awaited decision regarding the awarding of French-language specialty channel licences. 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.

Although the CBC had put forward four of its own applications, none was among the successful proposals.

On July 5, 1999 the CBC filed an appeal with the federal government of the CRTC decisions of May 21, 1999 granting the new French specialty channel licences. The last such appeal filed by the CBC to review a decision by the CRTC occurred in 1974. 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

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356 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.


358 Ibid.
and culture in their own language that is available to English Canadians." The CBC argued that its proposed channel, le Réseau des arts, was the only application submitted to the CRTC for a French language specialty channel devoted to the arts and culture.

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. 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 range of specialty services available for Francophones and Francophiles in Canada.” The CBC further argued that the CRTC’s stated criteria on the

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359 Ibid.

360 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

361 CBC, News Conference Concerning the Appeal, supra note 357.

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

363 Ibid. Section 3 of the Broadcasting Act states:

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

[...] (r) the programming provided by alternative television programming services should

(i) be innovative and be complementary to the programming provided for mass audiences,

(ii) 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,

(iii) reflect Canada’s regions and multicultural nature,

(iv) as far as possible, be acquired rather than produced by those services, and

(v) be made available throughout Canada by the most cost-efficient means;

[...]
selection of the channels placed a disproportionate emphasis on market considerations over programming diversity and the objectives of the Act.\(^{364}\)

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.\(^{365}\) The government has 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.”\(^{366}\) The options open to the CRTC include calling for oral public hearings on the matter, requesting only written submissions, or preparing a report on the basis of the testimony it has already heard.\(^{367}\) If the CRTC finds that a new French language cultural service is appropriate, there will be a call for applications.\(^{368}\)

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\(^{364}\) 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 431.


\(^{367}\) Fraser, supra note 365.

\(^{368}\) Ibid.
4.2.2 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. First, the CRTC announced that it would undertake a review of Canadian television policy with public hearings to begin in September 1998. 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 under-representation 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. 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.” The Report of the Commission was released in June 1999.

369 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.


371 Ibid.

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

1. 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?
2. 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.

The CRTC also undertook a 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 the objectives of the Broadcasting Act. 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. 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. 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. The final report of the Commission has yet to be released.

The Commission last considered licence renewal applications by the CBC for its television services in 1994. Since 1994, however, there have been a number of significant changes in the television services market. Rapidly changing technology continues to outpace

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375 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.


378 Ibid.
the corresponding initiatives of the public and private broadcasting sector. 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. In light of these changes one potential path for the CBC was to continue branching into additional specialty services, while maintaining its generalist channels. 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 the private sector. 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. 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.

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

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379 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.


381 Raboy, *ibid.* at 195.


383 *Ibid.* at 199. The CBC’s mandate is outlined in section 3 of the *Broadcasting Act*, supra notes 207 and 208.

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. 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 discussed earlier in Chapter 3. Once the recommendations contained in the document are outlined, an analysis of the corresponding issues will be undertaken below. As well, in March 1999 the CBC submitted a planning document as part of the CRTC public hearing and licence renewal hearings involving the CBC. The Strategic Plan details specific policy directions that the CBC proposes for the future of Canadian public broadcasting. Again, once the proposals are outlined, it will be determined whether the issues and policy proposals covered in the Strategic Plan are likely to be affected by any of the international agreements Canada has entered into.

### 4.2.3 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. The CBC focused on what it saw as the

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386 CBC, *Canadian Television for Canadian Audiences*, ibid.
problem of increasing viewership of Canadian content programming in the "under-represented" categories of drama, documentaries and children's programs.387

The CBC points out that since 1961, regulators have relied on quantitative Canadian content requirements to accomplish the cultural objectives of the Broadcasting Act.388 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.389 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.390 Specifically, the CBC requests that the CRTC tighten the current Canadian content quotas especially for the under-represented categories.391 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. Specifically, the CBC would

387 Ibid. at 14.
388 Ibid. at 15.
389 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.
390 Ibid. at 17.
391 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.
achieve this through specialty channels, as well as exporting not only programs, but also signals to the world market.\textsuperscript{392}

