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Protecting Canadian Culture: The Case of Split-Run Periodicals

By

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Receptivity to American cultural products in Canada has forced Canadian cultural industries to compete for the attention of their domestic audience. To ensure that Canadians have vehicles for self-expression, Ottawa has employed various policy instruments to protect its cultural industries. As the Canada-U.S. confrontation over split-run magazines illustrated, advances in information technology and liberalized trade rules have posed a serious challenge to these practices. Electronic transmission has reduced the regulatory significance of borders and trade agreements have limited the ability of states to restrict trade. Both factors, combined with U.S. resistance to cultural protectionism, have effectively dismantled Canada's long-standing periodical policies. In 1997, in the face of the challenge posed by American split-runs, Ottawa's efforts to protect Canadian periodicals were found to violate the disciplines of the WTO. This study argues that Canada should work with others to carve out a special status for cultural trade.

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LIST OF ABBREVIATIONS

CBC	Canadian Broadcasting Corporation
CMT	Country Music Television
CRTC	Canadian Radio-television and Telecommunications Commission
CUFTA	Canada-United States free Trade Agreement
DSB	Dispute Settlement Body
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICA	Investment Canada Act
INCP	International Network on Cultural Policy
ITA	Income Tax Act
MFN	Most Favoured Nation
MPAC	Magazine Publishers Association of Canada
NAFTA	North American Free Trade Agreement
RDML	Reader's Digest Magazines Ltd.
SAGIT	Sectoral Advisory Group on International Trade
SI	Sports Illustrated
USTR	United States Trade Representative
WGCDG	Working Group on Cultural Diversity and Globalization
WTO	World Trade Organization

CHAPTER 1 - INTRODUCTION

Culture has always been one of the most controversial issue areas in Canada-U.S. relations. American cultural products (films, books, television broadcasts, and periodicals) dominate the Canadian market. Although Canadians are receptive to American cultural products, they share a pervasive anxiety that U.S. cultural influences will overwhelm their capacity to express themselves as a distinct North American community. Reflecting this concern, the Canadian government has employed a variety of domestic policy instruments in an effort to preserve a cultural space for Canadians. The focus of this effort has been on supporting Canadian cultural industries as vehicles for self-expression. This has involved the use of both promotional policies, such as creating Canadian alternatives to US cultural products, and protective measures, such as investment restrictions. Cultural promotion has not created a problem but protectionist actions have often encountered strict opposition south of the border because they directly attempt to limit or control U.S. influence in Canada and therefore may harm American business interests. The U.S. has not challenged Canada's right to protect its national identity, but it does not want to pay the price when Canada exercises that right. American opposition continues to be one of the most serious obstacles to the development and implementation of measures designed to protect Canada's cultural industries from U.S. competition.

In recent years, two factors have made the task of protecting Canadian cultural industries even more difficult. First, advances in information technology have significantly improved the ease of cultural transmission. In the past, trade has involved the transfer of a physical object across state borders making these borders effective points of control for international trade. Now, media industries can send their products via satellite or phone-line, in effect, bypassing trade restrictions imposed at borders. Second, international trade regulation has limited the ability of states to impose restrictions on trade. Protecting national industries by discriminating against foreign producers is

inconsistent with current international trade norms. Trade in culture, having no distinct status, is subject to such trade law in the same way as other commodities.

This study attempts to shed light on Canada's cultural policy dilemma vis-à-vis the United States. It provides the first comprehensive account of Ottawa's efforts to protect the Canadian periodical industry from split-run editions of American magazines by halting the flow of advertising dollars to those sources. In 1965, Canada introduced measures to channel crucial advertising revenue to Canadian magazines in order to strengthen their position vis-à-vis their American competitors. In the 1990s, American opposition, advances in information technology, and international trade regulations combined to dismantle most of these policies. In 1993, satellite transmission allowed a split-run edition of *Sports Illustrated* to circumvent Canada's existing measures. When Canada responded by imposing an excise tax on split-run periodicals, the United States initiated a successful challenge in the World Trade Organization (WTO). The reasoning of the WTO in the periodicals case showed that the ability of states to protect their cultural industries is seriously threatened by current international trade law. Within the WTO, economic factors are the sole driving force in dispute resolution. The WTO panel constituted to consider the dispute concluded that American and Canadian magazines were 'like products' regardless of their differing national perspectives. Similarly, the Appellate Body in the case deemed Canadian and American magazines to be 'substitutable'.

After removing its WTO-offending measures in 1998, the Canadian government introduced another measure in the form of Bill C-55 to secure its long-standing objectives in the periodical industry. Rather than return to the WTO, the U.S. threatened retaliation under the provisions of the cultural exemption in the North American Free Trade Agreement (NAFTA). Canada was forced to retreat. In 1999, after a lengthy dispute, it reached an accord with the United States on allowable restrictions in the periodical industry. Although the U.S. agreed to limit the access of American periodicals to the Canadian market, Canada was forced to make concessions in its periodical policy regime to maintain these protections. The agreement seriously reduced the potency of this

regime, to the point where Canadian policies may no longer be able to sustain many domestic magazines. Moreover, the limitations accepted by the United States in the dispute over periodicals do not necessarily represent a precedent for other cultural disputes between the two countries.

The reasoning of the WTO in the periodicals case, and the ability of the U.S. to force Canada to water down Bill C-55 by threatening retaliation under the NAFTA's cultural exemption, demonstrate that Canada must alter its approach to dealing with culture and trade. The study suggests that, rather than exempting culture from its international trade agreements, Canada should actively promote the development of a special international instrument to govern trade in those products. Such an instrument could reflect a balance between the value of cultural diversity and the advantages of free trade.

Culture and Canadian Anxieties

'Culture' is an amorphous concept. There is little agreement as to its parameters. In fact, it often has different meanings in different circumstances. For the purposes of this study, culture is employed in its sociological or anthropological sense. It includes the beliefs, self-expressions, values, languages, traditions, mores, and experiences of a particular group. Whatever elements may be included in its definition, it is clear that culture is often an object of value for a community or nation. According to Bernard Ostry, "Our culture – all that we have inherited from our forebears and forerunners, all that we invent or create or imagine and figure forth in art and the works of intellect – is our community and our reason for existing as a nation, as a people, as a political entity."¹ In a related fashion, culture is often held to be a crucial factor in the *development* of a community or nation's identity – put simply, it "gives meaning to who we are."²

1. Bernard Ostry, "Culture and Trade: One Policy/No Options," in *The Culture/Trade Quandary: Canada's Policy Options*, ed. Dennis Browne (Ottawa: Centre for Trade Policy and Law, 1998), 20.

2. Victor Rabinovitch, "The Social and Economic Rationales for Domestic Cultural Policies," in *The Culture/Trade Quandary: Canada's Policy Options*, ed. Dennis Browne (Ottawa: Centre for Trade Policy and Law, 1998), 25.

Cultural expression has played an important role in Canadian nation-building efforts in the context of a highly asymmetrical Canada-U.S. relationship. The Canadian Broadcasting Corporation/Radio Canada, in its testimony to the 1985 Task Force on Broadcasting Policy, maintained, “At the very heart of our sovereignty is our culture. There can be no political sovereignty without cultural sovereignty.”³ Such emphasis on the importance of culture reflects the challenge for Canada to assert its existence as a distinct North American nation in the face of pervasive, at times overwhelming, American cultural influences.

The United States and Canada, particularly English Canada, share many cultural characteristics and thus American cultural producers have found an easy target in their Northern neighbour. In Canada, 95 percent of films screened in theatres, 84 percent of sound recording retail sales, 83 percent of magazine newsstand sales, 70 percent of annual book sales, and 85 percent of English-language drama on Canadian television feature foreign content, primarily imported from the United States.⁴ According to one commentator, “It’s as if a massive U.S. film festival were going on in every theatre, and a tribute to American genius were running perpetually on radio and TV.”⁵ The ubiquity of American cultural products illustrates the tremendous challenge faced by Canadian cultural industries in competing for the attention of their domestic audience. Canadian cultural producers have limited access to a relatively small domestic market that is already reduced by linguistic divisions. Their American competitors, on the other hand, operate from a domestic market that provides them an economic base 10 times larger. It is also a market that is resistant to foreign cultural products as Americans tend to prefer

3. Cited in, Richard Collins, “Trading in Culture: The Role of Language [online],” *Canadian Journal of Communication* 19, no. 3/4 (1994) [cited 30 May 2001]. Available from < <http://www.wlu.ca/~wwwpress/jrls/cjc/BackIssues/19.3/collins.html> >

4. Keith Acheson and Christopher Maule, *Much Ado About Culture: North American Trade Disputes* (Michigan: University of Michigan Press, 1999), 16.

5. Carl Wilson, “Northern Exposure: Canada Fights Cultural Dumping,” *The Nation* (20 May 1996): 15.

stories set in the U.S. with American themes and characters. For example, 98 percent of films shown in the U.S. are American.⁶

The difficulty for Canadian cultural producers to compete with their American rivals has been a source of great concern in Canada. Canadians need vehicles through which they can express Canadian themes, and the fear is that without sufficient access to those vehicles there can be no national dialogue, no Canadian national identity. With U.S. cultural products dominating the Canadian market and disseminating American themes, a cycle can develop in which pervasive foreign influences “soften” the domestic market to the foreign culture and, in doing so, make continued penetration increasingly easier to accomplish.⁷ As a result, the fear is that Canadians will increasingly reflect an American identity. Herbert Hoover, while U.S. Secretary of Commerce, recognized the Americanizing effects of U.S. cultural products, noting that “motion picture exporting [is significant] both as a straight commodity trade and as a powerful influence in behalf of American goods and habits of living.”⁸ The threat of such acculturation has motivated, even compelled, Ottawa to intervene in the cultural sector in an artificial attempt to balance the cultural equation.

Culture and the Canadian State

Within Canada, the state has long been accorded an important role in the cultural sector. The anxiety surrounding the effects of American cultural influences on what has been perceived as a fragile Canadian national identity has legitimated this role. Indeed, Canadians have traditionally held that “state and culture could not be separated in any

6. Patricia M. Goff, “Invisible Borders: Economic Liberalization and National Identity,” *International Studies Quarterly* 44 (2000): 558.

7. Chios C. Carmody, “When ‘Cultural Identity Was Not at Issue’: Thinking About Canada – Certain Measures Concerning Periodicals,” *Law and Policy in International Business* 30, no. 2 (1999): 252.

8. Cited in, Bill Grantham, “America the Menace: France’s Feud with Hollywood, [database online],” *World Policy Journal* 15, no. 2 (Summer 1998): p58-. [cited 10 February 2001]. Available from Canadian Periodical Index, University of Calgary, <http://web5.infotrac.galegroup.com/itw/infomark/364/508/26083659w3/purl=tc1_EAIM_0_A20928394&dyn=22!bmk_6_0_A20928394?sw_acp=ucalgary>

absolute, dogmatic, and unqualified way.”⁹ In performing this interventionist role, the Canadian state has attempted to reduce (though not eliminate) the American cultural presence in Canada and to promote the development of Canadian culture. Essentially, the objective has been to secure a cultural space for Canadians, to allow Canadians to express themselves in their own way. The 1961 Royal Commission on Periodicals noted, “the communications of a nation are as vital to its life as its defences, and should receive at least as great a measure of national protection.”¹⁰ Thus, the fundamental logic of government intervention has been based on the view that cultural familiarity breeds national familiarity, and hence, national identity.

Canada has perceived cultural products to be public goods. Public goods are deemed to have some form of intrinsic value that confers benefits to society as a whole, yet these goods are unavailable or effectively inaccessible in a free market. The private sector may not be willing or able to produce such goods, or at least unable to produce them at prices that the general public can afford.¹¹ In Canada’s case, this is primarily manifested in the high unit cost of Canadian cultural products relative to American products benefiting from tremendous economies of scale. This situation of so-called ‘market failure’ led the 1986 Canadian Government’s Culture/Communications Industries Committee to observe, “Canadian cultural content will simply not survive if our goods and services are required to be substantially repackaged to meet the tastes of a North American market, 90% of which does not share Canada’s interest in things Canadian.”¹² Correspondingly, Ottawa has utilized a variety of legislative measures in

9. Allan Smith, *Canada, an American Nation?* (Montreal and Kingston: McGill-Queen’s Press, 1994), 101.

10. Canada. Royal Commission on Publications, *Report of the Royal Commission on Publications* (Ottawa: Queen’s Printer, 1961), 4.

11. It should also be noted that public goods may be unavailable due to a failure on the part of consumers to recognize or consider the societal value of a good. Naturally, the private sector lacks an incentive to produce such goods.

12. Paul Audley, “Cultural Industries Policy: Objectives, Formulation, and Evaluation [online],” *Canadian Journal of Communication* 19, no. 3/4 (1994) [cited 30 May 2001]. Available from <<http://www.wlu.ca/~wwwpress/jrls/cjc/BackIssues/19.3/audley.html>>

order to maintain and promote the societal benefits conferred by Canadian cultural products.

The Canadian state has adopted four distinguishable avenues of approach reflecting both promotional and protectionist techniques. Initially, the government established Canadian cultural institutions in order to provide uniquely Canadian cultural alternatives to American imports. In the first half of the twentieth century, the American cultural presence in Canada increased dramatically due to the development of radio and television. In response, the Canadian government created the Canadian Radio Broadcasting Commission in 1932 and then the Canadian Broadcasting Corporation (CBC) in 1936. Providing Canadians with their own means of communication, this government enterprise has assisted in the production and distribution of Canadian content to Canadian audiences. For example, the CBC's mandate stipulates that "the programming provided by the Corporation should...be predominantly and distinctively Canadian...[and]...contribute to shared national consciousness and identity."¹³

Canada has also adopted measures designed specifically to promote the development of Canadian cultural products. For example, the government established the Canada Council in 1957 to fund "the production of works in the arts, humanities and social sciences," as well as the Canadian Film Development Corporation (now Telefilm Canada) in 1968 in an attempt to foster a domestic feature film industry.¹⁴ These cultural instruments utilize subsidies and tax incentives to encourage the production of Canadian works.

In addition to these promotional measures, Canada has taken more restrictive and protectionist approaches. Telefilm Canada, Revenue Canada, the Canadian Radio-television and Telecommunications Commission (CRTC), and Investment Canada all regulate the scale and scope of foreign ownership in the cultural industries. Numerous instruments have also been employed in an effort to restrict the importation of foreign

13. From the 1991 Broadcasting Act, cited in, CBC Radio-Canada, *Mandate* [online], updated 4 June 2001 [cited 9 June 2001]. Available from <http://cbc.radio-canada.ca/htmen/1_2.htm>

14. Paul Rutherford, "Made in America: The Problem of Mass Culture in Canada," in *The Beaver Bites Back: American popular Culture in Canada*, ed. David H. Flaherty and Frank E. Manning (Montreal and Kingston: McGill-Queen's University Press, 1993), 273.

cultural content. These restrictions have typically taken the form of punitive tariffs designed to prevent foreign material from crossing the Canadian border, as well as Canadian content requirements for existing media outlets within Canada. For example, the CRTC, in an effort to “encourage the development of Canadian expression,” imposes and enforces a 35 percent Canadian content quota for popular radio music broadcasts and, in general, a 60 percent overall requirement for private television licensees.¹⁵ These protectionist elements have been an integral part of Canada’s overall cultural policy due to the belief that promotional measures are insufficient on their own due to the sheer economic asymmetry between Canada and the United States. For example, supporters of protection often point to the Canadian film industry in which there are no regulatory controls to reduce the influx of American materials. Despite the availability of subsidies, Canadian movies only receive between 2 and 4 percent of total screen time in Canadian theatres. In contrast, the Canadian content quotas on Canadian radio are often cited as a reason for the domestic and international success of Canadian recording artists.¹⁶

The Cultural Industries

Canada’s traditional focus on the promotion and protection of its cultural industries as integral instruments of Canadian self-expression is a direct result of the ‘public good’ and ‘market failure’ rationales. Roger Swanson has termed the effort to assist domestic cultural industries ‘cultural retrofitting’ – a process in which these industries “are upgraded with governmental assistance to insulate them against massive U.S. cultural inflows, all in an attempt to make them more efficient and productive in furthering the Canadian goal of developing and maintaining a national identity.”¹⁷ However, is not clear from this description that such governmental assistance is generally

15. See, Canadian Radio-television and Telecommunications Commission, *Canadian Content on Radio and on TV* [online], updated 8 November 1999 [cited 9 June 2001]. Available from <http://www.crtc.gc.ca/ENG/INFO_SHT/G11e.htm>

16. See Adam Knelman Ostry, “Is Global Culture Upon Us?[online],” prepared for the 2000 National Foreign Policy Conference, *This Way to the Global Village* by the Canadian Institute of International Affairs [cited 28 May 2001]. Available from <<http://www.ciia.org/knelman.htm>>

deemed to be necessary for the *survival* of Canadian cultural producers. Given that Canadian cultural products are not sought after in the American market and that Canada's domestic market is a fraction of the size of that of the U.S., Canadian cultural producers are unable to obtain the economies of scale available to their American counterparts. Since the economic disadvantages faced by Canadian cultural producers are a systemic and inherent element of enduring market conditions, there is often no end goal at which government support can be removed. Instead, the government support network for the cultural industries has been entrenched in a manner that has made its elements a perpetual and natural extension of state activity. To put it another way, "With the cultural industries being given special attention...for much of the last century, beginning in the early 1970s one observes an increasing fusion of industrial, economic and cultural policy in Canada."¹⁸

This fusion, particularly as manifested in Canada's protectionist policies, has been the source of much discontent in the United States. The cultural industries are, by definition, industries and as such are enmeshed in the ebb and flow of market activities and national economies. The cultural sector contributes almost 4 percent to Canada's Gross Domestic Product.¹⁹ Canada's granting of cultural value to industrial activities, and in doing so, intervening on their behalf with protectionist measures, has thus been a disruptive issue in that country's relationship with the United States. Protective policies have market-distorting effects that not only run contrary to Washington's liberal economic worldview, but also, more importantly, affect American economic interests.