Essentially, the CBC’s new goals are driven by the emergence of new delivery technologies.\textsuperscript{393} 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 \textit{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.\textsuperscript{394} 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.\textsuperscript{395} The CBC claims that constellations have moved in to replace networks as the dominant industrial structures.\textsuperscript{396} The CBC cites its own positive experience with the CBC Newsworld and RDI specialty channels as evidence of the effectiveness of the constellation approach.\textsuperscript{397}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{392}]\textit{Ibid.} at 18.
\item[\textsuperscript{393}]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, \textit{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, \textit{ibid.} at 25.
\item[\textsuperscript{394}]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, \textit{ibid.} at 23.
\item[\textsuperscript{395}]\textit{Ibid.} at 27.
\item[\textsuperscript{396}]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
\end{enumerate}
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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 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. Therefore, the CBC advocates copying the successful marketing practices of the U.S. constellations, and calls on the CRTC to encourage an industrial restructuring that would incorporate the constellation model on an industry-wide basis. 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 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.

397 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.

398 Ibid. at 29.

399 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.

400 Ibid. at 33.
programs on other services owned and controlled by the program broadcaster.\textsuperscript{401} 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.\textsuperscript{402}

4.2.4 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 a document outlining its plan for the future of its television and radio operations.\textsuperscript{403} Recalling that the CRTC review encompassed hearings regarding applications for renewal of the network television licences issued to the CBC,\textsuperscript{404} the CBC’s Strategic Plan outlines specific commitments for each of the 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

\textsuperscript{401} 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, \textit{ibid.} at 34.

\textsuperscript{402} The content quotas had been originally set at 55 per cent, but now stand at 60 per cent, \textit{ibid.} at 15.


\textsuperscript{404} At the hearings, the Commission considered applications by the CBC to renew the licences for the following 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.

addition, the CBC 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. 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. 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. A main component of the strategic direction for French television includes the addition of specialty services and positioning Radio-Canada as a leader in Francophone content on the internet. In addition, the CBC plans to extend and improve international coverage through other strategic partnerships.

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405 CBC, Strategic Plan, supra note 403 at 20.

406 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.

407 Ibid. at 21.

408 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
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\(^4\) requiring that it distinguish itself as Canada's main supplier of all-Canadian content.\(^5\) The CBC believes that a constellation approach would provide economies of scale and create the additional broadcasting outlets needed to increase viewing shares of Canadian programming. 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.\(^6\)

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\(^{4}\) Section 3 of the Act states:
3 (1) It is hereby declared as the broadcasting policy for Canada that

\[\ldots\]

(i) 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;

\(^{5}\) Ibid. at 19.

\(^{6}\) 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.
French television.\textsuperscript{413} 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.\textsuperscript{414}

### 4.2.5 Analysis of the CBC's New Direction under GATS

The key aspects of the CBC's new policy direction call for 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.\textsuperscript{415} 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.\textsuperscript{416} 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

\textsuperscript{413} 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, \textit{Strategic Plan}, \textit{supra} note 403 at 18.

\textsuperscript{414} 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.

\textsuperscript{415} 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.

\textsuperscript{416} CBC, \textit{Canadian Television for Canadian Audiences}, \textit{supra} note 385 at 41.
increasing amount of the money they spend annually on programming to production in those categories. 417

Of the international agreements discussed in Chapter 3, 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. 418 The MAI, by definition could have application to investment in the broadcasting and cable industries, 419 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.” 420 As noted earlier in Chapter 3, the purpose of the GATS is to extend general principles governing GATT to trade in services, 421 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

417 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.

418 See the discussion of television programming constituting a service as opposed to a good under the GATT supra note 300.

419 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.

420 The industry would then be subject to the same debate as each of the other exempted sectors concerning permitted retaliation. See the definition of “cultural industries” in Article 2107 of the NAFTA, supra note 273.

421 GATS, supra note 271, preamble.
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." With no cultural exception 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. 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

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422 Under the GATS, each member country has to formulate offers and commit itself by way of a written obligation 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 Cahn and Schimmel supra note 294 at 299.