"Systems Tension"

At the heart of the cultural discord between Canada and the United States is a collision between two interpretations of the meaning of culture. Do cultural products

17. Roger Swanson, "Canadian Cultural Nationalism and the US Public Interests," in *Canadian Cultural Nationalism: The 4th Lester B. Pearson Conference on the Canada-US Relationship*, ed. Janice L. Murray (New York: New York University Press, 1977), 58.

18. Glenn A. Gottselig, "Canada and Culture: Can Current Cultural Policies be Sustained in the Global Trade Regime?" *International Journal of Communications Law and Policy* 5 (Summer 2000): 8.

19. Ostry, "Is Global Culture Upon Us? [online]."

possess an inherent value that is fundamentally unique in its contribution to society that the production of such products warrants state protection? Or, are such products primarily industrial outputs that should be subject to the same market forces as any other commodity? These opposing views have made culture “one of the least understood and one of the most difficult issues confronting the bilateral relationship.”²⁰ According to Rowland Lorimer and Nancy Duxbury:

Canada's position starts with culture, acknowledges the industrial nature of cultural production in our modern information economy, and ends with cultural goals which may be achieved in part by industrial means. The U.S. position starts with markets, speaks in the language of free trade, property rights in copyright, free speech, free flows of information, consumer rights, and entertainment products, and ends with markets.²¹

It is important to note, however, that this pseudo philosophical divergence is not based on a misunderstanding of a state's right to support and maintain its cultural integrity. Indeed, American officials have consistently acknowledged such a right. It is instead based on the right of a state to intervene in the market on behalf of what are essentially industrial activities. Where Canada sees a ‘cultural industry’, a crucial element of its cultural survival and thus a legitimate target of state intervention, the U.S. sees an ‘entertainment industry’, its second largest export industry and a crucial element of its global balance of trade.²² In the European Union market, for example, the United States claimed 70 percent of the total film market in 1996 and nearly half of Hollywood's revenues are now gained internationally.²³ Therefore, it should not come as a surprise when the United States interprets those Canadian measures that negatively affect

20. Swanson, 55.

21. Nancy Duxbury and Rowland Lorimer, “Of Culture, the Economy, Cultural Production, and Cultural Producers: An Orientation [online],” *Canadian Journal of Communication* 19, no. 3/4 (1994) [cited 30 May 2001]. Available from
<<http://www.wlu.ca/~wwwpress/jrls/cjc/BackIssues/19.3/lorimer.html>>

22. If one includes computer software as a cultural product, this industry became the largest US export in 1996. This is quite significant if one considers other successful exports such as automobiles and aerospace and defence. See, United Nations Educational, Scientific and Cultural Organization, *Culture, Trade and Globalisation* [online], [cited 30 May 2001]. Available from
<http://www.unesco.org/culture/industries/trade/html_eng/question3.shtml>

23. “Culture Wars,” *Economist* 348 (12 September 1998), 97.

American business interests in the cultural/entertainment sector as unacceptable protectionism.

Undoubtedly, the remarkable successes of U.S. cultural exports have at least partially caused and perpetuated the opposing views that Canada and the U.S. hold on cultural issues. They also highlight a difference between two national priorities – one cultural, the other economic. Given the industrial nature of the cultural industries, both priorities occasionally and necessarily collide as Canada is compelled to use economic instruments to achieve cultural goals. It is similar to what Liss Jeffrey has described as ‘Systems Tension’ – “a reflection of a deeper collision of values between an economic and cultural approach.”²⁴ This tension, a long-standing component of the Canada-U.S. relationship, has consistently represented a challenge to Canada’s cultural policies. Being the much smaller partner, Canada has found it necessary to consider and respond to U.S. concerns about the implementation of its cultural measures that harm American interests. When it has done so after the fact, it has been harshly reminded of the asymmetrical nature of the relationship through American retaliatory responses. The challenge to Canada’s cultural policies does not stop there, however. Recently, the attention of Canadians has been drawn to two compounding factors. Advances in information technology and international trade law, in their own way, have reinforced the American approach to culture.

Information Technology

Advances in information technology have been both a cause and effect of ‘Globalization’ – “a compression of space and time, as a result of which the movement of global phenomena transcends borders and is much less bound by physical location than ever before.”²⁵ This has had a profound impact on the production and distribution methods of the cultural industries. Over the last two decades, a greater volume and

24. Liss Jeffrey, “The Impact of Globalization and Technological Change on Culture and National Identity: A Call for Visionary Pragmatism,” in *The Culture/Trade Quandary: Canada’s Policy Options*, ed. Dennis Browne (Ottawa: Centre for Trade Policy and Law, 1998), 169.

25. Sarah Armstrong, “Magazines, Cultural Policy and Globalization: The Forced Retreat of the State?” *Canadian Public Policy* 26:3 (2000): 371.

variety of cultural products have been made available. The so-called ‘globalization’ of the cultural industries is not an entirely new phenomenon. Television and radio both had a significant global impact with their adoption. Even Gutenberg’s press contributed to an unprecedented capacity for cultural exchange.²⁶ What can be considered novel, however, is the pace, scale, and scope of the globalization process, or what Robert Keohane and Joseph Nye have referred to as the ‘thickness’ of globalism.²⁷

The computer revolution and digitization have resulted in a “dematerialization” of cultural products of all categories, making their distribution, and hence, access to them much easier than in the past. Whether transported by telephone line, cable or satellite, cultural products, in their non-material form, can be accessed rapidly and relatively easily, irrespective of distance.²⁸ This has been especially true for the print medium. For example, the Internet allows one to easily read an ‘e-book’, or read the on-line version of a foreign newspaper. Publishers, in addition to using the Internet to reach audiences, can send their products in a digitized format around the world allowing them to print directly in a foreign country.

This dematerialization has also compromised the significance of political borders. With no material object crossing their borders, states have found that punitive border restrictions, such as tariffs, designed to prevent the entry of certain cultural products are no longer options. In short, advances in information technology, especially the dematerialization of cultural products, have posed a considerable challenge to the ability of states, including Canada, to protect their domestic culture.

26. Collins, “Trading in Culture: The Role of Language [online].”

27. Robert O. Keohane and Joseph Nye assert that the issue is not how old globalization is, for it is not ‘new’, but how ‘thin’ or ‘thick’ it is at a given time. “Globalization is the process by which globalism becomes increasingly thick.” See, Robert O. Keohane and Joseph S Nye Jr., “Globalization: What’s New? What’s Not? (And So What?)” *Foreign Policy* 118 (Spring 2000): 108.

28. This ease of access does not necessarily exist irrespective of location, however. It must be recognized that citizens of ‘industrialized’ countries have been able to take advantage of such technology at a much greater level than those citizens in ‘developing’ countries.

Trade Regulation

The expansion of international trade over the course of the last half-century has been accompanied by successive international agreements designed to regulate this trade. In addition to reducing barriers to trade, these rules-based agreements have also made international trade more predictable, and thus offer security to states. International trade accounts for a significant proportion of Canada's wealth (43 percent of GDP). Indeed, Canada exports four times more proportionately than the United States and three times more than Japan – two of the world's largest and most active traders.²⁹ Given Canada's dependence on international trade, a rules-based trading system is in this country's interest. However, such rules have also had a negative impact on Canada's long-standing approach to culture and the cultural industries.

International agreements, being based on the principles of liberal economic theory, have favoured the American approach to culture. They have largely commercialized cultural products by omitting any attached socio-cultural value for such products that would make them distinct from other 'regular' commodities such as automobiles or shoes. This omission has posed a significant challenge for states to use domestic policy measures to protect their cultural industries.

Unlike the performing arts, which are not amenable to industrialization and international commerce, cultural industries produce products that play an important role in international transactions and in the wealth of nations. In fact, with the advances in communication technology described above, cultural content has become increasingly important. For instance, there was five times more trade in cultural goods in 1998 than in 1980.³⁰ Given the industrial nature of the cultural industries and the prevalence of their products in international trade, the absence of a cultural value attached to such products has made them susceptible to the same barrier-reducing provisions as any other commodity. There are three international trade agreements that directly affect Canada's ability to implement policies designed to protect its cultural industries: the General

29. Ostry, "Is Global Culture Upon Us? [online]."

Agreement on Tariffs and Trade (GATT); the General Agreement on Trade in Services (GATS); and, the Canada-U.S. Free Trade Agreement/North American Free Trade Agreement (CUFTA/NAFTA). Both the GATT and the GATS are multilateral agreements administered by the World Trade Organization (WTO).

GATT

Those products that are goods, including cultural products, are subject to the provisions of the General Agreement on Tariffs and Trade. Since 1947, this agreement has reduced both tariff and non-tariff barriers to international commerce. In essence, the treaty's purpose is to eliminate the discriminatory treatment of goods in international trade.

The GATT was the first major trade agreement to contain an explicit reference to culture. However, the circumstances in which the GATT was initiated were very different than they are at present. Except for the film industry, cultural industries were relatively limited in their global reach at the time, and hence the world was more culturally segregated than it is today.³¹ Thus, the references to culture that the GATT does contain are sparse and relatively insignificant. In successive negotiations to amend and add to the agreement, culture has not been addressed in any substantive way.

Article IV of the GATT allows for states to impose screen quotas outlining a minimum amount of domestic films to be shown in domestic theaters. Their provision, however, "shall be subject to negotiation for their limitation, liberalization, or elimination."³² Article XX(f), which lists the general exceptions to the GATT, permits "measures which are imposed for the protection of national treasures of artistic, historic, or archaeological value and are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between two countries or a disguised

30. United Nations Educational, Scientific and Cultural Organization, *Culture, Trade and Globalisation* [online].

31. Carmody, 254.

32. Cited in, Ibid.

restriction on international trade.”³³ Aside from these references, cultural products are subject to the same GATT disciplines as other commodities.

The most important disciplines governing the trade of goods are contained within three articles. Article I provides for Most Favoured Nation (MFN) treatment. According to this principle, every member state is entitled to and shall receive no less favourable treatment than any other party to the agreement. Thus, a member state cannot grant benefits to one member without extending the same benefits to all other members. The principle of national treatment is outlined in Article III. This forces a member nation to treat foreign firms in a manner that is no less favourable than it treats its domestic firms. The final discipline is contained within Article XI and prohibits quantitative restrictions to international trade.

GATS

The GATS, as the name suggests, is the agreement within the WTO that regulates trade in services. During the negotiations of the GATS, Canada worked to establish an overarching general exemption clause for the cultural industries. It was forced to abandon this position, however, as it could not obtain the needed support.³⁴

The GATS is based on the same governing principles as the GATT. For the principle of national treatment to apply, however, a state must make a specific commitment in a particular service sector. Canada has made no commitments for any cultural services. However, three points must be made about this. First, it is probable that states that have made limited commitments will be pressured to liberalize their restrictions in future negotiations.³⁵ Second, it is sometimes difficult to distinguish between a good and a service, and the treatment of one can affect the treatment of the

33. Ivan Bernier, “Cultural Goods and Services in International Trade Law,” in *The Culture/Trade Quandary: Canada’s Policy Options*, ed. Dennis Browne (Ottawa: Centre for Trade Policy and Law, 1998), 114.

34. *Ibid.*, 126.

35. Standing Committee on Foreign Affairs and International Trade, *Canada and the Future of the World Trade Organization: Advancing a Millennium Agenda in the Public Interest* [online], June 1999 [cited 29 October 2001]. Available from <<http://www.parl.gc.ca/InfoComDoc/36/1/FAIT/Studies/Reports/faitrp09-e.htm#toc>>

other. For example, advertising is a service and a magazine is a good, yet the former is an integral part of the latter. According to the 1997 decision of the Appellate Body which ruled on the legality of Canada's policies to protect its periodical industry, "the obligations under GATT 1994 and GATS can co-exist and...one does not override the other."³⁶ Thus, protections afforded by one agreement may not save a state from its obligations under the other. Finally, the fact that states are not obliged to make national treatment (and market access) commitments in the cultural services sector is not a reflection of an established distinct status of cultural services as having a unique socio-cultural value. Again, they are subject to the same guidelines as other services. Consequently, as liberalization in the service arena progresses, the absence of a distinct status for cultural services will only serve to encourage their commercialization.

CUFTA/NAFTA

During the negotiations to establish the CUFTA, which entered into force on January 1 1989, the issue of cultural protection was of enormous importance to Canada. Canadians had long been concerned about the potential Americanizing effects of a comprehensive free trade agreement with the United States. To ensure Canada's ability to maintain protectionist policies in its cultural sector Brian Mulroney's Progressive Conservative government sought and achieved a cultural exemption.

Article 2005(1) of the CUFTA states that the "Cultural Industries are exempt from the provisions of this Agreement, except as specifically provided."³⁷ Under this paragraph of the Article, not considering the exceptions, either party can freely intervene in the cultural sector. However, the second paragraph of Article 2005 places a serious obstacle to such intervention. According to Article 2005(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

36. Cited in, Bernier, 112.

37. Richard G. Dearden and John D. Richard, *The Canada-US Free Trade Agreement: Final Text and Analysis* (Don Mills: Commerce Clearing House Canadian Limited, 1988), 311.

paragraph 1.”³⁸ In a technical sense, this paragraph does not limit the *freedom* of a party to intervene in the cultural sector, but it does impose a serious limitation on a party’s *ability* to do so. In a literal sense, it contradicts paragraph 1 by penalizing the “non-respect of obligations from which the parties are exempted.”³⁹ In effect, the provision allows a party to adopt ‘inconsistent’ measures in the cultural sector, only if it is willing to pay the price in the form of retaliation. The allowance of this retaliation has a much greater potential negative effect on Canada than it does on the United States for several reasons. Canada is the smaller of the two parties and the more dependent on the bilateral trading relationship as a source of national revenue. It is also more concerned about cultural protection and thus more likely to be subject to the retaliation.

The NAFTA maintains the cultural exemption of the CUFTA and extends its application to trade between Canada and Mexico. In fact, the NAFTA states that all trade in culture will be governed by the CUFTA. According to Annex 2106:

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided...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*.⁴⁰

Thus, the same limitation to Canada’s ability to intervene in the cultural sector applies.⁴¹ Essentially, this limitation represents a commerce-oriented treatment of cultural industries at the expense of recognition of their socio-cultural role.

38. Ibid., 312.

39. Bernier, 123.

40. Canada, *North American Free Trade Agreement: Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America* (Ottawa: Minister of Supply and Services, 1993), 21-11.

41. The fact that the cultural exemption, and the retaliation provided in cases of its utilization, is governed by the CUFTA is interesting as trade in services were not included within that agreement. Thus it has been argued that retaliation of equivalent commercial effect cannot be adopted in response to a measure relating to cultural services (discussed in Chapter 3). Since services were not included within the CUFTA, there is no obligation that can be violated.

Magazines and the Canadian Cultural Dilemma

The pattern of intervention by the Canadian state to protect its domestic periodical industry from overwhelming foreign competition illustrates the challenges that Canada faces in the development and implementation of its cultural policy. Like other cultural industries, the periodical industry is considered to make an important contribution to the development of culture and identity. Magazines, however, perform this role in a unique way. They expand and comment upon information and, in doing so, “provide the forum for debate and discussion which is essential to the democratic process.”⁴² They provide an awareness of national events, governmental institutions, communities, society, and the nation. Arthur Irwin, then editor of *Maclean's*, in a submission on behalf of the Periodical Press Association to the 1951 Royal Commission on National Development in the Arts, Letters and Sciences (Massey Commission), described magazines as public goods:

By its very nature, the national magazine must be all that the name implies, else it withers.
 To live, it must reflect the larger vision.
 To serve its constituency, it must reveal the nation to itself, not only in parts but as a unity.
 Of provincialism, or parochialism, it can have no part.
 Always it must maintain the open forum where opposing views can be aired and thus bring men to better understanding.
 Where there is strife, it must record the facts, the issues of the conflict; but always as the interpreter whose concern is the national interest – never as a partisan leader.
 Being above party, it must deal fairly with men of all parties; by doing so it brings to its readers the means to appraisal of current affairs unclouded by party bias.
 Being a means to self-criticism of the people it serves, it must speak bluntly of national misdemeanor....
 And since its field is the nation, it must perforce unfold the story of a nation's progress.

42. Royal Commission on Publications, 70.

Which is why the national magazine is at once a means to a people's self-understanding and a dynamic national force.⁴³

Magazines allow Canadians to understand their own country and assess the rest of the world from a Canadian point of view.⁴⁴ They are able to bring communities of common interest together, creating a sense of cultural identity in the process. Historically, this has been extremely important for Canada, a country in which a relatively small population is dispersed across an enormous landmass. According to the 1961 Royal Commission on Publications (O'Leary Commission), "It is left to our periodical press, to our magazines big and little, to make a conscious appeal to the nation, to try to interpret Canada to all Canadians, to bring a sense of oneness to our scattered communities."⁴⁵ A decade later, the Special Senate Committee on Mass Media went so far as to observe, "Magazines, in a different way from any other medium, can help foster in Canadians a sense of themselves. In terms of cultural survival, magazines could potentially be as important as railroads, airlines, national broadcasting networks, and national hockey leagues."⁴⁶ Correspondingly, the Canadian government has treated the periodical industry as having an intrinsic societal value. As with other cultural industries, however, the commercial aspect of the equation is a crucial factor in providing both the motivation for and the challenge to government intervention.