423 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.
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 may not be one the CRTC is willing to endorse for the national broadcaster in Canada.

4.2.6 Conclusion

Certain policies put forward by 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, 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.

4.3 The Feature Film Advisory Committee and Canadian Film

4.3.1 Introduction

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. Indeed, it has been observed that Canadian feature films almost never recover their budgets from theatrical admissions. Aside from the industry’s

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424 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 thesis may wish to review the list below and determine themselves how many of these “top” Canadian films they have seen 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 40 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.

425 Between 1987 and 1990, only three of 48 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 Lorimer & Company, 1996) 145 at 150.
"structural problems" related to an exodus of talent to the U.S. and a relatively small population available as audiences, 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. Many Canadian films simply are not provided with access to theatre screens at the theatre chains in Canada.

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. 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. Naturally, the best available screen time at Cineplex Odeon and

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426 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.

427 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 often-times, references to things Canadian may be avoided in order to appeal to the international audience. Fraser, supra note 135 at 222.

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

429 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 135 at 222-3.


431 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 425 at 149.
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.432

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.433 The major Hollywood production-distribution companies not only produce and distribute their own (proprietary) films; they also seek to distribute (non-proprietary) films produced by independent production firms.434 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 consumers 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.435 Further, the arrangement deprives Canadian distribution firms from distributing

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433 Film distribution firms are in the business of obtaining rights to films, arranging for the manufacture of videocassettes 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 Shao, supra note 297 at 132-3.

434 Magder, supra note 425 at 152.

435 Many Canadians were recently outraged 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.
major films in the Canadian market, resulting in the loss of significant revenues to the Canadian firms. 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, with the result that Canadian distributors are denied the ability to compete for Canadian-only rights to such films.

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. In 1987 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. However, the major U.S. firms objected strongly to such an initiative and undertook an intense lobbying campaign in opposition to the proposals. Eventually, the federal government abandoned the initiative in favour of an emasculated version of the 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.

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 The Cultural Industries Sectoral Advisory Group on International Trade, supra note 73 at 14.

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 425 at 152.

Feature Film Advisory Committee, supra note 40 at 19.

See the discussion regarding the film distribution policies under the Investment Canada Act, beginning at Section 4.3.2.

The Cultural Industries Sectoral Advisory Group on International Trade, supra note 73 at 14. For a discussion of various government-internal factors influencing the push toward the policy initiatives and its ultimate failure, see Fraser, supra note 135 at 242-3.

With the assistance of the U.S. trade negotiators at the time, the effort against the legislation included American threats to abandon the Free Trade Agreement during the final stages of negotiation. Magder, supra note 425 at 172.
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. Due to the continued dominance of the major U.S. distributors, the Canadian-owned distribution sector remains in a stagnant state to this day.

4.3.2 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. 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. 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. However, those who would defend the

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442 Magder, ibid.

443 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 135 at 221.

444 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 425 at 156.

445 Magder, ibid. at 158.
subsidies say that each dollar spent by the federal government in the feature film industry generates another $3.88 in investment from other sources.446

As noted in Chapter 2, 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.447 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.448 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.449 Many of the films produced during the tax-shelter boom were criticized for being unidentifiably Canadian productions.450 The tax-shelter boom ended in 1983 when the allowable capital cost deduction was drastically reduced, with further reductions implemented in 1988.451

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

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446 Feature Film Advisory Committee, supra note 40 at iii.

447 Supra pages 32-6.

448 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 425 at 166-7 and Fraser, supra note 135 at 241-4.

449 Fraser, supra note 135 at 241.


451 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 425 at 167.
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.\footnote{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.} 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.\footnote{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 297 at 131.} Therefore, the Hollywood distribution companies have continued to operate as they have for decades; however, any non-Hollywood foreign distributors are not allowed to distribute non-proprietary films in Canada.\footnote{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 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. See Magder, supra note 425 at 172.} This policy caused significant tension 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.\footnote{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.} The Canadian government allowed PolyGram to establish a film production subsidiary in Canada, but refused the request for an
exemption from the investment policy. The Canadian actions provoked an official protest from the EU. 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.