From its inception, the Canadian periodical industry has had to contend with stiff competition from American alternatives. With their enormous domestic market, American periodical publishers have an advantage over their Canadian counterparts. The larger a print run, the lower the unit costs of the magazine. There are a number of fixed costs for magazines, such as editorial content, that are recovered by a certain level of sales. After this point, additional costs to produce the periodicals are relatively small.

43. Quoted in. Fraser Sutherland, *The Monthly Epic: A History of Canadian Magazines, 1789-1989* (Toronto: Fitzhenry & Whiteside, 1989), 11-12.

44. Canada. Task Force on the Canadian Magazine Industry, *A Question of Balance: Report of the Task Force on the Canadian Magazine Industry* (Ottawa: Minister of Supply and Services, 1994), 1.

45. Royal Commission on Publications, 6.

46. Canada. Senate. Special Senate Committee on Mass Media, *Report of the Special Senate Committee on Mass Media* (Ottawa: Queen's Printer, 1970), 153.

The more magazines that are sold, the cheaper is the average cost of producing individual units. Thus, as a share of total revenue, the publishing expenses to U.S. publishers are much lower than they are for Canadian periodical producers.⁴⁷ For American publishers already experiencing healthy profits at home, Canada is a very lucrative market. As a result, it has been difficult for Canadian magazines to compete in their own domestic market.

The remarkable presence of American periodicals in Canada is most pronounced on newsstands where US magazines dominate and only three out of ten Canadian magazines are available for sale.⁴⁸ The rest are available only through subscription sales. This relative paucity of Canadian magazines is significant as it highlights both the attractiveness of American magazines to Canadian readers and the challenge for domestic publishers to capture the attention of that same audience. Exposure on newsstands is not only a reflection of a magazine's desirability, but an important means to heighten a magazine's profile and, in turn, the number of potential subscribers.

There are two forms of American competition in the Canadian periodical industry: overflow circulation and by-product publications. Overflow circulation consists of periodicals that are produced for their domestic market but 'flow' over the border to be sold in Canada. Many of the products sold in Canada have a common international or North American brand and thus overflow circulation is sufficient for advertisers of such goods to reach the Canadian audience. American subsidiaries of American companies may restrict their advertising in Canadian periodicals for this reason.⁴⁹ There is also an incentive for Canadian firms to advertise in such American magazines since many of them tend to have a much greater audience than their Canadian competitors.

All other American periodicals in Canada are termed 'by-product' publications. The distinguishing feature of by-product periodicals is that their content differs in some way from their domestic versions. The most noteworthy of these magazines, in terms of

47. Gottselig, 39.

48. Catherine Kcachie and Kim Pittawa, "Federal Policy and Canadian Magazines," *Policy Options* 15, no. 1 (January-February 1994): 14.

competition in the Canadian market, are ‘split-run’ periodicals and Canadian/regional editions. Split-runs are designed to increase advertising revenues and to target advertising to a specific audience. They consist of the same editorial content as their domestic copies although they sometimes incorporate a few pages of Canadian content. Their advertising content, however, is entirely original. Put simply, the American editorial content is recycled, while the American advertisements are stripped in favour of Canadian advertisements. Regional or Canadian editions of a foreign magazine differ from split-runs only in that they are entirely separate production runs from their domestic editions. They are subsidiaries in the same manner as an American automotive manufacturing plant in Canada. They may have different administrative staff, but their editorial content is taken from the same ‘pool’ as their domestic copies and advertising is sold anew.

An American publisher of a split-run magazine or Canadian edition incurs very few additional costs in producing that periodical for the Canadian market. Because the magazine recycles existing editorial content, its production costs have already been recovered by sales in its domestic market and Canadian advertising revenues are thus easy profits. As a result, American publishers of such magazines can charge much lower rates for advertising than their Canadian counterparts, and in the process, divert advertising revenue from Canadian periodicals.

The competition for advertising revenues from American overflow circulation, and especially split-run magazines and Canadian editions, has serious implications for the Canadian periodical industry. Advertising revenue is crucial for most magazines, as it is their primary source of revenue. For example, in 1991-92, approximately 64 percent of all revenue of Canadian magazines came from advertising sales.⁵⁰ The immediate and direct impact of lack of advertising revenue on a magazine’s health is clear. However, there is also an important long term less direct effect. The larger a periodical’s circulation, the more it can charge for advertising; the greater the advertising revenues,

49. Isaiah A. Litvak and Christopher J. Maule, “Bill C-58 and the Regulation of Periodicals in Canada,” *International Journal* 36, no. 1 (Winter 1980-1): 84.

50. Task Force on the Canadian Magazine Industry, 12.

the more it can improve its editorial content. The more it can improve its editorial content, the better its chances at increasing its circulation. This ‘publishing spiral’ also works in the opposite direction.⁵¹ Thus, the concern in Canadian policy circles has not centred solely on the fact that American magazines are present in great numbers in Canada, but that they will attract advertising at the expense of Canadian periodicals. In short, the concern has not been that American magazines exist, but that Canadian ones will not.

Of course, the problem is that American magazines cannot confer the same socio-cultural benefits offered by Canadian periodicals as their content is qualitatively different. The absence of Canadian magazines would be detrimental to the development and maintenance of Canadian culture and identity. Moreover, American magazines, by filling the void with U.S. themes and perspectives, would contribute to an acculturation process. As the Massey Commission noted in 1951, U.S. sources of communication “are almost certain to have an American slant and emphasis by reason of what they include or omit, as well as because of the opinions expressed.”⁵² For example, during the 1950s, *Reader’s Digest* - which had a Canadian edition – encouraged the publication of politically oriented articles that were supportive of the Taiwan regime, while also being very critical of ‘Mainland’ China. *Reader’s Digest* adopted a similar approach toward Cuba. During this period, however, the Canadian government was attempting to promote and improve its relationship with these two countries – an approach that was largely supported by Canadian periodicals of all political orientations.⁵³

The objective of Ottawa’s intervention in its periodical industry has consistently been to secure sufficient Canadian advertising revenues for domestic publications. Logically, this has involved measures to reduce the negative impact of split-run

51. Royal Commission on Publications, 28.

52. Canada. Royal Commission on National Development in the Arts, Letters, and Sciences, *Report of the Royal Commission on National Development in the Arts, Letters, and Sciences* [online], (Ottawa : King’s Printer, 1951), 18. [cited 15 March 2001]. Available from <<http://www.nlc-bnc.ca/massey/emassey.htm>>

53. Reader’s Digest example is found in Isaiah A. Litvak and Christopher J. Maule, *Cultural Sovereignty: The Time and Reader’s Digest Case in Canada* (New York: Praeger Publishers, Inc., 1974), 5-6.

magazines and Canadian editions of U.S. periodicals. In general, these policies have not been designed to restrict the presence of American periodicals in Canada per se, but rather to maintain a place for Canadian periodicals and thereby “provide Canadians with distinctive vehicles for expression.”⁵⁴

The challenges posed by American opposition, advances in information technology, and trade liberalization, however, have had particularly erosive and limiting effects on Canada’s periodical policy instruments. This study examines these challenges in more detail. Chapter 2 outlines the evolution of Canadian periodical policies implemented in response to the overwhelming presence of American magazines in Canada. Emphasis is given to the most successful regional editions of American magazines - *Time Canada* and *Reader’s Digest Canada* – and to the role of the U.S. government in defending these interests. Chapter 3 illustrates the impact of technological advances and trade regulation on Canada’s periodical policy regime. Digitization and dematerialization allowed an American split-run edition, *Sports Illustrated*, to circumvent protectionist Canadian policies by using satellite transmission. When Canada attempted to fill the gap with an additional protectionist measure, it elicited a challenge before a WTO Dispute Panel. When the dust had settled, most of Canada’s periodical policies were found to contravene international trade law and were consequently repealed by the Canadian government. Chapter 3 also details the 1999 Canada-U.S. Agreement on Periodicals; a deal that significantly watered down Canada’s past measures. The restrictions that were maintained by Canada will likely be insufficient to protect many Canadian magazines. The final chapter addresses the implications and lessons of the case. It addresses the merits of abandoning the traditional practice of exempting culture in favour of the international instrument approach and suggests fundamental principles that should be incorporated in such an instrument.

54. Canada. Department of Canadian Heritage, *Culture & Heritage: Making Room For Canada’s Voices*, (Ottawa: Minister of Public Works and Government Services Canada, 1998), 14.

CHAPTER 2 - THE EVOLUTION OF CANADIAN PERIODICAL POLICY

A truly Canadian periodical industry took time to develop. Canada's dispersed population, and that population's geographical and cultural proximity to the United States, made domestic periodical publishing a challenging enterprise. In contrast, American publishers had a large domestic base from which they could easily reach the Canadian public. By the 1920s, as the influence of Britain waned in Canada, there was a developing view that there was a need to promote and protect a distinct 'Canadian culture' from the influences of the United States. For example, during this period, *Maclean's* magazine voluntarily adopted a policy of publishing only non-fiction articles that related to Canadian issues.¹ To support such voluntary promotional undertakings, the Canadian government was increasingly being asked to take restrictive measures to combat the escalating American periodical presence in Canada. In 1922, the Canadian Magazine Publishers Association sent letters to each Member of Parliament asking for tariffs to protect Canadian periodicals from American competition.² The extent of this competition was highlighted by a November 1924 editorial in *Saturday Night*:

...six out of every seven magazines read in Canada come from the United States. Twenty-five of the best known of these magazines and periodicals have a total circulation in Canada of nearly 600,000 copies per issue, or a grand total of upward of twelve million copies per annum. And these figures take no account of dozens of other U.S. publications of the cheap magazine type sold throughout the country....The Government must get behind the product to the extent of giving publishers some degree of protection against the dumping process which is now going on and which

1. Isaiah A. Litvak and Christopher J. Maule, *Cultural Sovereignty: The Time and Reader's Digest Case in Canada* (New York: Praeger Publishers, Inc., 1974), 16.

2. Hale E. Hedley, "Canadian Cultural Policy and the NAFTA: Problems Facing the U.S. Copyright Industries," *The George Washington Journal of International Law and Economics* 28, no. 3 (1995): 657.

over a space of ten years has increased the sale of United States periodicals in the Canadian market by upward of three hundred percent.³

The initial response of the Canadian government was to reduce tariffs on magazine paper and other production materials by 80 percent.⁴ MacKenzie King's Liberal government ignored the pleas for protection, and it was not until the 1930 victory of R.B. Bennett's Conservative Party that efforts to discourage the sale of U.S. magazines in Canada were taken.

The Bennett government's 1931 budget contained a proposal for a duty of 15 cents per pound, plus an additional 1 cent excise tax on all foreign periodicals entering Canada, except for scientific, educational and religious magazines. However, the government quickly realized that the duty would affect 'better-class' magazines more severely than popular literature since the former was often heavier in weight. Thus the government's legislation was changed so that advertising content would be the determining factor for the rate of taxation. Periodicals with 20 percent or less advertising content were granted free entry into Canada; those with up to 30 percent paid two cents per copy; and magazines with more than 30 percent advertising content paid 5 cents per copy. The objectives of the new protectionist measure were to discourage the purchase of 'undesirable' literature and to assist domestic magazine publishers by reducing the competitive influences of American magazines in Canada. Evidence suggests that the Bennett government's tax had a positive effect on Canadian periodicals. By 1935, American magazine circulation had fallen 62 percent while Canadian magazine circulation had increased 64 percent.⁵

In the same year, however, the Conservatives lost a federal election to Mackenzie King's Liberals and the tax was marked for elimination. After coming to power, the Liberals continued negotiations with the United States undertaken by the Conservatives

3. Quoted in, Fraser Sutherland, *The Monthly Epic: A History of Canadian Magazines, 1789-1989* (Toronto: Fitzhenry & Whiteside, 1989), 114.

4. Ibid., 115.

5. Statistics and description of 1931 tariff taken from, Litvak and Maule, *Cultural Sovereignty: The Time and Reader's Digest Case in Canada*, 23-24, 26.

to establish the Canada-U.S. Trade Agreement. The U.S., citing the ability of Canadian magazines to cross the border freely, demanded reciprocal treatment for the duration of the three-year agreement.⁶ In response, the Liberals repealed the duty in 1936. It was never reinstated. With the elimination of the periodical duty, American magazines quickly exceeded their past sales in the Canadian market. The value of imported U.S. magazines increased from \$2.6 million in 1935 to \$5.9 million in 1937.⁷ By 1938 American periodicals had more than tripled their 1935 circulation levels.⁸

Competition in a New Form – Time and Reader's Digest

In 1943, Canadian magazines were introduced to a new form of American competition when *Reader's Digest* became incorporated in Canada and *Time* began the printing of a Canadian edition of its magazine in Chicago. These two magazines initiated a novel approach to magazine marketing that was soon followed by other foreign publishers. *Reader's Digest* and *Time* presented themselves as Canadian magazines to their Canadian consumers. Although they sold Canadian advertising, these magazines consisted mostly of recycled American content. In 1944, for example, *Time Canada* contained 2 pages dedicated to Canada's war effort. A year later the Canadian section of its magazine was increased to 3 pages.⁹ The existence of such magazines exacerbated the difficult circumstances already faced by Canadian periodicals, and by the early 1950s the issue had become a matter of public debate.

The Massey Commission

In 1951, the Royal Commission on National Development in the Arts, Letters and Sciences, chaired by Vincent Massey, released what would become a pivotal report in Canadian cultural policy development. The Massey Report is often considered to have offered the first substantial legitimization of the role of the government in the cultural

6. Ibid., 27.

7. Ibid., 28.

8. Sutherland, 116.

affairs of the country.¹⁰ Although the Commission did not focus on the periodical industry, it did highlight the difficulties faced by Canadian magazines in competing with their American counterparts. Indeed, the Commission noted that the difficulties of the Canadian periodical press seemed “to symbolize many of the problems of Canada as a nation and of Canadians as a people.”¹¹

The Commission highlighted the fact that Canadian magazines possessed a circulation of 42 million per annum in Canada while the circulation of U.S. magazines was more than double that at 86 million.¹² According to a submission by the Canadian Periodical Press Association, “Canada...is the only country of any size in the world whose people read more foreign periodicals than they do periodicals published in their own land.”¹³ Even under these extremely difficult circumstances the Commission deemed the Canadian periodical industry to be relatively healthy:

We are informed that the important Canadian magazines have a Canadian content of seventy or eighty per cent, that they do attempt to interpret Canada as a whole to all Canadians, that they comment vigorously upon national issues in a non-partisan spirit, and that they manage to survive and even to flourish although American periodicals outsell them by more than two to one in their own Canadian market.¹⁴

Despite the assurances in the Massey Report, Canadian periodical publishers were finding it increasingly difficult to compete with their American counterparts. It did not take long before protectionist pleas gathered momentum once again.

9. Ibid., 116.

10. Paul Rutherford, “Made in America: The Problem of Mass Culture in Canada,” in *The Beaver Bites Back: American popular Culture in Canada*, eds. David H. Flaherty and Frank E. Manning, (Montreal and Kingston: McGill-Queen’s University Press, 1993), 273.

11. Canada. Royal Commission on National Development in the Arts, Letters, and Sciences, *Report of the Royal Commission on National Development in the Arts, Letters, and Sciences* [online], (Ottawa : King’s Printer, 1951), 64. [cited 15 March 2001]. Available from <<http://www.nlc-bnc.ca/massey/emassey.htm>>

12. Ibid., 17.

13. Quoted in Ibid., 17-18.

14. Ibid., 64.

In March of 1952, only one year after the Massey Report, the Magazine Publishers Association of Canada (MPAC) submitted a brief to Prime Minister Louis St. Laurent and his Finance Minister detailing the financial position of the industry. The MPAC stated that the position of Canadian magazines was “precarious,” primarily due to the competition of American magazines, particularly the Canadian editions of *Time* and *Reader’s Digest*.¹⁵ The advertising revenue obtained by these regional editions was the critical source of income for Canadian magazines. Thus, the association requested that several measures be adopted, including a specific duty. The MPAC noted that inaction would eventually make continued publication of Canadian magazines impossible.¹⁶

Initially, the government responded by earmarking more of its advertising dollars for Canadian periodicals at the expense of other communications media. However, it became increasingly clear to St. Laurent’s government that such promotional measures would be insufficient on their own. By 1955, *Time* and *Reader’s Digest* had captured over one-third of all advertising revenue in the Canadian periodical industry and the government was compelled to act.¹⁷ In 1956, the Liberals introduced a 20 percent tax on the advertising revenues of Canadian editions of foreign periodicals (magazines that contained at least 25 percent identical editorial content to their parent publications but had different advertising). All American magazines that published Canadian editions, regardless of the nationality of their advertisements, were subject to the tax. In all there were ten U.S. editions affected, including *Time* and *Reader’s Digest*.¹⁸

Both magazines mounted opposition to the new measure. The advertising director of *Time*’s international editions, W.S. Honneus, called the legislation “punitive” and “discriminatory.” His magazine’s position was that Canadians simply preferred

15. Canada. Department of External Affairs, “Financial Position of Canadian Magazines [Memorandum to Cabinet],” 10 July 1952, in *Documents on Canadian External Relations*, vol. 18 (Ottawa: Minister of Supply and Services Canada, 1990), 1329.

16. *Ibid.*, 1329.

17. Roger Swanson, “Canadian Cultural Nationalism and the US Public Interests,” in *Canadian Cultural Nationalism: The 4th Lester B. Pearson Conference on the Canada-US Relationship*, ed. Janice L. Murray, (New York: New York University Press, 1977), 65.

18. Details of the 1956 tax, Sutherland, 183.

periodicals of “superior quality.”¹⁹ The director of *Reader’s Digest Canada* argued that “precedents such as this tax on advertising can be extremely dangerous and have far-reaching implications on the freedom of the press itself.”²⁰ In addition to their concerted public relations campaigns, the two magazine publishers lobbied the Eisenhower administration to act on their behalf.

Days after the budget outlining the magazine tax was announced in March of 1956, President Dwight Eisenhower discussed the matter with Prime Minister St. Laurent at a meeting in White Sulphur Springs, West Virginia. During the meeting Eisenhower revealed that *Time* magazine had been putting pressure on both the State Department and the White House to act in opposition to the tax.²¹ Later, in July of 1956 the U.S. government sent a formal note to the Canadian embassy in Washington in which it argued that the tax “would have a discriminatory effect in practice and be injurious to established USA business interests.” The U.S. was concerned that the legislation “would set an undesirable precedent for other countries which could create difficulties for USA periodicals.” The note also stated that the measure “would be a significant reversal of the trend toward development of commercial relations” between Canada and the United States.²²

As with Bennett’s 1931 tax, the new legislation did not survive a change of government in Ottawa. John Diefenbaker’s Conservatives, like Mackenzie King’s Liberals, repealed their predecessor’s protectionist measure in 1958. When Finance Minister Donald Fleming eliminated the tax, he told the House of Commons that the government wanted to assist Canadian periodicals, but any support would have to be implemented in a way that infringed “neither the freedom of the press nor the reading preferences of the public.”²³ However, the periodicals issue continued to gather

19. Litvak and Maule, *Cultural Sovereignty: The Time and Reader’s Digest Case in Canada*, 33.

20. Quoted in, *Ibid.*, 33.

21. Stephen Azzi, “Magazines and the Canadian Dream,” *International Journal* 54, no. 3 (1999): 503.

22. Cited in, *Ibid.*, 503-4.

23. Cited in, *Ibid.*, 505-6.

momentum because the Canadian government had not been able to provide sufficient protection to Canadian magazines while the presence of U.S. magazines in Canada increased unabated. Only months after the Conservatives repealed the magazine tax, “*Everywoman’s Family Circle*, *Argosy*, and *True* began Canadian editions, and *TV Guide* started an Ontario edition. *Popular Mechanics*, *Saturday Evening Post*, and *Life* began publishing editions printed in the United States with entirely American content but with advertising sold only for the Canadian market.”²⁴

In 1959 the United States Post Office outlined a policy to strengthen the influence of American periodical publications by reducing postal rates:

In view of growing world acceptance of American published materials, and the desire of Americans to encourage their influence abroad (international postal rates will be lowered)...By this new move we will be keeping increases moderate enough to encourage continued growth of the world market for printed materials which spread American ideals, culture and facts abroad.²⁵

On September 16, 1960, in response to such developments and only two years after repealing his predecessor’s tax on foreign periodicals, Diefenbaker appointed a royal commission to examine the position of the Canadian periodical industry and to suggest solutions as to how it could be improved. The Royal Commission on Publications, chaired by Grattan O’Leary, marked a turning point in Canada’s approach to magazine policy and would finally initiate the development of more durable and long-lasting protectionist policies in Canada’s domestic periodical industry.

The O’Leary Commission

The mandate of the O’Leary Commission made it clear that American magazines, particularly those with Canadian editions, would be a central subject of inquiry. The Order in Council defining the terms of reference for the Commission asserted that,

24. Ibid., 506.

25. Quoted in, Litvak and Maule, *Cultural Sovereignty: The Time and Reader’s Digest Case in Canada*, 34.

...Canadian magazines and periodicals add to the richness and variety of Canadian life and are essential to the culture and unity of Canada...[and]...it has been alleged that because of inequitable competition from foreign periodicals of various forms the publication of Canadian magazines has been prejudicially affected.²⁶

The Commission's objectives were twofold. The first was to examine the health of the Canadian magazine industry with special emphasis on the negative impact of regional editions of foreign periodicals. The second was to make recommendations to the Canadian government on possible measures that, "would contribute to the further development of a Canadian identity through a genuinely Canadian periodical press."²⁷

Publishing interests were given the opportunity to make submissions to the Commission. Canadian publishers lamented the fact that magazines like *Time Canada* and *Reader's Digest Canada* were siphoning off enormous amounts of Canadian advertising revenue. They emphasized that if the situation did not change, only a few regional Canadian publications would continue to exist. As a result, the health of a distinguishable Canadian culture would be increasingly placed in jeopardy.²⁸ Conversely, *Time* argued that, "the magazine industry in its entirety is flourishing and expanding at a rapid rate...and that the competition from foreign periodicals, whether equitable or inequitable, has negligible effect on the health and stability of the magazine industry in Canada."²⁹

The findings of the Commission, however, did not support *Time Canada's* assertions. The Commission's report, published in 1961, found that the circulation of Canadian periodicals was not increasing at the same rate as their foreign competitors. In 1950, Canadian magazines accounted for 28.8 percent of total circulation; this dropped to only 23.3 percent in 1959. In contrast, U.S. overflow circulation increased its share from

26. Canada. Royal Commission on Publications, *Report of the Royal Commission on Publications*, (Ottawa: Queen's Printer, 1961), 107.

27. Ibid., 107.

28. Litvak and Maule, *Cultural Sovereignty: The Time and Reader's Digest Case in Canada*, 47-48.

29. Ibid., 52.

60.6 percent to 64.9 percent in the same period. In fact, the Commission found that three out of every four magazines read by Canadians were imported from the United States.³⁰

When it came to advertising revenues, the Commission highlighted the detrimental effects of Canadian editions of U.S. magazines. Between 1950-1958, *Time Canada*'s advertising revenues increased by nearly 208 percent, *Reader's Digest Canada*'s by 194 percent, and all Canadian magazines, including these Canadian editions, by only 96.5 percent. By 1959, 40 cents of every dollar spent on advertising in consumer magazines in Canada were going to the Canadian editions of *Time* and *Reader's Digest* alone (15-16).

In discussing the negative effects of special Canadian editions on the Canadian periodical industry, the Commission focused on the competitive advantage of regional editions stemming from their re-use of editorial content provided by their parent editions. It argued that this "editorial 'dumping' is an important competitive factor, in both advertising and circulation, for the Canadians to overcome" (32). It cited the fact that *Time Canada* contained the same editorial content as its parent edition, prefaced by four pages of Canadian news affairs. Similarly, *Reader's Digest Canada* obtained its editorial content from a central pool but provided footnotes and boxes written by editorial staff in Canada to explain the Canadian aspects of the content. As a result, these regional editions were able to get editorial content that was unaffordable for Canadian magazines for only a fraction of what Canadian magazines spent on editorial expenses (39).

The overwhelming competition from American overflow circulation and special Canadian editions of U.S. magazines was considered by the O'Leary Commission to be a serious threat to the Canadian magazine industry. The Commission found that during the 1950s, more Canadian consumer magazines were discontinued than begun. Those Canadian magazines that did manage to survive did so by subsidizing their operations through other business ventures of their owners (5, 43). Such dismal statistics forced the Commission to consider the "possibility of there being no Canadian voices at all [in the

30. Royal Commission on Publications, 16, 33.

Canadian magazine industry]” (5). The Commission presented several conclusions and recommendations designed to ensure that such a situation would never occur.

It asserted that the revenues available from Canada’s advertising market should be devoted to domestic media and that the media, in general, must not simply recycle editorial content in order to support an advertising structure. The Commission also noted that these principles would require government intervention for their implementation and maintenance (76).

Having established that government action was necessary to support the periodical industry, the Commission turned its attention to the issue of *how* to intervene. The objective was clear to the Commission:

If we hold that a periodical press is essential to the Canadian nation, no more to be produced for us by outlanders than our statute books, then we face an inescapable choice: either our periodical press must have preserved for it enough Canadian advertising to ensure its existence, or it must be subsidized by the State (75).

The O’Leary Commission rejected the use of subsidies as a means of government action as they were considered to be “alien to our political and economic way of life” (75). Instead, two alternative recommendations were brought forward, both of which were aimed at diverting Canadian advertising revenues away from foreign competition. First, the Commission proposed that taxpayers no longer be permitted to make deductions from their income tax for expenditures incurred for advertising in foreign periodicals directed at the Canadian market. The Commission maintained that the adoption of this recommendation would double the cost of domestic advertising in a foreign periodical and thus induce Canadian firms to advertise in Canadian periodicals rather than in the foreign Canadian editions that were produced in Canada (78). Second, it recommended that all foreign periodicals containing Canadian advertising aimed at the domestic market should be denied entry into Canada. Domestic advertising would include “postcards, coupons and inserts contained in a periodical and indicating the availability of a product or service in Canada” (79).

The Commission made it clear that its only objectives were to prevent the placement of Canadian domestic advertising in foreign periodicals, and to discourage publishers from recycling editorial material as a means of securing additional advertising revenues. In the view of the Commission, the two measures would not interfere with the preparation of editorial content nor would they interrupt the free flow of this editorial content or the preferences of Canadian consumers (79-81). Finally, the Commission expressed confidence that, “the people of the United States, reading the facts as we have presented them, will agree that their country, placed in Canada’s circumstances, would not hesitate to take the measures which we recommend for Canada” (94). This statement, though likely correct, proved to be somewhat naïve.

It was clear to everyone that the report’s recommendations, if adopted, would have serious negative implications for U.S. private interests, including *Time* and *Reader’s Digest*. The American publishers of those magazines possessed substantial political influence in the United States and the possibility of their ill treatment at the hands of Canada induced a response by the U.S. government.

The U.S. State Department became involved in the issue soon after the public release of the O’Leary Report. The American embassy asked Canada to delay action on the report’s proposals “until the United States government has had an opportunity to present its views to the Canadian government on the Commission’s recommendations.” These views were presented in a note delivered in August 1961. The note called the restriction on tax deductions for advertising in split-run editions, a measure similar in nature to the short-lived 1956 magazine tax. It argued that the O’Leary Commission’s recommendations were discriminatory and inconsistent with Canada’s obligations under Article III of the General Agreement on Tariffs and Trade, which prohibited the implementation of internal taxes to protect domestic producers from foreign competition. If the Canadian government adopted these measures, the U.S. made it clear that it expected “satisfactory compensation.” The note made it clear that the adoption of the report’s proposals would “damage mutually beneficial commercial relations” between

Canada and the United States. Put simply, implementing the report's recommendations would invite U.S. retaliation.³¹

The U.S. continued to press Canada by highlighting the negative economic consequences that could result from the acceptance of the Commission's recommendations. A senior White House representative warned that a major U.S. aircraft components contract under negotiation with Canadair Ltd. in Montreal could be canceled. Washington also threatened to review Canada's export quotas for oil to the U.S., Western Canadian oil production being highly dependent on the American market.³²

Although the Canadian government was concerned about pressure from the U.S., it decided to move forward with the proposals in the O'Leary Report. On January 18, 1962 the Speech from the Throne indicated that the government intended to recommend:

a number of measures that will constitute further steps in working out the purposes of confederation and identifying more clearly the Canadian nationality in various aspects of public and business affairs. With this purpose in mind, you will be asked to give effect, with modifications, to the recommendations of the royal commission on publications.³³

Four days after the Throne Speech, Prime Minister Diefenbaker announced that his government would introduce both the income tax restriction and the tariff prohibition recommended by the O'Leary Commission. The income tax measure, however, was to contain an exception for advertising that was aimed at the Canadian market in a foreign periodical that was already established in Canada. This included the Canadian editions of *Time* and *Reader's Digest*. Half of advertising expenditures in such pre-established magazines were to be deductible. Diefenbaker told the House of Commons that, although the measures had unavoidable economic implications, he considered them to be crucial for Canada's culture and identity and thus legitimate acts of state intervention:

31. See, Azzi, 512-13.

32. See, Litvak and Maule, *Cultural Sovereignty: The Time and Reader's Digest Case in Canada*, 76-77.

33. Quoted in Ibid., 65.

The government has considered the relationship between the recommendations of the royal commission and our commercial obligations to other countries under the general agreement on tariffs and trade. The commission establishes very clearly that the issues at stake...are not essentially of a commercial character but go into the fabric of our culture.³⁴

American private interests and the U.S. government were not convinced. After the Conservatives had announced their intention to implement the O'Leary Commission's recommendations, the president of *Reader's Digest Canada* wrote a letter for the March 1962 issue of the magazine urging Canadians to support his magazine. The potential negative effects of a forced retreat of *Reader's Digest* from Canada were clearly highlighted:

It's the cruelest of dilemmas. Withdrawing from Canada and reverting to the production of Canadian copies in the United States would protect the Digest from the harsh and discriminating economic consequences of the new law; but for the Digest this would involve abandoning its home in Canada and abandoning the 1000 Canadians who depend on it for living and career.³⁵

For its part, the U.S. government continued to highlight the economic consequences of Canada's implementation of the intended policies. U.S. State Department officials made their position clear in January of 1962:

While we are sympathetic with the Canadian Government's desire to foster the development of a publishing industry reflecting Canadian cultural aims, we think that the reportedly proposed tax-action of this type is neither the proper nor practical method to reach this end....We expect to consider seeking an early opportunity to present our views to the Canadian Government on its proposed actions.³⁶

Once again, an election intervened and forced the U.S. to deal with a newly formed government.

34. Quoted in Ibid., 66.

35. Cited in Ibid., 128.

36. Cited in Ibid., 68.

In 1963 the victorious Liberals, led by Lester B. Pearson, were pressured by the Canadian magazine industry to act on the O'Leary Commission's recommendations. As Tom Kent, Prime Minister Pearson's senior policy analyst, put it, "By the time we inherited the problem, it was becoming more desperate. *Maclean's* was operating at a heavy loss. There was little doubt that, if nothing was done, it and other commercial magazines would disappear before long...There would be no Canadian publications on a national scale."³⁷ As inaction no longer appeared to be a viable option, the Liberal government supported its predecessor's proposed policy and the measures recommended by the O'Leary Report were finally implemented, with modifications, in 1965.

The tariff measure was implemented as recommended.³⁸ Schedule C of the customs tariff was amended to prohibit the entry of foreign split-run or regional editions as well as foreign magazines that had advertising content directed at the Canadian market in excess of a specified level. Part one of the tariff dealt with the prohibition of split-run and regional editions. Both types of magazines were defined as foreign publications sold in Canada containing advertisements that were directed at the Canadian market but did not appear in their domestic issues. Part two restricted the permissible level of Canadian advertising in a foreign periodical to 5 percent. In both cases, several factors were taken into account to determine whether advertising was primarily directed at the Canadian market, including whether an advertisement contained a specific invitation to Canadian consumers and whether it listed locations of the availability of a good or service in Canada.³⁹ The legislation authorized Canada Customs to prevent the entry into Canada of the four subsequent issues of an offending issue.⁴⁰

The *Income Tax Act* (ITA) was also amended to prohibit the deduction from income tax of expenditures for advertising directed at the Canadian market and placed in

37. Cited in, Azzi, 516.

38. Hereinafter 'Tariff Code 9958'.

39. Chios C. Carmody, "When 'Cultural Identity Was Not at Issue': Thinking About Canada – Certain Measures Concerning Periodicals," *Law and Policy in International Business* 30, no. 2 (Winter 1999): 281.

40. Canada. Task Force on the Canadian Magazine Industry, *A Question of Balance: Report of the Task Force on the Canadian Magazine Industry* (Ottawa: Minister of Supply and Services, 1994), 4.

foreign periodicals. A periodical would have to be 75 percent Canadian-owned and not “substantially the same” as a periodical printed, edited or published outside of Canada before the expenditures for advertising in that periodical could qualify for tax deductions. Pearson’s government, however, made an important exception to this second measure. All magazines that “throughout the period of 12 months ending April 26, 1965...were being edited in whole or in part in Canada and printed and published in Canada” were not to be considered as foreign publications.⁴¹ In effect, this provision exempted both *Time* and *Reader’s Digest* from the measure because they were both printed and published in Canada.⁴²

It appeared that ongoing U.S. threats of retaliation played a considerable role in the government’s decision to grant the exemption. By 1965, the U.S. government had another leverage point. At this time the Canada-U.S. Automotive Agreement was in its final stage of negotiations. The Auto-pact, as it is commonly referred to, prescribed a large degree of free trade in automotive parts and thus encouraged the production of such parts in Canada. According to then finance minister Walter Gordon, the ITA exemption was key to the success of the agreement between the two countries:

The matter came up when the automobile agreement was under heavy attack in Congress. Approval of the agreement might have been jeopardized if a serious dispute with Washington had arisen over *Time*. In the circumstances, I believe the decision to grant the exemption was realistic.⁴³

Although the U.S. hinted at retaliation after the measures were adopted, nothing materialized, and in that sense, the exemption worked. However, though the exemption may have been realistic, it significantly limited the effects of Canada’s policies. The Government finally responded to the calls for action, but it failed to eliminate the

41. Canada. Senate. Special Senate Committee on Mass Media, *Report of the Special Senate Committee on Mass Media* (Ottawa: Queen’s Printer, 1970), 158.