4.3.3 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 recommendations aimed at increasing the “production capacity, diversity and availability of Canadian films.”

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, as well as the consolidation of at least $53

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460 Feature Film Advisory Committee, supra note 40 at ii.

461 Feature Film Advisory Committee, supra note 40 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
million of existing 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.\(^{462}\) 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.\(^{463}\) The remainder of the funds would be available to certain other films, as well as to emerging filmmakers and to training and mentoring programs.\(^{464}\)

The Committee further recommended changes to the Production Services Tax Credit.\(^{465}\) 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.\(^{466}\) The Committee believed that support to foreign film producers was inconsistent with the other federal policies that support the cultural industries in Canada.\(^{467}\)

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 459.

\(^{462}\) 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 40 at 15.

\(^{463}\) Ibid. at 13. Recently, it was reported that the Minister of Canadian Heritage plans to 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.

\(^{464}\) Ibid.

\(^{465}\) As discussed in Chapter 2, 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.

\(^{466}\) Feature Film Advisory Committee, supra note 40 at 9.

\(^{467}\) Ibid.
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. It was recommended that the financing could take the form of equity investments and licence fees. 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.

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 Committee 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

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468 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.

469 Ibid.

470 The Committee further endorsed having the CRTC structure other regulations that would both require and encourage broadcasters to incorporate feature films into their broadcasts, ibid. at 18.

471 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.
availability of separate Canadian rights have been made known and other distributors have had an equitable opportunity to bid on those Canadian-only rights.472

4.3.4 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 introduced in Chapter 3. 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 audiovisual 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.”473 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.

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

472 Ibid.

473 Article XVII:1, GATS, supra note 271.
Canada’s policies that have sought to attract foreign production business in the guise of Canadian cultural development.\textsuperscript{474} 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.\textsuperscript{475} Although, the international agreements recognize this concept, there is a definite trend toward implementing a system of negotiations aimed at reducing and eliminating

\textsuperscript{474} 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” \textit{The National Post} [National edition] (21 August 1999) D5.

\textsuperscript{475} Export subsidies, on the other hand, can have significant distortive effects on trade and are typically banned among members of free trade agreements.
subsidization of domestic industry.\footnote{476} In this respect, the audiovisual industries are addressed by Article XV of the 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.\footnote{477} Presently, though, Canadian commitments under the GATS do not prevent the federal government from legally pursuing the establishment of the film-fund subsidy to assist Canadian producers.

\footnote{476} 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 1 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;

(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.


\footnote{477} Cahn and Schimmel, \textit{supra} note 294 at 301.
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 1987\textsuperscript{478} 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 \textit{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, management, maintenance, use, enjoyment and sale or other disposition of investments.”\textsuperscript{479} 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 1997-8, both

\textsuperscript{478} 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. See the discussion at 4.3.1 and Fraser, \textit{supra} note 135 at 242-3.

\textsuperscript{479} MAI Text, \textit{supra} note 336.
proprietary and non-proprietary products. 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.

4.3.5 Conclusion

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. 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. 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.

480 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.
4.4 The Canada-United States Periodical Dispute

4.4.1 Introduction

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. The USTR alleged that the measures unfairly protected Canada's domestic magazine industry. In its June 1997 decision, the Appellate Body of the WTO essentially agreed with an earlier decision 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 GATT 1994. The United States had argued that the measures prohibited or restricted the importation into Canada of certain periodicals. Canada has now enacted legislation respecting advertising services supplied by foreign periodical publishers. Canada initially took the position that since the new legislation sought

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481 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. See s.2, Foreign Publishers Advertising Services Act, infra note 483. A similar definition had been found in Tariff Item 9958, infra note 508. The terms “periodical” and “magazine” may be used interchangeably throughout this paper.


485 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 detail in subsequent pages.
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. The U.S., however, regarded the new legislation as simply a new prohibition on U.S. companies' ability to do business in Canada. The U.S. took the position that the new legislation was as inconsistent with Canada's international trade obligations as the former discriminatory measures. The U.S. had threatened trade retaliation in other sectors had Canada enacted the Advertising Services Act in its originally proposed form.