42. There were also a handful of other much smaller publications that were exempted under this criteria: three American medical journals, an American-owned daily newspaper, and three British owned weeklies.

43. Cited in, Litvak and Maule, *Cultural Sovereignty: The Time and Reader’s Digest Case in Canada*, 72.

competitive advantage possessed by the two magazines that were the overwhelming source of concern to the Canadian periodical industry. Indeed, the government had secured their position within Canada. Grattan O’Leary, stated that with the exemption *Time* and *Reader’s Digest* had been “in effect issued Canadian passports – given a green light to go ahead with their destruction of our Canadian periodicals.”⁴⁴ In the end, the government had ensured that the health of the periodical industry would remain in jeopardy and, as a result, that the periodical issue would not go away.

The Davey Committee

Only five years after the Liberal government implemented policies designed to assist the Canadian periodical industry, the plight of Canadian magazines was once again being questioned and examined in a government study. In 1970, the Special Senate Committee on Mass Media, chaired by Keith Davey, was appointed to, “consider and report upon the ownership and control of the major means of public communication in Canada, and in particular, and without restricting the generality of the foregoing, to examine and report upon the extent and nature of their impact and influence on the Canadian public.”⁴⁵ Though the periodical industry had to share the spotlight with other cultural industries, the effects of the exemption that had been granted to *Time* and *Reader’s Digest* from the 1965 legislation received a significant portion of the Committee’s attention. Like the earlier bodies of inquiry, the Davey Committee would play a substantive role in shaping Canadian cultural policy in the periodical industry.

Both sides of the periodicals issue were able to make submissions to the Committee. Peter. C. Newman, editor of *Maclean’s*, representing those interests opposed to the favoured status of *Time* and *Reader’s Digest* in Canada, said that he found it,

incomprehensible that two American magazines should be allowed, with government sanction, to pass off what are almost entirely American publications...as Canadian magazines, attracting Canadian advertising. Since the local editors of *Time* and the *Digest* are directly responsible to

44. Cited in, Azzi, 521.

45. Special Senate Committee on Mass Media, v.

their American head offices where the final decisions about what goes into their magazines are made, they do not and in fact, cannot accurately reflect the Canadian reality in the very few pages they relegate to Canadian news. Only truly Canadian magazines can fulfill this essential mandate.⁴⁶

For their part, *Time* and *Reader's Digest* restated those arguments they had put before the O'Leary Commission ten years prior. In 1970, however, they did so more quietly. Both were confident that the Canadian government would not risk U.S. retaliation by eliminating the exemption.⁴⁷ Moreover, many prominent Canadian periodical publishers were now supporting the presence of the two magazines in Canada. Since the legislation of 1965, a Magazine Advertising Bureau had been created in which the two American publications worked with a select group of Canadian periodicals to attract advertising revenue for the industry as a whole. The Davey Committee, however, found that the two American magazines continued to benefit most, and at the expense of others.

According to the Committee, the Canadian periodical industry remained in a precarious situation. Only a few Canadian consumer magazines were assured of survival. By "normal corporate standards," only *Time*, *Reader's Digest*, *Miss Chatelaine*, and *Toronto Calendar* were in what could be considered a "healthy" financial condition.⁴⁸ In large part, this was due to their ability to attract and secure advertising revenues. *Time* and *Reader's Digest* were clearly in the lead in this respect.

By 1970, *Time* and *Reader's Digest* received over half of the advertising revenues acquired by all major consumer magazines in Canada and this share was found to be rising. Their share of total advertising revenues increased from 43 percent in 1960 to 56 percent in 1969. The Committee believed the trend would persist saying, "It is reasonable to anticipate that *Time* and *Reader's Digest* will continue to grab off larger and larger proportions of available revenues."⁴⁹

46. Cited in, Litvak and Maule, *Cultural Sovereignty: The Time and Reader's Digest Case in Canada*, 87-88.

47. For *Time* and *Reader's Digest's* response to the Davey Committee, see, Ibid., 89.

48. Special Senate Committee on Mass Media, 154-5.

49. Ibid., 155; quote, 157.

Like the O’Leary Commission, the Davey Committee argued that the favourable situation in which *Time* and *Reader’s Digest* found themselves relative to Canadian magazines was due in large part to the economic advantages they received by recycling editorial content provided by their parent publications. But, as pointed out by the Committee, since 1965 *Time* and *Reader’s Digest* also had an advantage over foreign competitors in that the tax and tariff measures adopted in that year effectively blocked the entry of ‘Canadian’ editions of foreign magazines.

The Committee concluded that the status quo was insupportable and that the Canadian periodical industry had to be assisted so that it could operate within a more equitable competitive environment. The focus of the Committee’s recommendations to improve the situation was clearly on the position of *Time* and *Reader’s Digest*:

The competitive advantage that *Time* and *Reader’s Digest* enjoy is greater today than it was when O’Leary made his recommendations in 1961. The consumer magazine segment of the industry is by far the most important segment in terms of our cultural survival. It is also the segment which, because of subsidized foreign competition, faces the greatest difficulties. Whatever the admen say, whatever the economists say, this is a situation we should no longer tolerate (163).

The solution, according to the Committee, was to be found in the recommendations of the O’Leary Commission. The Committee believed that if the tax measure had not been adopted in 1965, the health of the Canadian periodical industry would have been much worse than it was in 1970. The exemption granted to *Time* and *Reader’s Digest*, however, was a mistake. As the Committee put it, “It was a bad decision...Frankly, we marvel that *any* Canadian mass consumer magazines have survived in such a forbidding climate” (164). The Committee was certain that there would be more Canadian magazines if the exemption had not been granted. If the competitive advantage possessed by the two American publications continued, the survival of existing Canadian magazines would be increasingly threatened, and the birth of new Canadian magazines would be stifled (164).

The Committee considered recommending that *Time* and *Reader’s Digest* be prohibited from publishing their magazines and accepting advertising in Canada, thus

forcing them to be available only as overflow circulation. This approach, however, was deemed by the Committee to be “inconsistent with the Canadian character” (165). Instead, it recommended that the exemptions that had been granted to *Time* and *Reader's Digest* be removed, “the sooner the better” (165).

After making its recommendation, the Committee addressed possible criticisms of withdrawing the exemption. It noted that those opposed to removing the exemption were of the view that *Time* and *Reader's Digest* would continue to publish Canadian editions, that such action would not help and could even hurt the Canadian periodical industry, and that removing the exemption would invite American retaliation. The Committee, however, regarded these arguments as indications that action was necessary:

The exemptions must remain, we are told, because to remove them would mean that two foreign magazines, backed by foreign advertising agencies that are in turn backed by foreign corporations that already control much of our economy would combine to defeat the legislation...[if this is true then]... the future of an important – perhaps essential -- Canadian industry is already irretrievably mortgaged to Time, Reader's Digest, General Motors, Kraft Foods and the State Department, it means that Canadians are much less independent than they like to believe (162-163).

If the elimination of the exemption for *Time* and *Reader's Digest* failed to improve the situation for Canadian periodicals, the committee recommended that the two magazines be allowed to publish in Canada only under the condition that they sell 75 percent of their stock in their Canadian subsidiaries to Canadian residents. By doing so the government would be creating two Canadian magazines. If the publishers chose to abandon their Canadian operations in the face of such a requirement, the Committee believed that Canadian publishers would quickly fill the resulting vacuum (166-167).

The report of the Davey Committee met with a receptive audience in Canada. In the early and mid 1970s, the Canadian government, under Prime Minister Pierre Trudeau was moving on a number of fronts, including the broadcasting and book publishing sectors, to reduce the American cultural influence in Canada. The *New York Times* referred to this trend as “a new nationalism that has overtaken English-speaking Canada...encouraging Canadians to develop and emphasize their difference from

Americans.”⁵⁰ Not surprisingly, the state of the Canadian periodical industry was among the cultural concerns of the Trudeau government. Picking up from the Davey Committee’s report, the government’s attention in this sector was squarely focused on the Canadian editions of *Reader’s Digest* and *Time*.

Bill C-58

By 1974, it was clear that the Canadian government was seriously considering the removal of *Time* and *Reader’s Digest*’s exemption under Section 19 of the *Income Tax Act* as amended in 1965. Both magazines would be subject to all of the provisions of the 1965 legislation. In order for Canadian advertising in their publications to be deducted as a business expense, the two magazines would have to become 75 percent Canadian owned, and consist of editorial content not ‘substantially’ the same as that contained in their parent (U.S.) editions.

Aware that the Canadian government was considering the elimination of their exemptions, both *Time* and *Reader’s Digest* mounted an extensive public relations campaign in Canada. Stephen LaRue, president of *Time*’s Canadian subsidiary asserted in a full page statement in his magazine that, “We believe we have a contract with our readers to be a window on the world as well as a mirror to Canada. We would deeply regret being unable to continue that contract.”⁵¹ For its part, *Reader’s Digest* attempted to find sympathy by declaring that it was different from *Time* in many important respects. It stressed that it was already partly Canadian owned, and that even though most of its editorial content was imported from its parent edition, it was all re-edited in Montreal.⁵²

The initial campaign by the two American magazines proved fruitless as the government introduced the long-awaited and long-expected legislation to remove the tax concessions for advertising in foreign periodicals in the House of Commons on April 18, 1975 (a similar measure was introduced for the television-broadcasting sector). After the

50. William Borders, “Canada is Seeking to Reduce US Cultural Influence,” *The New York Times*, 11 January 1975.

51. Ibid.

52. Ibid.

introduction of Bill C-58, the Canadian Secretary of State, Hugh Faulkner, declared, “This is not an anti-*Time* or anti-*Reader’s Digest* bill. This is a measure designed to encourage the Canadian publishing industry.”⁵³ Although it was not immediately defined, the Canadian government later clarified the requirement that a magazine be ‘substantially’ different in its editorial content from a foreign publication by setting it at 80 percent. So, under the pending legislation, *Time* and *Reader’s Digest* had to be both 75 percent Canadian owned as well as consist of 20 percent or less recycled editorial content before advertising in their magazines could qualify for a tax deduction. At this time, 75 percent of the editorial content in *Reader’s Digest*, and over 90 percent in *Time*, were recycled from their parent editions.⁵⁴ Clearly, even if one believed Faulkner in his assertion that the legislation was not particularly anti-*Time* and anti-*Reader’s Digest*, the removal of the exemption was designed to seriously limit the competitive advantage of these two magazines.

It was expected that Bill C-58 would double the cost of advertising in foreign editions. Both magazines stated that the loss of advertising revenues resulting from the measure would force them to abandon their Canadian operations. To prevent this from happening, they continued their fight against the legislation while it was before parliament and also attempted to reach alternative arrangements with the Canadian government.

Paul Zimmerman, president of Reader’s Digest Association Canada, argued in negotiations with the government that the requirements of the legislation were the result of what he called “a flowing tide of extreme nationalism” and were impossible for his publication to meet.⁵⁵ The publication could adequately respond to the 75 percent Canadian ownership provision, he declared, but there was no way for it to comply with

53. Robert Trumbull, “Bill on Foreign Publications Introduced in Canada,” *The New York Times*, 19 April 1975.

54. William Borders, “Canada Involved in Press Dispute,” *The New York Times*, 21 March 1975.

55. Robert Trumbull, “US Magazine Aide in Canada Criticizes a Nationalist ‘Tide’,” *The New York Times*, 26 Nov 1975.

the content controls since the magazine was a digest of previously published works.⁵⁶ The Canadian government included Cabinet members sympathetic to *Reader's Digest Canada* since the magazine had at least some degree of Canadian ownership and it was printed and edited in Montreal. The government eventually agreed with the publication's position and an agreement between the two sides was reached on February 3, 1976 while the bill was still before parliament.⁵⁷ Stories in *Reader's Digest*, regardless of their origin, which were edited and condensed in Canada were allowed to count as Canadian content. This agreement, in respect to the content requirements of Bill C-58, allowed the Canadian edition of *Reader's Digest* to maintain its status as a Canadian magazine, and thereby continued the allowance of income tax deductions for advertising in its publications.

Reader's Digest only had to conform to the 75 percent Canadian ownership requirement for its exemption to remain. It was able to do this through a complex restructuring process. The publication of the Canadian edition of *Reader's Digest* was given to a newly created company, Reader's Digest Magazines Ltd. (RDML). The ownership structure of this company was such that 25 percent of it was owned by Reader's Digest Association Canada (67 percent of which was owned by *Reader's Digest* in the U.S.), and 75 percent by a newly formed charitable foundation consisting of 6 Canadian directors.⁵⁸

With the new arrangement in place, when the legislation passed in March 1976, *Reader's Digest* was technically a Canadian magazine and no longer considered a split-run or regional edition in the usual sense. Although the exemption for *Reader's Digest* was extended, Bill C-58 did level the playing field to some degree in terms of that magazine's competitive position vis-à-vis other Canadian periodicals. For example, in

56. Peter Kihss, "Canadian Bill Bids US Magazines Alter Content," *The New York Times*, 30 September 1975.

57. Borders, "Canada is Seeking to Reduce US Cultural Influence."

58. See, Isaiah A. Litvak and Christopher J. Maule, "Bill C-58 and the Regulation of Periodicals in Canada," *International Journal* 36, no. 1 (Winter 1980-1): 80.

fiscal year 1977, the editorial staff of the magazine increased by 75 percent and editorial expenses by \$1.2 million.⁵⁹

Time also sought an agreement with the Canadian government. Like *Reader's Digest*, it allowed for the possibility of meeting the ownership requirements of bill C-58 but argued that it could not comply with the content provision. Unlike *Reader's Digest*, *Time* was unable to secure an agreement that would allow it to maintain its Canadian status. It appeared to many observers that the Canadian government was simply trying to run *Time* out of Canada, especially given the fact that *Reader's Digest* was afforded a more favourable result. According to Ralph P. Davidson, the publisher of *Time* in this period, "It became more and more apparent that the Government did not want us to comply; they simply wanted us to go home. It became apparent that whatever move we would make, they were going to counter-move. We felt that we were dealt with in a very unfair fashion."⁶⁰

Remarkably, the harsh treatment of the two American magazines did not elicit a substantive response from the U.S. government. At that time it had a plethora of abrasive Canadian policies to deal with, from restrictions in broadcasting to oil. The U.S., however, did not see the periodical issue as an area in which it could act, or perhaps, wanted to act. In February of 1976, a spokesman from the U.S. State Department stated that Canada's new policy did not violate any agreement or international standards and thus there was no basis on which to protest the measure.⁶¹ The exemption that was granted by the Canadian government in 1965 was simply a benefit that both magazines received; it was not a right. Moreover, both magazines, with their exemption in 1965, were technically Canadian magazines under the legislation prior to the 1976 amendment. They were reluctant to have the U.S. government intervene on their behalf, as this would have damaged their credibility as Canadian periodicals. Thus they were largely on their own.

59. Ibid., 82.

60. Deirdre Carmody, "Canadian Edition of Time Plans Cutbacks Because of Ottawa Bill," *The New York Times*, 27 February 1976.

61. Ibid.

Bill C-58, while costly to the two Canadian editions of American magazines, particularly for *Time*, achieved positive results for Canadian periodicals. *Maclean's* magazine changed from a monthly general interest publication to a bi-weekly newsmagazine in October of 1975 and in 1978, it began publishing on a weekly basis. According to the 1982 Report of the Federal Cultural Policy Review Committee, “*Maclean's* has acknowledged that... [without Bill C-58]...it would not have felt able to undertake its transformation from a monthly consumer magazine to a weekly newsmagazine.”⁶² The key to this transformation was an increase in advertising revenue for the Canadian periodical industry in general, and for *Maclean's* in particular, that resulted from Bill C-58.

From 1976 to 1982, contrary to the arguments of the two Canadian editions – *Time* and *Reader's Digest* – advertising revenues in the periodical industry were not diverted to other communications media but instead increased by 245 percent.⁶³ In the first year of the legislation, a massive change in the amount of advertising revenues received by *Maclean's*, *Time*, and *Reader's Digest* took place. The gross advertising revenue for *Time* and *Reader's Digest* decreased by 64 percent and 3 percent respectively. In contrast, *Maclean's* increased by approximately 35 percent.⁶⁴ The share of advertising revenues between these three magazines also changed markedly after the implementation of Bill C-58. In 1975, *Maclean's* had 25 percent, *Time* 47 percent and *Reader's Digest* 28 percent. In 1979, the shares were 43 percent, 26 percent, and 31 percent respectively.⁶⁵

The legislation also resulted in an expansion of other Canadian magazines. It gave a psychological boost to many smaller magazines and according to one source, 45 percent of the magazines in Canadian circulation were launched between 1971 and 1986. Moreover, the circulation of Canadian magazines as a share of the total rose from 30

62. Canada. Federal Cultural Policy Review Committee, *Report of the Federal Cultural Policy Review Committee* (Ottawa: Department of Communications, Information Services, 1982), 225.

63. Steven Globerman, *Culture, Governments and Markets: Public Policy and the Culture Industries* (Vancouver: Fraser Institute, 1987), 35.

64. Litvak and Maule, “Bill C-58 and the Regulation of Periodicals in Canada,” 74.

percent to about 40 percent over the same period.⁶⁶ Bill C-58 had made an enormous impact in numerous ways.

Bill C-58 was just one step in a long process. When considered in combination with its predecessors, the evidence suggests that Canada's protectionist policies in its periodical industry, starting in 1965, and amended in 1976, had an overall positive effect on the health of Canadian magazines. In 1959, before the O'Lcary Commission and the Liberals' 1965 legislation, Canadian magazines accounted for 23 percent of all circulated magazines in Canada. This increased to 30 percent in 1971, to nearly 40 percent in 1981, and to nearly 68 percent by 1992.⁶⁷ Moreover, by the mid-1990s, the circulation of the top 10 Canadian periodicals in Canada was almost 5 times greater than that of their top 10 American rivals.⁶⁸

It should be noted here that Canada also utilized several promotional measures during this period to assist its domestic periodicals, the most important of which was a postal subsidy offered to Canadian publications. For over 100 years the government provided this postal subsidy to publishers in order to reduce their distribution costs and thereby reduce their price to the consumer. In large part, though the subsidy assisted Canadian magazines, its intent was to enable a geographically dispersed population in an enormous country to have access to reading material. In 1981, the Canadian government began using the newly incorporated Canada Post as the vehicle for this subsidy. It provided funding to the Crown Corporation under the Publications Distribution Assistance Program. The program provided reduced postal rates to eligible Canadian magazines to offset some of their distribution costs.⁶⁹

It should also be noted that the two measures – the tariff and the *Income Tax Act* provisions – did not have a completely exclusionary effect. Some American magazines

65. Ibid., 75.

66. Sutherland, 263.

67. Task Force on the Canadian Magazine Industry, 34.

68. Lon Dubinsky, "Periodical Publishing," in *The Cultural Industries in Canada*, ed. Michael Dorland (Toronto: James Lorimer & Company, Publishers, 1996), 44.

continued to be produced in Canada. They offered very attractive advertising rates to Canadian advertisers that partially offset the fact that these advertisers received no tax deductions.⁷⁰ Tariff Code 9958 in particular appears to have been somewhat limited. It was designed to respond to foreign magazines with Canadian advertising that were produced outside of Canada. Yet, magazines that had their editorial content imported into Canada in an unfinished state for printing, typically contained on microfilm, were not prevented from entering Canada. Technically, since *Time* and *Reader's Digest* were only exempt from the income tax provisions after 1965, the tariff should have prevented the entry of their editorial content into Canada. After its exemption was removed in 1976, *Time Canada* eliminated its Canadian section, continued to import its editorial content on microfilm to be printed in Canada, and still solicited Canadian advertising. It is not clear why Canada did not enforce the import prohibition with respect to unfinished editorial content, especially after 1976. Keith Acheson and Christopher Maule have speculated that the import prohibition was not designed to respond to unfinished magazines or that Ottawa did not want to draw unwanted American attention. It is possible that Canada had already recognized that the tariff violated the disciplines of the GATT (as was formally revealed in 1997). Finally, in 1976, with Bill C-58 having transferred a significant share of advertising revenues to *Maclean's* and other Canadian magazines, and having forced *Reader's Digest* to invest in Canada and Canadian content, perhaps the Canadian government decided to quit while it was ahead. Whatever the case may be, the tariff did prevent the importation of finished foreign magazines with significant Canadian advertising, while Section 19 of the *ITA* limited the effects of those magazines that the tariff could not or did not stop. Working in tandem, these protectionist measures gave a

69. Glenn A. Gottselig, "Canada and Culture: Can Current Cultural Policies be Sustained in the Global Trade Regime?" *International Journal of Communications Law and Policy* 5 (Summer 2000): 41.

70. Patricia M. Goff, "Invisible Borders: Economic Liberalization and National Identity," *International Studies Quarterly* 44 (2000): 549.

significant boost to Canadian periodicals. Canadian magazines had come a long way since 1965.⁷¹

71. For discussion of why Tariff Code 9958 was not strictly enforced, see, Keith Acheson and Christopher Maule, *Much Ado About Culture: North American Trade Disputes* (Michigan: University of Michigan Press, 1999), 200.

CHAPTER 3 – THE DEVOLUTION OF CANADIAN PERIODICAL POLICY

The cultural exemption obtained in the CUFTA and continued in the NAFTA served as a means to extend Canada's cultural policies. With respect to magazine measures, the CUFTA did provide for the abolition of the requirement under the *Income Tax Act* that magazines must be printed or typeset in Canada before they could qualify as Canadian and hence the tax deductibility status. Yet, the other provisions of Bill C-58, as well as the tariff that was adopted in 1965, were allowed to remain in effect. This grandfathering of Canada's periodical policies – as well as other cultural measures – seemed to be a significant achievement for the Canadian government. Important events, however, would change the entire landscape of Canadian magazine policy.

Although Canada obtained a cultural exemption in its regional agreements with the United States, it did not make any progress in the multilateral (GATT/WTO) arena in terms of cultural protection. Moreover, the cultural exemption still allowed the U.S. to retaliate against Canada if it adopted new protectionist measures in the cultural industries, including the periodical sector. When, in the early 1990s, technological advancements forced Canada to close a gap in its existing periodical policies by adopting a new policy, it found that its range of actions was severely limited by both the NAFTA and the WTO. Indeed, it found its entire periodical policy regime in serious jeopardy.

In 1990, Time Warner Inc. proposed the publication of a split-run edition of its *Sports Illustrated (SI)* magazine for the Canadian market. As *Time Canada*, another Time Warner publication, had a lengthy history of publication in Canada, Investment Canada determined the proposal to be an expansion of an existing business and thus non-reviewable under its *Related Business Guidelines*. Apparently free to proceed, Time Warner began publication of the split-run in 1993. The magazine, in typical split-run form, consisted of recycled domestic (U.S.) editorial content with advertisements directed at the Canadian market. Such publications had been prevented from entering Canada for nearly three decades.

Digitization of information and satellite transmission combined to give the split-run edition of *SI* new access to the Canadian advertising market. The publisher produced the content of *SI* in New York City and sent the magazine via satellite to a printer in Canada. The methods employed by *SI* revealed that the 1965 import prohibition was no longer effective in preventing the entry of foreign split-run magazines. There was no physical object being ‘imported’ into Canada and thus Canada Customs was powerless to enforce Canada’s long-standing policy measure.

This development also indirectly undermined the effectiveness of Section 19 of the *ITA*. The recycled editorial content utilized by *SI* ensured that the cost of its production was limited. This cost was already recouped in domestic advertising sales and thus the magazine’s Canadian advertising sales were almost entirely pure profit for its publisher. The ability to produce the split-run magazine’s content in a central location and simply transport it electronically further reduced the costs involved in printing and distributing the magazine in several locations simultaneously. As a result of these factors, the split-run periodical was able to charge relatively low advertising rates. For example, the advertising rate for a full-page colour advertisement in *SI Canada* in 1993 was \$6250 while the rate for the same advertisement in *Maclean’s* was \$25,400. The fact that *Maclean’s* had a higher circulation in Canada than *SI* explains part of the rate difference. However, *SI*’s objective of attracting Canadian advertising by limiting its advertising rates is highlighted by the fact that its rate of \$6250 in Canada was half of what it charged for the same advertisement in a regional U.S. edition with similar circulation.¹ The relatively low rates in the split-run magazine offset the effects of Section 19 of the *ITA* on Canadian advertisers. The tax deduction available for advertising in Canadian magazines lost its value in the wake of such bargain split-run ad rates. Describing the situation in 1993, Catherine Keachie, executive director of the Canadian Magazine Publishers Association, lamented, “We don’t mind competition, but

1. Canada. Task Force on the Canadian Magazine Industry, *A Question of Balance: Report of the Task Force on the Canadian Magazine Industry*, (Ottawa: Minister of Supply and Services, 1994), 44-45.

it's not possible to compete for advertising dollars against publishers who have no serious costs here except for printing bills.”²

The Task Force on the Canadian Magazine Industry

Having been thrust into a new era of digitization and satellite transmission, and having realized that the crucial elements of its long-standing periodical policy regime had become obsolete, the Canadian government was forced to act once again on behalf of Canadian magazines. Its initial response was to establish the Task Force on the Canadian Magazine Industry on March 23, 1993. The mandate of the newly formed Task Force was to,

recommend ways in which the two legislative measures whose purpose is to ensure an adequate flow of advertising dollars to Canadian magazines could be brought up-to-date. The Task Force was also charged with recommending possible new measures in furtherance of the government's policy objectives.³

The Task Force went to work immediately, and on May 31, 1993 it issued an interim report designed to spur government action on what was the initial breach in Canada's wall of protection for Canadian periodicals – Investment Canada's *Related Business Guidelines*.

In a letter to Perrin Beatty, the Minister of Communications, the Co-Chairmen of the Task Force, J. Patrick O'Callaghan and Roger Tasse, presented two recommendations. Although the interim report was based on a “preliminary assessment,” the letter stated that there was “sufficient information available to indicate that a serious potential problem exists, requiring immediate government action” (87). It noted that the first split-run issue of *SI* took \$250,000 worth of Canadian advertising, a rate that would siphon off a total of \$1.5 million in Canadian advertising for six of its issues. To put this into perspective, the report highlighted the fact that the total 1991 profit of the Canadian magazine industry was \$18 million. According to the report, other U.S. publishers could

2. Manly Lorne, “U.S. Titles in Border Fight Over Canadian Editions,” *Folio: the Magazine for Magazine Management*, (1 August 1993), 19.

follow the example set by *SI* before the Task Force completed its final recommendations and “some Canadian magazines would inevitably fail as a direct result” (86).

To prevent U.S. publishers from targeting the Canadian advertising market before the government could act on the Task Force’s final report, the letter suggested two immediate measures. First, the “Government [should] make a clear public statement reaffirming its long-standing policy objectives for the Canadian magazine industry, with particular reference to split run or ‘Canadian’ regional editions sold in Canada with advertising aimed primarily at a Canadian audience” (87). The objective was to illustrate that the government intended to act and thereby deter U.S. publishers from launching a split-run venture in Canada. The announcement would also serve as a foundation for reviewing investments under the *Investment Canada Act (ICA)*, which in the view of the interim report, also had to be changed because it failed to prevent Time Warner’s split-run expansion. Such an amendment was deemed critical as Time Warner published 23 different titles that could follow the lead of *SI*. The second recommendation was that the *Related Business Guidelines* of the *ICA* be changed to state, “that an investment by a non-Canadian related to the publication, distribution or sale of a magazine or periodical not already being published in Canada would be considered to be an investment to establish a new business and not the expansion of an existing business” (88). This would allow Investment Canada to review such investments with the government’s public statement serving as guidance.⁴

In July 1993 the Canadian government responded to both recommendations of the interim report by issuing a public statement and making changes to the *Related Business Guidelines* of the *ICA*. To eliminate any doubt surrounding the government’s intention to fully protect the Canadian magazine industry Ottawa added that, “should foreign publishers decide during the work of the Task Force to undertake any new publishing activity in Canada which would contravene or sidestep the Government’s policy objectives for the magazine industry, they would do so at their own risk” (92).

3. Task Force on the Canadian Magazine Industry, 4-5.

4. For more detail on the Interim Report’s recommendations see, *Ibid.*, 87-89.

The stopgap measures by the Canadian government appeared to have worked as the final report of the Task Force, issued in March of 1994, found no additional U.S. split-runs in Canada. Its report echoed the issues, facts, and concerns of the committees and commissions that had investigated the magazine industry in the past. It described the Canadian periodical industry as being in a precarious situation. Though past measures had alleviated some of the difficulties for Canadian publishers and contributed to the diversity found in the Canadian magazine industry, the sheer enormity of U.S. competition meant that many Canadian magazines continued to walk a fine line between success and failure. In 1991, over half of Canada's magazines had no operating profit. At the time of the report, 21 of the 50 magazines with the highest circulation were American and the circulation share of foreign consumer magazines (99 percent of which was American) amounted to 50.4 percent, with the share on newsstands increasing to 81.4 percent.⁵

The Task Force considered the *SI* challenge to be a serious threat, not only in its own right, but also because of the precedent that it would set for other U.S. publishers. According to the Task Force, "The signal has gone out that it is now possible for non-Canadian magazines to enter the Canadian advertising market, notwithstanding the measures in place since 1965 to discourage this phenomenon" (49). Its investigation found that 53 English-language consumer magazines could enter the Canadian market and take about 37 percent of the total advertising revenue gained by the Canadian consumer magazine industry (50). For English-language trade periodicals, the numbers rose to 70 and 39 percent respectively (52). The report concluded that "the Canadian magazine industry would be seriously hurt by the entry of split-runs, and its important contribution to Canadian communication and cultural development would be diminished" (55).

The report highlighted the need for the Canadian government to balance its objectives in international trade and cultural policy. It rejected free trade in the magazine sector, noting that the U.S. is a daily fact within Canada while in the U.S. Canada draws

5. Ibid., 27, 40.

no interest. The government should not abandon its past efforts to protect the Canadian magazine industry. Indeed, according to the report, "The success or failure of public policy will determine whether people of this country have the freedom to read not only foreign magazines but also magazines developed to address their own unique needs and perspectives" (61). Without this freedom and "the means to express a distinctive voice speaking to a Canadian audience, cultural expression, social cohesion and a sense of national destiny would be impaired, if not irrevocably damaged" (63). With this logic guiding its work, the Task Force set out 11 recommendations for government action.

The Task force recommended that the government take measures to facilitate the auditing of Section 19 of the *ITA*, that the 1965 import prohibition be maintained in its present form, and that the government continue its practice of providing postal subsidies to Canadian publishers through Canada Post. The most important recommendation called for the imposition of an excise tax on split-run magazines worth 80 percent of the total charged for advertising in each magazine. The tax would be applied on a per issue basis and would be paid by the printer or distributor of the split-run periodical. To avoid the tax, a split-run would have to be at least 80 percent original from its parent issue, and in such a way that was not "cosmetic or trifling."⁶

The Task Force considered the excise tax to be entirely consistent with Canada's international trade obligations. By emphasizing original content, the measure would not discriminate between domestic and foreign non-original content and thus would not contravene the national treatment provisions in the GATT and the NAFTA. The tax would not discriminate against investment as all printers and distributors of split-run magazines, regardless of national origin, would be within the purview of the tax. Finally, the measure would not impose a domestic content quota, but rather only promote the publication of original content (66).

The purpose of the excise tax was to strike a balance between Canada's trade obligations and its cultural objectives, a balance the Task Force believed to be of critical importance. Though the measure would not directly promote the development of

6. Ibid., 64-65.

Canadian editorial content, the Task Force was “of the view that, on balance, it is better to aim wide and comply with trade obligations by promoting original content than to target a narrow field and end up in protracted disputes with Canada’s principal trading partners” (66). To further advance this objective, the Task Force recommended that split-run magazines already published in Canada should receive an exemption from the excise tax equal to the number of issues published prior to the issuance of the report (79). This would effectively exempt *Time Canada* and *Reader’s Digest Canada*. For the Canadian edition of *SI*, however, the exemption would cover only seven issues per annum.

Ottawa’s Response

In December of 1994, the Canadian government announced that it intended to impose an excise tax on split-run editions in Canada. On December 15, 1995 parliament passed Bill C-103. The legislation mirrored the recommendations of the Task Force in nearly every respect. It was to be applied to split-runs consisting of less than 80 percent original content and was to be levied on a per issue basis worth 80 percent of the total advertising charged in that issue. The printer or distributor of the violating split-run magazine would pay the tax.⁷

Section 39 of the legislation contained an exemption for split-run magazines distributed in Canada prior to March 26, 1993 as long as they did not exceed the number of issues published in the 12 months prior to that date. By setting the date as such, the government specifically denied the exemption to *SI Canada*. Contrary to the recommendation of the Task Force, every issue of that split-run magazine would be subject to the tax. Michel Dupuy, the Minister of Canadian Heritage, declared that the tax was not a protectionist act of the Canadian government, but a necessary measure to ensure the survival of the Canadian magazine industry. According to Dupuy, continued loss of advertising to foreign split-run magazines would have been a death knell for many

7. World Trade Organization, *Report of the Panel on Canada – Certain Measures Concerning Periodicals* [online], 14 March 1997, p. 4. [cited 15 March 2001]. Available from <http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm>

Canadian periodicals.⁸ For *Sports Illustrated Canada* the new legislation was its own death knell. It ceased publication in December of 1995.

Not surprisingly, Time Warner objected to the imposition of the new restriction. It deemed the tax to be strictly protectionist, designed only to force a foreign firm out of business. If the tax was effective it would not raise revenue for the Canadian government as foreign split-run magazines would be deterred from conducting operations in Canada.⁹ As most U.S. business interests do when they find themselves negatively affected by Canadian policy, Time Warner sought the assistance of the U.S. government.