On May 26, 1999 Canadian and U.S. representatives announced that a compromise to the dispute had been reached. 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. It is therefore useful to determine whether Canada has in fact found a legitimate way of supporting Canadian culture; or, whether the new legislation, like the predecessor legislation, may yet contravene Canada's international trading obligations under GATT 1994. In order

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486 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.


488 Ibid.


490 Jack, supra note 261. The Agreement is analyzed in greater detail in subsequent pages.
to accomplish this task, it is useful to provide an historical context for the dispute, along with a brief examination of the periodical industry in Canada. Next, the previous measures that the WTO found to be inconsistent with Canada’s GATT obligations are 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 GATS to determine whether it is in fact consistent with Canada’s obligations under those agreements.

4.4.2 Background

Historically, the Canadian periodical industry has been perceived as an industry with a primarily national emphasis, as opposed to the locally focused Canadian newspaper industry.\(^{491}\) Canadian periodicals cover a wide variety of topics including news, politics, sports, trades and professions, and geography. The national character of periodicals led the Senate Committee on the Mass Media (the “Davey Committee”)\(^{492}\) 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.\(^{493}\) 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.

\(^{491}\) Recently, however, city and regional periodicals have emerged (for instance: Toronto Life or Western Living), which cater primarily to a specific, localized readership. In addition, periodicals targeted toward a specific market segment (sport and fitness, computer, interior design etc.) have become increasing prominent; however, these can still maintain a national focus. See Dubinsky, supra note 224 at 37.

\(^{492}\) Senate Committee on the Mass Media, supra note 225.

\(^{493}\) Audley, supra note 28 at 54; and Acheson and Maule, supra note 226 at 13.
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.\footnote{Statistics Canada, Periodical Publishing, 1996/97 (Ottawa: Statistics Canada, 1998). Available: http://www.statcan.ca/ Daily/English/980914/d980914.htm#ART1.} 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.\footnote{Making Room for Canada's Voices, supra note 203.} However, the home delivery market reveals a considerably different trend. According to Statistics Canada, in 1996-97 single copy sales of English language Canadian magazines accounted for $26.6 million, while subscription sales accounted for $176.8 million.\footnote{Statistics Canada, supra note 494.} 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.\footnote{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.} 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.\footnote{Canadian Circulations Audit Board, Audit Bureau of Circulation, Print Measurement Board, as referred to by Dubinsky in Dorland, supra note 352 at 45.}

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-language\textsuperscript{499} magazines, while revenues from subscription and single-copy sales \textit{together} accounted for less than half that amount.\textsuperscript{500} 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.\textsuperscript{501} 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 \textit{Sports Illustrated}'s Canadian edition. \textit{Sports Illustrated Canada} was printed in Canada but

\begin{footnotes}
\item[499] 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, \textit{supra} note 494.
\item[500] Statistics Canada, \textit{ibid}.
\item[501] 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 \textit{A Question of Balance, supra} note 38 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.
\end{footnotes}
contained primarily U.S. editorial copy 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.502

Time Canada announced plans to launch a split-run503 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.504 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 1993.505 Nevertheless, the government became dissatisfied with the prospect of *Sports Illustrated* operating a Canadian edition and in the spring of 1993

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502 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.

503 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.

504 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.

505 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.
proceeded to establish The Task Force on the Canadian Magazine Industry in order to identify potential policy options.

The 1994 Report of the Task Force\(^{506}\) 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.\(^{507}\) 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.\(^{508}\)

### 4.4.3 The Canadian Legislation

#### Historical Overview

In 1965, section 19 of the *Income Tax Act*\(^{509}\) and Tariff Code 9958\(^{510}\) implemented the recommendations of the Royal Commission on National Development in the Arts, Letters and Sciences (Massey Commission, 1951)\(^{511}\) and the Royal Commission on Publications...

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506 *A Question of Balance*, supra note 38.

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

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


510 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.

gradually The essentiality apply to The Canada Post to eligible "Canadian" sold in 1996 the government announced a editorial revenues had recovered to "funded" advertising in outside ownership, advertising in "" (Le. periodicals had to be at 52 periodicals in Canada - three first, that foreign periodicals not more there governmental provision, yet both Time and Reader's Digest were able to find ways essentially to circumvent the effects of the new legislation.  

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.  

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512 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 38.

513 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 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.

514 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 226 at 13.

515 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 and the commercial "Canadian" and commercial "International" 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.
A 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.\(^{516}\)

**The U.S. Challenge**

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:

1. Tariff Code 9958 - Import Prohibition;
2. Part V.I of the *Excise Tax Act*; and
3. Funded and Commercial Postal Rates.

**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.\(^{517}\) However, the Appellate Body reversed the Panel's decision in part and decided against Canada on all issues.

1. **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

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\(^{517}\) 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 GATT 1994; however, the Panel found that the maintenance of the "funded" rate scheme was justified under Article III:8(b) of GATT 1994.
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 there was a possible defence against the application of Article XI:1.\(^{518}\) Canada argued that it was entitled to the measure under Article XX(d),\(^{519}\) as it was "necessary to secure compliance with other GATT-consistent legislation."\(^{520}\)

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.\(^{521}\) 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.

\(^{518}\) 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]..."

\(^{519}\) The relevant part of Article XX of GATT 1994 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; ..."

\(^{520}\) The reference to "other GATT-consistent legislation" was to section 19 of the *Income Tax Act*.

\(^{521}\) Panel Report, *supra* note 484, para. 5.10.
2. **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.\(^{522}\) 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.\(^{523}\)

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.\(^{524}\) However, the Panel was "not fully convinced 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."\(^{525}\) 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

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\(^{523}\) Appellate Body Report, *ibid*.

\(^{524}\) 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.

\(^{525}\) Panel Report, *supra* note 484 para. 5.15.
- on a "per issue" basis.\footnote{Appellate Body Report, \textit{supra} note 483, at 17.} 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.\footnote{See \textit{An Act to Amend the Excise Tax Act and the Income Tax Act}, S.C. 1995, c. 46, s. 35(1).} The Appellate Body focused on the applicability of Article III:2, second sentence.\footnote{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, \textit{supra} note 483 at 21.} Canada maintained that split-run periodicals were not "directly competitive or substitutable" for periodicals with editorial content developed for the Canadian market.\footnote{Panel Report, \textit{supra} note 484, para. 3.113; and Appellate Body Report, \textit{ibid.} at 24.} Canada contended that although the split-run periodicals may have been substitutable advertising vehicles, they were not competitive or substitutable information vehicles.\footnote{\textit{Ibid.}} 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.\footnote{Appellate Body Report, \textit{supra} note 483 at 27.}

3. 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 GATT 1994, because the subsidy was not directly payable to the publisher of Canadian
magazines as required by Article III:8(b).\textsuperscript{532} 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.

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.\textsuperscript{533} 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 1994. The Appellate Body referred to the Panel decision in \textit{United States – Malt Beverages},\textsuperscript{534} 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

\textsuperscript{532} Article III:8(b) of GATT 1994 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."

\textsuperscript{533} Panel Report, \textit{supra} note 484, para. 3.194 and 3.211.

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.535

4. **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:4.536

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 Canadian or commercial international rates charged for the delivery of periodicals were established by Canada Post based on commercial and marketing


536 4. The 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.
practices and not influenced by government policy, and therefore did not qualify as "regulations" or "requirements" within the meaning of GATT Article III:4.  

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. Therefore, the scheme was inconsistent with Article III:4. This finding of the Panel was not appealed to the Appellate Body.

4.4.4 The Agreement on Periodicals and Bill C-55

Canada's legislative response to the Dispute Settlement Body's request that it bring those measures found to be inconsistent with GATT 1994 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., 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:

537 Panel Report, supra note 345, para. 3.168; and see Panel Report, supra note 484, paras. 3.153 and 3.154 for a discussion of the meaning of the terms "regulations" and "requirements" found in Article III:4.