The Clinton administration lost little time opposing the measure. Just before the Chretien government announced that it would propose the excise tax in the House of Commons, U.S. Ambassador to Canada, James Blanchard told the *New York Times*, “We have made our feelings very clear to them [Canadian officials] at high levels. There may have to be retaliation...We are looking at all our options.” On the issue of the right of Canadian officials to protect domestic cultural industries, Blanchard stated, “We have no problem if they want to subsidize these industries. Where we object is when they act to penalize our industries, making us pay the cost.”¹⁰

The U.S. became involved in the magazine issue in large part due to an increasing concern in the Clinton administration, as well as in Congress, over a multitude of Canadian protectionist advances in its cultural industries. The CRTC decided to delete the American-owned Country Music Television by January 1, 1995 and replace it with a directly competitive Canadian channel, New Country Music. Canada also announced its intention to levy blank audio tapes in order to compensate Canadian performers and producers. According to the U.S. State Department:

The U.S. Government sees these developments as concrete evidence of an increasing and disturbing trend in Canada toward the implementation of

8. Lon Dubinsky, “Periodical Publishing,” in *The Cultural Industries in Canada*, ed. Michael Dorland (Toronto: James Lorimer & Company, Publishers, 1996), 36.

9. Keith Acheson and Christopher Maule, *Much Ado About Culture: North American Trade Disputes* (Michigan: University of Michigan Press, 1999), 193.

10. Quoted in, Clyde H. Farnsworth, “Canada Plans Tax on a US Magazine,” *The New York Times*, 22 December 1994.

policies that are intended to protect Canadian industry by discriminating against legitimate U.S. broadcasting, publishing, and copyright interests in Canada. In an era of rapidly changing communications technologies and the development of the information superhighway, it is difficult to understand the Government of Canada's implementing such policies, which are directly contrary to the global trend toward liberalization and cooperation in these sectors.¹¹

As the already huge U.S. trade deficit was steadily increasing, the Clinton administration was under significant pressure from Republicans in Congress to take a hard line with U.S. trading partners, particularly in the information/entertainment sector. With the decline of traditional manufacturing industries in the U.S., the entertainment industries were of considerable importance as a valuable American export. Thus Canada's protectionist policies were high on the Clinton administration's radar screen not only for their immediate negative impact on U.S. business interests, but also due to their potential precedent setting effects.

During the Uruguay Round of GATT negotiations, French President Francois Mitterand, in arguing for an exemption for the audio-visual sector, claimed, "We have the right to ask the American government to have the same regard for Europeans as they do for our friends the Canadians."¹² Clearly the case of the excise tax was a serious issue for Washington. As United States Trade Representative (USTR) Mickey Kantor pointed out in March 1996, "Other countries will be watching the situation with Canada to see how we react."¹³ Kantor was determined to make an example of what he considered as Canada's practice of using culture as an excuse for protection:

[American] action is justified not only on the merits of the case itself, but it is also important in setting a clear precedent that the United States is prepared to act on so-called cultural issues where there is discrimination

11. U.S. Department of State, "US Response to recent Canadian Trade-Related Decisions," *US Department of State Dispatch* 6, no. 2 (9 January 1995): 21.

12. Joyce Zemans, "'And the Lion Shall Lie Down With the Lamb': U.S.-Canadian Cultural Relations in a Free Trade Environment," *The American review of Canadian Studies* 24, no. 4 (Winter 1994): 524.

13. Richard W. Stevenson, "US to Fight Magazine Ad Tax by Ottawa," *The New York Times*, 11 March 1996.

against U.S. interests. The Clinton Administration is committed to combating the growing attack on our country's publishing and entertainment industries, whether from Canada, Europe or Asia.¹⁴

On March 11, 1996 the USTR initiated an investigation of Canadian policies in the magazine industry under section 301 of the U.S. *Trade Act, 1974*. Under this section, the USTR has the authority to launch investigations of unfair foreign trade practices, to pressure countries to alter their policies, and to recommend retaliation if compliance is not forthcoming.¹⁵ In addition, the U.S. requested consultations with the Canadian government as required by GATT dispute resolution procedures. The purpose of the consultations was to address “measures prohibiting or restricting the importation into Canada of certain magazines, tax treatment of so-called ‘split-run’ magazines, and the application of favorable postage rates to certain Canadian magazines.”¹⁶ Thus, in addition to the excise tax, Canada’s long-standing customs tariff and postal subsidies were targeted by the USTR. All three measures were deemed to be unfair protectionist policies. In announcing that consultations with Ottawa had begun, Kantor stated, “While Canada has characterized many of its concerns about its magazine sector in cultural terms, the actions it has taken with regard to foreign periodicals are, in fact, aimed at protecting Canadian commercial interests.”¹⁷

With both sides adhering to their respective positions, discussions between the two countries, held on April 10, 1996, failed to lead to a settlement. On June 19, the U.S. requested the establishment of a WTO Dispute Settlement Panel to consider the legality of Canada’s three periodical policies. Canada had to face the erosive effects of

14. Both quotes from, United States Trade Representative, *USTR Kantor Announces Challenge of Discriminatory Canadian Magazine Practices; Cites Clinton Administration Determination to Defend U.S. Industries*, 11 March 1996 [cited 10 March 2001]. Available from <<http://www.ustr.gov/releases/1996/03/96-23.html>>

15. Acheson and Maule, 75-76.

16. United States Trade Representative, *WTO Appellate Body Expands U.S. Victory in Challenge to Canada's Restrictions on U.S. Magazine Exports*, 30 June 1997 p. 2. [cited 10 March 2001]. Available from <<http://www.ustr.gov/regions/whemisphere/canada/releases.shtml>>

17. United States Trade Representative, *USTR Kantor Announces Challenge of Discriminatory Canadian Magazine Practices; Cites Clinton Administration Determination to Defend U.S. Industries*.

international trade regulation with the hope that its past practices would not be found to contravene its international obligations.

The WTO: Canada – Certain Measures Concerning Periodicals

Any member of the WTO can bring a trade dispute before the organization. Under its dispute resolution procedures, a three-member panel is established by agreement of the disputing parties to consider the details of the dispute. The decision of the panel is given effect unless both parties disapprove of its findings. The panel only considers whether a member's obligations have been violated. It does not prescribe a solution. Where a member country fails to comply with the WTO panel's decision, the panel can be reconvened to set the amount of retaliation the aggrieved country may apply against the violating member.¹⁸

In the dispute between Canada and the United States over Canada's periodical policies, the U.S. asked the WTO to find three measures in contravention of member obligations contained in the GATT: Tariff Code 9958, the excise tax, and the postal subsidies offered to Canadian magazine publishers through Canada Post. In October and November of 1996, the Dispute Settlement body (DSB) of the WTO met with both parties to consider their arguments.

Tariff Code 9958

The first measure considered by the DSB was the 1965 import prohibition of foreign split-run magazines - Tariff Code 9958. In respect to GATT disciplines, there were two dimensions to this measure. First, the U.S. claimed that Tariff Code 9958 violated Article XI:1 of GATT 1994 which banned quantitative restrictions on imports, "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

18. See, Andrea Knox, "The World Trade Organization at a Crossroads," *World Trade* 12, no. 10 (1999): 38.

territory of any other [Member]....”¹⁹ It was clear that the tariff violated this provision. However, Canada claimed that the tariff was legitimated under Article XX(d) of the GATT, which reads as follows:

...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... (68).

Canada argued that the tariff secured the objectives of Section 19 of the *Income Tax Act*. Tariff Code 9958 and Section 19 formed an integral part of a package with a single objective -- to assist Canadian periodicals in their effort to gain advertising revenues. They represented an effort to, “establish and maintain a place for Canadian periodicals in their own domestic market while at the same time ensuring that Canadians have unrestricted access to foreign periodicals” (9). The tax deductibility measure was designed to address periodicals printed inside Canada, while the tariff dealt with those printed abroad. The effectiveness of Section 19, if implemented without the tariff, would have been seriously limited (10).

The United States, referring to the WTO panel on *United States – Standards for Reformulated and Conventional Gasoline*, pointed out that a party justifying a restrictive measure under Article XX(d) must demonstrate that the restriction secures the compliance of another measure which is itself not inconsistent with GATT disciplines. Furthermore, the contravening quantitative restriction must be necessary to secure this compliance. According to the U.S., Canada had failed to demonstrate both. By Canada’s own admission, the tariff did not enforce the income tax provisions, but rather advanced the same objective. Since the tariff did not secure the compliance of Section 19, clearly it was not necessary either. If Canada’s argument were to be accepted, any member could implement a swath of GATT-inconsistent measures on the basis that they advanced the same objectives as other protectionist legislation.²⁰

19. World Trade Organization, *Report of the Panel on Canada – Certain Measures Concerning Periodicals*, 68.

20. *Ibid.*, 9-11.

Excise Tax

The DSB then examined Canada's newly-implemented excise tax and the U.S. claim that the tax violated Article III:2 of GATT 1994. Article III:2 prohibits the protection of domestic producers obtained by the imposition of restrictions, directly or indirectly, on imported products in excess of those applied to "like" or "directly competitive or substitutable" domestic products (72). Thus, in examining Canada's excise tax, the DSB had to determine whether imported split-run magazines and domestic non-split-run magazines were 'like products' under the meaning of Article III:2 first sentence, or 'directly competitive or substitutable' products under Article III:2 second sentence.

Canada argued that the DSB could not even consider the question of whether the excise tax was inconsistent with Article III. In Canada's view, since the legislation applied to advertising services it was subject only to the disciplines of the GATS and not those of the GATT. The panel had been constituted solely to consider matters under the latter. Moreover, Canada had no commitments in its advertising services sector under the GATS. According to Canada, interpretation of the two agreements must be done in a manner that avoided overlap and potential conflict between the application of the two treaties. No single measure should be subject to both treaties at the same time. Rather, the dominant or essential character of the measure should determine the relevant disciplines to apply. If this particular measure were deemed to be inconsistent with the disciplines under the GATT, Canada argued that the WTO would provide concessions to the U.S. that were not agreed to under the GATS. The U.S. would not gain greater access for its magazines in Canada; it would gain access to Canada's advertising market (16-23).

The United States considered Canada's assertion that GATS and GATT must be autonomous, a "test Canada had invented" (19). Even if the excise tax was a measure affecting trade in services, it was still an indirect tax on a good (split-run magazine) as included under Article III:2. Although Canada made no commitments in its advertising services under the GATS, this did not insulate all of Canada's measures connected to advertising from consideration under other WTO treaties. This would seriously

undermine the effectiveness of GATT as any member could easily find service-related measures that could discriminate against foreign goods (18-20).

With respect to the ‘like product’ issue, the U.S. argued that foreign split-run magazines and non-split-run domestic magazines were like products within the meaning of Article III:2 first sentence. Since the excise tax applied only to split-run periodicals, it violated that Article. As the U.S. pointed out, the excise tax defined a split-run magazine in terms of its relationship with another magazine published outside of Canada (similarity of editorial content). Thus, one could not determine if a magazine was a split-run or a domestic non-split-run magazine simply by observing its physical characteristics (28).

If the panel did not consider split-run magazines and domestic non-split-run magazines to be ‘like’ products, the U.S. argued that it should find them ‘directly competitive or substitutable’ products. The U.S. considered the very existence of the excise tax to be evidence that they were competitive products in the Canadian market. Canada admitted that split-run magazines competed for advertising revenue with domestic non-split-run magazines and it followed from this that they also competed for the same readers. By targeting only one group (split-runs) of this competitive equation with a prohibitive 80 percent tax, the measure effectively protected the Canadian magazine industry from split-run competition. According to the U.S., this inherently favoured Canadian producers as they were “much more likely than foreign producers to publish magazines directed solely at Canadian readers” (44).²¹

Canada considered foreign split-run magazines and domestic non-split-run magazines to be significantly different products. It argued that magazines and other cultural products were distinguishable from other articles of trade because content was their primary characteristic. Editorial content developed for a Canadian audience differed from foreign content in that it reflected a “Canadian perspective.” In general, Canada was of the view that the “content of a periodical created for one community will necessarily differ from what is created for another community” (28). Canada offered an example of this difference by providing copies of *Time Canada* and *Maclean’s* to the DSB. Almost

every article in *Maclean's* dealt with Canada, while *Time Canada's* issue was nearly devoid of Canadian content. As Canada pointed out to the panel, in *Time Canada*, "There are two out of 21 letters from Canadian sources....[and]...There is a travel advisory on Montreal, but it turns out to be about an exhibit dedicated to an American landscape architect" (28). Therefore, Canada argued that the panel should treat cultural products differently from other goods (25-33).

Canada argued that split-run periodicals and domestic non-split-run periodicals were not 'directly competitive or substitutable' with respect to editorial content, though they could be substitutable advertising vehicles. The U.S. had not sufficiently demonstrated that these types of magazines compete with each other. Granted, they competed for advertising revenue, but that was irrelevant to the disciplines of the GATT. In Canada's view, magazines created for different audiences were not substitutable products since they had different end uses. Indeed, if all periodicals were substitutable products, then there would not have been 1440 different periodical titles in Canada (39-40).

Canada added that the excise tax did not afford discriminatory protection and unfair advantage to Canadian periodical producers. First, Article III:2 dealt with imported products and in the case before the panel there was no such product since *Sports Illustrated* was printed in Canada. Second, the tax was not designed to protect domestic periodical production, but rather to prevent the use of recycled editorial content as low cost vehicles for advertising. This tactic would eliminate a "level playing field" and "would lead ultimately to a reduction of material dealing with the Canadian scene and in turn to a Canadian public that is less well-informed on Canadian affairs" (46). Thus, for Canada, "These are not only legitimate legislative concerns; they are far removed from the idea of protecting domestic production which is referred to in Article III. Ultimately, of course, the concern behind this legislation is with the preservation of Canadian culture in the face of an extraordinary challenge from across the border" (46).

21. For US argument concerning direct competitiveness and substitutability see, same source, 39-44.

Postal Rates

In examining Canada's Publications Distribution Assistance Program, the panel had to consider several issues. Canada Post charged three different rates to periodical publishers: funded rates; domestic commercial rates; and, international rates. The first category was offered to Canadian magazines that qualified for government assistance. Those that did not qualify for the funded rates were charged the domestic commercial rate, which was lower than that charged for international periodicals. The panel had to first determine if the rates charged to imported magazines were higher than those for domestic periodicals, in violation of Article III:4, which states:

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 (75).

If either the funded rates or the commercial rates failed to meet the requirements of Article III:4 in such a way that afforded protection to domestic production, then they could be found to be in violation of the GATT. However, the panel also had to determine whether the assistance provided to Canadian magazines through Canada Post was a justifiable subsidy under Article III:8(b), the provisions of which,

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 and subsidies effected through governmental purchases of domestic products (77).

The key issue in examining both the funded and commercial rates was whether Canada Post was a government entity directly under the control of the Canadian government.

The United States argued that Canada Post was a "creature of the Canadian Government, subject to its direct supervision and control" (52). It cited the existence of a minister responsible for Canada Post as indicative of governmental control over the Crown Corporation. It also argued that this control extended beyond the funded rates to

the commercial rates as well. From the American point of view, given that there existed multiple policies designed to protect Canadian magazines, it was entirely plausible that even the lower domestic commercial rates reflected Canadian government policy. Thus, according to the U.S., since Canada Post charged lower rates for domestic magazines (funded and commercial) than it did for imported magazines, and because this pricing system provided a competitive advantage to Canadian production, both pricing rates had to be found in violation of the GATT (49-56).

With respect to the caveat, Article III:8(b), the U.S. argued that because Canadian periodical producers received reduced postal rates rather than subsidy payments, Canada's postal pricing scheme did not provide a subsidy *exclusively* to periodical producers as required by the Article in question. The Publications Distribution Assistance Program, provided through Canada Post, was an indirect subsidy (58-61).

Canada made sure to emphasize the distinction between the funded and commercial rates. The funded rates were the result of government policy. The commercial rates were "the result of generally accepted commercial and marketing practices and [were] not influenced by government policy" (50). Canada argued that Canada Post had its own legal personality, distinct from that of the government. Therefore, the national treatment provisions of Article III should not apply to Canada Post's independent commercial practices (49-53).

Canada also argued that the funded rates should be considered allowable subsidies under the meaning of Article III:8(b). The benefits of the subsidies went directly to Canadian magazine publishers since Canada Post acted only as the intermediary and received nothing in the transaction. In Canada's view, it was "only the mechanics of payment that were indirect" and thus the argument of the U.S. was "based on a difference of form, not substance" (59). If the program's payments were given directly to magazine publishers, the effects of the subsidy would be the same. However, the program would then become extremely expensive and difficult to operate. Thus, Canada's position was that there was no reason for the panel to interpret the case in such a way as to replace a simple system with a complex system (59-65).

The WTO's Decision and the Response

The panel quickly identified Tariff Code 9958 to be in violation of Article XI:1 as it clearly prohibited the importation of certain foreign products (split-run magazines). Like the U.S., the panel cited the case of *United States – Standards for Reformulated and Conventional Gasoline* to determine whether the tariff could be justified on the basis of securing compliance with another GATT-consistent measure. The Member asserting this justification had to demonstrate that the violating measure not only secured compliance with another consistent measure but that the restriction was necessary. Since the U.S. was not challenging Section 19 of the *Income Tax Act*, the issue was how to interpret the requirement of securing compliance. The panel cited the WTO decision on *European Economic Community – Regulations on Imports of Parts and Components*, in which it was determined that the phrase meant “to enforce obligations under laws and obligations,” not “to ensure the attainment of the objectives of the laws and regulations” (69). Therefore, the panel concluded that the two measures were separate, despite the fact that they pursued the same objective, and thus Tariff Code 9958 violated the GATT. In reaching this conclusion, the panel stressed that, “we are neither examining nor passing judgment on the policy objectives of the Canadian measure regarding periodicals; we are nevertheless called upon to examine the *instruments* chosen by the Canadian Government for the attainment of such policy objectives” (69).