538 Panel Report, ibid., paras. 5.35 and 5.39.

539 Agreement on Periodicals, Department of Canadian Heritage: 1999, available: http://www.pch.gc.ca/bin/News.dll/
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 publisher and any entity that is controlled, directly or indirectly, by non-Canadian persons 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. These provisions have the effect of creating a broad definition of what is meant by a Canadian advertiser, and, taken together with 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.

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540 s. 3(2), Advertising Services Act, supra note 485.
541 s. 3(3), ibid.
542 s. 3(5), (6) and (7), ibid.
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),\textsuperscript{543} 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.\textsuperscript{544} The demand may require the foreign publisher, \textit{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.\textsuperscript{545}

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.\textsuperscript{546} Should the foreign publisher wish to

\textsuperscript{543} s. 3(4), \textit{ibid.}

\textsuperscript{544} s. 7(1), \textit{ibid.}

\textsuperscript{545} s. 7(2), \textit{ibid.}

\textsuperscript{546} 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\% of the revenues generated by the total supply of advertising services of the periodical. See section 21.1, \textit{Advertising Services Act, supra} note 483.
exceed the legislated limits, section 21.2 of the 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. The publisher would have to “create majority Canadian content and establish a new periodicals business in Canada.”

4.4.5 Analysis of the Agreement on Periodicals and Bill C-55 under GATT 1994

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, 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. Similarly, there is no present

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547 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.”

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

549 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 the Agreement.” Agreement on Periodicals, supra note 539.

550 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 the 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
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 GATT 1994.

The following discussion will focus on whether these provisions of GATT 1994 are applicable to the Advertising Services Act in its present form and whether the measures contained within this legislation violate Canada’s obligations under GATT 1994. 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 GATS and GATT 1994; the applicability of certain Articles under GATT 1994; and the nature of the competing products within the Canadian periodical market.

**Are the Advertising Services Supplied by Publishers Governed by GATT 1994?**

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. Canada's argument that those measures were governed by the GATS as opposed to GATT 1994 was not well received by the Panel or Appellate Body. Both the Panel and Appellate Body found that obligations under GATT 1994 and the GATS can co-exist and that one does not override the other. Further, the Panel recognized that overlaps between the subject matter of disciplines in GATT 1994 and in the GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities. 

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: 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. Therefore, with respect to Advertising Services Act, it seems likely that, as with certain of Canada's previous measures, both the GATT and GATS could simultaneously apply.

Panel Report, supra note 484, para 5.15.

Ibid. at para. 5.17 and Appellate Body Report, supra note 483 at 18.

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 1994 and the GATS. Appellate Body Report, ibid. at 19.
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 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 GATT 1994, the Advertising Services Act is simply outside the scope of 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.555 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

554 Panel Report, ibid.
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,\(^{556}\) 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 1994 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.\(^{557}\) This non-discrimination principle is supported by an explicit ban on the use of such measures in a discriminatory manner against imported products, whether imposed on them either at the border or after they have entered the importing country.\(^{558}\) 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

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\(^{555}\) Panel and Appellate Body Reports, *supra* note 553.


\(^{557}\) The non-tariff barriers would include all “laws, regulations, and requirements” affecting internal marketing of foreign products GATT, *ibid.*, para. 7.1.2.

\(^{558}\) *Ibid.*
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. 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.  


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.”561 The U.S. drew attention to a number of the characteristics of periodicals that supported its contention of similarities between the two products,562 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.”563 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

561 The Appellate Body noted that the Panel’s findings with respect to the issue of “like products” was not based 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 483 at 22.

562 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 484, para. 3.78.

563 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.
(Time Canada, and Maclean's) were recognized to be direct competitors by industry witnesses in testimony before a Canadian Senate committee.\footnote{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, \textit{ibid.}, para 3.92.}

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.\footnote{\textit{Japan – Alcoholic Beverages, supra} note 560 at 18.} Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production.\footnote{\textit{Ibid.}} Further, the protective application of a measure can most often be discerned from the design, the architecture, and the structure of the measure.\footnote{\textit{Ibid.} at 29.} In the case of the \textit{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.

4.4.6 Conclusion

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 1994.
Chapter 5 Conclusion

The question facing this country, then, is whether or not we have ‘built up a reservoir of support – frequently described as patriotism, love of country, loyalty and the like – upon which it can count regardless of the particular trials and tribulations of its members.’


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 those films that most interest them and if these happen to be American films, as opposed to Canadian films, the most the federal government can 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. 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 still continues to fund and otherwise support the cultural industries in the guise of protecting Canadian culture.

But the other question that should then be addressed simultaneously is whether the products of the cultural industries are making any contribution to the cultural heritage of Canada. This foundational question must be based on an acceptable understanding of what is meant by “culture.” This understanding need not entail a precise definition, nor should it strive to be exhaustive. The idea of what is meant by culture is multi-faceted and cannot be compartmentalized and rigidly defined. For the present purposes, there is no reason to deny that Canadian culture draws from many sources, including the cultural industries, in order to form its eventual shape. But the cultural industries are not, nor should they be, the sole or primary source of what is meant by Canadian culture. Many other experiences and institutions enter the continual culture-defining and culture-building process. Nevertheless, one should not deny the importance that has come to be attached to the cultural industries in this respect.

These cultural products are adding to the Canadian cultural experience in terms of Canadians listening to and becoming familiar with the works of Canadian musicians, actors and authors. But is this trend actually adding value to the Canadian cultural heritage? Of course answering this question is a highly subjective, and therefore problematic, exercise and
one should not claim otherwise. Yet it can surely be agreed that it is important to the present generation that cultural heritage encompass leaving a lasting legacy for successive generations of Canadians that would provide these Canadians with a true and meaningful understanding of what is meant by the Canadian experience. Do the products of the Canadian cultural industries accomplish this task? Certainly a persuasive argument could be made that novels by Margaret Atwood or Mordecai Richler will be cherished by subsequent generations. However, will successive generations treat the music of Canadian singer Shania Twain with any greater reverence than that of her American country music counterparts? Similarly, Canadian television programs such as “The Outer Limits” or “Nikita,” apart from being successful entertainment products, are virtually indistinguishable from typical American television program offerings, with many Canadians even mistaking them for U.S. programs.

It seems that without a base knowledge of the Canadian identity, successive generations may be increasingly unable to differentiate between American and Canadian culture. Indeed it is has already become difficult to do so in certain instances in the present day in English Canada. Without being raised with this ability, how will the Canadian artists and performers of the future be able to fashion Canadian works? Therefore, establishing the base knowledge of the Canadian identity appears to be the key to the future preservation of a distinctly Canadian culture. Would not future generations be better equipped with resources consisting of a solid understanding of Canada’s history, a strong sense of the importance of family and community, knowledge of Canadian political institutions and processes, and other such identity-strengthening values? On the whole, the funds directed to the cultural industries by the federal government would not appear to be a prudent investment in the
future of Canadian culture, unless the aim is to foster a rather shallow appreciation of popular 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; however, there will also be an increased emphasis on marketing and promotion of Canadian films. Yet 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
industries in the audiovisual sector. The focus of the recent recommendations, however, has for the most part simply proposed continuing the subsidization of production in the film industry, and has not offered any innovative 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 GATS will also affect the Canadian television sector in future years once audiovisual services are brought entirely within the application of the agreement. 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 increased 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. Therefore, any modifications to the current system of content quotas could only be viewed as merely a 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.

Therefore the GATS has the potential to have significant impact on the CBC’s proposed policies concerning modifications to the Canadian content requirements, as well as the present system of content quotas. Although Canada made no commitments regarding the television or broadcasting industries in its Schedule of Specific Commitments in this regard, as noted earlier, Canada’s policies in the audiovisual sector will come under pressure primarily as a result of the U.S. preoccupation with further liberalization in that sector. Under the constellation model, broadcasters would be encouraged to cultivate relationships with other industry players, be they a formal, long-term alliance or a project-related joint venture. The constellation approach would entail emulating the successful marketing practices of the U.S. constellations with respect to procedures such as cross-promotion of programs on other stations owned by the program broadcaster, simultaneous broadcasting on two or more channels, and re-broadcasting of programs. 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. Therefore, the Agreement 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 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 1994; 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 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 as noted early on in this thesis, 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.
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