The panel was also not persuaded by Canada's argument that the GATT should not apply to the excise tax, or that Canada's non-commitment in the advertising services sector in the GATS should preclude Canada from obligations under the GATT in this case of overlap between the two agreements. The panel noted that the “ordinary” meanings of the GATT and the GATS indicate that obligations under both agreements can co-exist and one does not override the other; there is no hierarchical order between the two agreements. The panel rejected Canada's argument that interpretation of the two agreements should be done to avoid overlaps saying that overlaps between the disciplines of the GATT and GATS are inevitable. The panel also noted that advertising services

have had a history of being associated with the obligations under the GATT. Thus, given that there was no conflict between Canada's obligations under the GATT and GATS (no obligations in the services sector), the panel concluded that both agreements applied to the excise tax simultaneously (70-72).

Having ruled the excise tax subject to the GATT, the panel examined the issue of whether foreign split-run magazines and domestic non-split-run magazines are 'like products' under the meaning of Article III:2. It noted that a comparison of these two products would have to be based on a hypothetical example since the import prohibition had long prevented the existence in Canada of an imported split-run magazine. It gave an example of a magazine, *Harrowsmith Country Life*, that printed both an American and Canadian edition in the U.S. and then exported the Canadian edition to Canada. It argued that should the U.S. edition be discontinued, all Canadian editions of the magazine published prior to the discontinuation would have been subject to the tax, while all of the Canadian editions published and exported after that time would not. According to the panel, these two issues of the magazine would have common end uses and have the same physical attributes and thus would be 'like products', yet only one is subject to the tax. Therefore, the panel concluded that foreign split-run magazines and domestic non-split-run magazines could be considered to be 'like products' (73-74).

Making this determination, the panel then noted that the excise tax, though applied to advertising, was an indirect tax on a good (split-run magazine). Therefore, the panel ruled that the excise tax violated Article III:2 as it imposed an internal tax on a foreign product in excess of a domestic 'like product'. Having already ruled the excise tax in violation of GATT, the panel did not go on to consider the second question that was raised in this particular issue, whether foreign split-run magazines and domestic non-split-run magazines are 'directly competitive or substitutable' products (74-75).

The panel issued two separate conclusions with respect to Canada Post's commercial and funded postal rates. Before drawing these conclusions, however, the panel had to first examine whether the funded or commercial rates for Canadian

magazines were lower than those for imported periodicals (international rates), and whether the funded rates were an allowable subsidy under Article III:8(b).

The panel quickly determined Canada Post to be an extension of the Canadian government. It supported this assertion by noting that Canada Post's mandate as a commercial entity was set by the Canadian government, as well as the fact that the Canadian government could change Canada Post's pricing rates under Section 22 of the *Canada Post Corporation Act* if it felt its rates were inappropriate. According to the panel, Canada Post's commercial rates, which the government could have regulated, afforded protection to the production of domestic (Canadian) periodicals and thus violated Article III:4 of GATT (76-77).

In contrast, the panel determined the funded rate scheme to be an allowable subsidy under Article III:8(b). It noted that the United States had not sufficiently demonstrated that Canada Post received any benefits from the issuance of the subsidy. It also argued that if Canada Post was indeed a government entity, as the U.S. had asserted in its argument against the commercial rates scheme, then it would follow that the subsidy provided to Canadian periodical publishers through the Publications Distribution Assistance Program would be direct in nature. According to the panel, "the payment of funds from Canadian Heritage to Canada Post is merely an internal transfer of resources, and the payment of the subsidy is made directly to Canadian publishers" (78). Therefore, Canada Post's funded rates scheme was deemed by the panel to be justified under Article III:8(b) and therefore not subject to the national treatment obligations of Article III (78).

In drawing its conclusions, issued in an interim ruling on January 17, 1997 and a final report on March 14, 1997, the WTO panel effectively dismantled Canada's long-standing periodical policy regime. Only the promotional subsidy was found to be consistent with Canada's WTO obligations. Perhaps the most significant aspects of the panel's ruling (discussed in greater detail in Chapter Four) was the determination that magazines, and by extension all other cultural/intellectual products (save audio-visuals), are not to be considered differently from other articles of trade. Above all, cultural products were considered to be 'like products' regardless of the origin of their content.

The panel, however, was not blind to the significance of the case before it. Before stating its conclusions, it asserted:

in order to avoid any misunderstandings as to the scope and implications of the findings above, we would like to stress that the ability of any Member to take measures to protect its cultural identity was not at issue in the present case. The only task entrusted to this Panel was to examine whether the treatment accorded to imported periodicals under specific measures identified in the complainant's claim is compatible with the rules of GATT 1994 (78).

With the non-existence of a generally accepted distinction between cultural products and other articles of trade in the international organization, only the letter of the disciplines mattered. Regardless of any sympathy toward Canada's cultural objectives that may have been present within the panel, this proved fatal for Canada's periodical policies.

With the release of the WTO panel's interim ruling in January, it was clear that the United States had won a substantive victory. The WTO had not only dismantled Canadian policies that had limited the access of American magazines to the Canadian advertising market, the ruling also provided the U.S. with ammunition that could be used against Canada's other cultural sectors. Charlene Barshefsky, who succeeded Mickey Kantor as USTR, stated in her confirmation hearings before the U.S. Senate Finance Committee on January 29 that she would use the WTO ruling as a precedent to open up Canada's other cultural industries.²² In revealing this strategy she reiterated that the U.S. had, "no objection to the promotion of Canada, or other countries, of national identity through cultural development. But [it did]...object to the use of culture as an excuse to take commercial advantage of the United States, or as an excuse to evict American companies from the Canadian market."²³

Within Canada, there was great concern surrounding the loss in the WTO. Gordon Ritchie, a former deputy minister of industry and a chief negotiator of the Canada-U.S. Free Trade Agreement, warned that there would be "other assaults" on

22. Laura Eggertson, Val Ross and Hugh Windsor, "Copps Sets Stage for War Over Culture," *The Globe and Mail*, 11 February 1997.

Canada's cultural protections in the wake of the ruling, saying, "the indirect [implication] is that, having probed the weak spot in the wall and been able to get through, the Americans are going to step up the assault. There's no question that they're on a crusade here."²⁴ The Canadian government, however, was not willing to let this 'crusade' succeed.

After learning of its loss at the WTO, the Canadian government began searching for new alternatives to past policies in order to maintain its protection of the Canadian magazine industry. According to Sheila Copps, the Canadian Heritage Minister, "The Americans are playing hardball on the issue of the [World Trade Organization] and magazines. Well, we can play hardball too."²⁵ Shortly after the interim ruling, Copps flew to France in an effort to enlist its support for the principle of cultural protectionism. She also had discussions with Italian and Irish officials in an attempt to recruit "allies that fear the Americanization of culture around the world."²⁶

On the issue immediately at hand, the protection of Canadian magazines against unfair competition from foreign split-run magazines, the Canadian government's first move was to appeal certain aspects of the WTO panel's decision. It elected not to challenge the decision on Tariff Code 9958 and the postal ruling. It challenged only the findings related to the excise tax. Canadian officials apparently recognized that the import prohibition was a lost cause as it was clearly in violation of the GATT. Copps noted, "We made a qualitative decision to appeal the excise tax because we felt we had the best chance of winning that."²⁷ For its part, the U.S. appealed the only decision that it had lost in the initial ruling of the WTO, the finding that Canada's subsidy to Canadian publishers through Canada Post constituted a direct payment and thus was justified under

23. Graham Fraser, "Barshefsky Sees Magazine Ruling as Trade Weapon," *The Globe and Mail*, 30 January 1997.

24. Laura Eggertson, "Cultural 'Assault' by US Feared," *The Globe and Mail*, 18 January 1997.

25. Eggertson, Ross and Windsor, "Copps Sets Stage for War Over Culture."

26. John DeMont, "On Guard for Thee," *Maclean's*, 24 February 1997, 25.

27. Laura Eggertson, "Ottawa plans New Strategy in Campaign to Save Magazines," *The Globe and Mail*, 13 May 1997.

the GATT. In May 1997, both countries filed appellant submissions, once again arguing their case to the WTO.

WTO Appeal

Canada's appeal of the panel's decision on the excise tax consisted of several arguments. Canada contended that the panel had erred in its decision to apply the disciplines of the GATT to the excise tax on the same basis as before, specifically, that the measure pertained to services and was subject only to the GATS. According to Canada, if the WTO were to accept the panel's logic that all services measures should be subject to the GATT where there is an indirect effect on goods, then the GATT would be transformed into a services agreement. In short, Canada argued that, "the mere fact that a service makes use of a good as a vehicle or a medium is an insufficient ground on which to base a challenge under the GATT 1994."²⁸

Even if the excise tax should be subject to GATT disciplines, the Canadian Government argued that the panel incorrectly found American split-run magazines and Canadian non-split-run magazines to be 'like products' under the meaning of Article III:2. The 'like product' test required a comparison between an imported product and a domestic product. The panel, however, in using its hypothetical comparison for its example, compared two imported versions of the same magazine (a Canadian issue of *Harrowsmith* with the existence of a similar issue for sale in the U.S., and an issue of *Harrowsmith* without an accompanying foreign issue). It made this comparison despite the fact that Canada had provided actual examples of the difference between foreign split-run magazines and domestic non-split-run magazines (*Time Canada* and *Maclean's*) (5). Even if the Appellate Body determined foreign split-run magazines and domestic non-split-run magazines to be 'like products', Canada argued that it must find that the excise tax act was still not inconsistent with Article III since the tax did not discriminate against imported products. The tax made no distinction between domestic and foreign

28. World Trade Organization. *Report of the Appellate Body on Canada – Certain Measures Concerning Periodicals* [online], 30 June 1997, p. 3. [cited 15 March 2001]. Available from <http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm>

split-run magazines and thus it affected domestic magazines no less than imported magazines (6).

Finally, Canada argued that foreign split-run periodicals and domestic non-split-run periodicals were not ‘directly competitive or substitutable products’. Canada considered content to be the dominant characteristic of magazines. Periodical content is specific and since “readers are looking for something fairly specific, magazines are not interchangeable or substitutable” (6). Canada went even further asserting that the Appellate Body did not even have the necessary authority to consider this particular issue. Because the panel found foreign split-run magazines and domestic non-split-run magazines to be ‘like products’ under Article III:2, first sentence, and then failed to examine the issue of whether they were ‘directly competitive or substitutable’, Canada argued, the Appellate Body could not go on to address this issue should it decide to overturn the panel’s ‘like product’ decision (7).

The United States submitted to the Appellate Body that the panel mistakenly determined Canada’s funded postal rates to be justified under Article III:8(b) of the GATT. It argued that the transfer of money from the Canadian Government to Canada Post, which then provided reduced postal rates to Canadian publishers, did not constitute a payment made “exclusively” to domestic producers, as required by the provision. According to the U.S., the fact that the subsidy was “reflected” in the funded rates did not make the subsidy a direct payment, rather it took the form of “advantageous transport and delivery rates for domestic periodicals” (13).

The Appellate Body disagreed with each of Canada’s arguments in defence of its excise tax. First, it ruled that the panel was correct in applying the GATT to the excise tax. The tax, according to the Appellate Body, was applied to split-run editions of periodicals. It noted that even the title of the legislation stated “TAX ON SPLIT-RUN PERIODICALS,” not, as Canada may have wished, “tax on advertising” (16). Moreover, a periodical contains both editorial content and advertising content. Both ingredients combine to form a physical product – a periodical. The Appellate Body also noted that the excise tax was designed to shore up the strength of Tariff Code 9958 by achieving the

same objectives and thus, in the Appellate Body's view, it "should be analyzed in the same manner" – as a prohibition of a good (18). Consequently, it considered the excise tax to be subject to GATT as well as GATS disciplines, agreeing with the panel before it that obligations under both agreements could coexist (16-18).

With respect to the 'like products' issue, the Appellate Body noted that the panel had not made its comparison of foreign split-run magazines and domestic non-split-run magazines on the evidence provided by Canada. It also found that the panel's comparison was one between two editions of the same magazine, both imported products, and therefore concluded that there was a "lack of proper legal reasoning based on inadequate factual analysis..." (22). As a result, the Appellate Body decided that the panel incorrectly reached its determination that foreign split-run magazines and domestic non-split-run magazines are 'like products'. However, the Appellate Body did not preclude the existence of such a relationship. Rather, it simply stated that the panel's reasoning was logically insufficient to reach that conclusion. Moreover, because the panel's report did not have sufficient analysis, the Appellate Body decided that it could not make a determination of its own on the issue (21-22).

Having reversed the panel's findings on 'like products', the Appellate Body deemed it necessary to consider the second sentence of Article III:2, whether the products were 'directly competitive or substitutable', in order to determine if there was a violation of the GATT. Contrary to Canada's assertion that the Appellate Body lacked jurisdiction in this matter, and inconsistent with its approach to the 'like products' issue, the Appellate Body considered it reasonable and necessary to "complete the analysis" (23). It noted that the first and second sentence of Article III:2 are "closely related" and therefore, the determination of whether the excise tax was consistent with the second sentence was "part of a logical continuum" (23).²⁹

The Appellate Body cited the WTO ruling in *Japan – Alcoholic Beverages*, in which three issues were determined to be relevant in the consideration of whether a measure was inconsistent with Article III:2 second sentence. A measure was deemed

29. Ibid., 22-23.

inconsistent under Article III:2 if it applied to imported and domestic products that were in competition with each other, if these products were not similarly taxed, and if this difference in taxation afforded protection to domestic production (24).

The Appellate Body found that imported split-run magazines and domestic non-split-run magazines were in fact ‘directly competitive and substitutable products’. The competitive aspect of the relationship was evident by the need to take measures to limit or eliminate this competition. With respect to their ‘substitutability’, the Appellate Body noted that Canada’s argument was based upon ‘perfect substitutability’ which would fall under the ‘like products’ provision of Article III:2 first sentence. The broader prohibition of Article III:2 second sentence, however, was deemed to include cases where substitutability is imperfect. According to the Appellate Body, this included the case of imported split-run periodicals and domestic non-split-run periodicals. While concluding that these two types of magazines were ‘directly competitive or substitutable’, the Appellate Body noted that this relationship did not extend to all magazines in every reader’s market. Only magazines that had the same relevant market were considered to be ‘directly competitive or substitutable products’ under the meaning of Article III:2 second sentence. The nationality of the editorial content, however, was not considered by the Appellate Body to be a factor in determining the market of any particular magazine. Citing an example of magazines with the same relevant reader’s market, the Appellate Body declared that “newsmagazines, like *Time*, *Time Canada*, and *Maclean’s*, are directly competitive or substitutable in spite of the “Canadian” content of *Maclean’s*” (28).

Turning its attention to the issue of taxation, the Appellate Body found that the excise tax was applied only to split-run periodicals, and that it was of such a magnitude that it was “beyond excessive,” it was “prohibitive” (30). Given the enormity of the tax and past statements made by the Canadian government outlining the objectives of the tax, the Appellate Body concluded that the excise tax afforded protection to domestic production. With all three of the conditions outlined by the ruling in *Japan – Alcoholic*

Beverages met, the Appellate Body concluded that the excise tax was inconsistent with Article III:2 second sentence (29-32).

On Canada's funded postal rates scheme, the Appellate Body agreed with the U.S. position and found that the panel incorrectly interpreted Article III:8(b). It therefore reversed the panel's conclusions with respect to the legality of the funded postal rates, considering them unjustified under this provision (35). All of Canada's arguments were rejected by the WTO and the Canadian government was given until the end of October 1998 to respond to the Appellate Body's conclusions.

The Thin Edge of the Wedge

The U.S. administration heralded its victory in the WTO as a step toward redressing past grievances with Canada, as well as a clear precedent denying states the ability to take protectionist measures to safeguard culture. According to USTR Barshefsky, the periodical case made it "clear that WTO rules prevent governments from using 'culture' as a pretense for discriminating against imports."³⁰

For Canada, the decision of the Appellate Body, which left every measure presented to the WTO defeated, elicited great concern. There was fear that the U.S. would push for more changes in other cultural industries. Not only were Canada's periodical measures deemed illegal, but they were considered so in spite of the fact that Canada had negotiated a cultural exemption in the CUFTA/NAFTA, and had not made any specific cultural concessions in the WTO. Of immediate concern, however, was the state of Canada's periodical industry. With the decision of the WTO, Canadian magazines stood to lose a significant share of their domestic advertising market. Ottawa resolved that it would continue to work toward its long-standing objective of preserving this advertising for Canadian periodicals. After hearing of the appeal decision, heritage

30. United States Trade Representative, *WTO Appellate Body Expands U.S. Victory in Challenge to Canada's Restrictions on U.S. Magazine Exports* [online], 30 June 1997, p. 1. [cited 10 March 2001]. Available from <<http://www.ustr.gov/regions/whemisphere/canada/releases.shtml>>

minister Sheila Copps stated, “We intend to preserve the unique nature of the Canadian magazine industry and we’re not about to let it go belly-up because of this ruling.”³¹

After months of contemplating alternative measures for its periodical industry, the Canadian government announced in July 1998 that it intended to introduce legislation that would effectively ban advertising in foreign split-run editions in Canada. The ban would consist of punitive fines for the sale of such advertising. This measure, which was to be tabled in the House of Commons in the fall, was considered by both the heritage minister and the trade minister to be necessary for the preservation of the Canadian periodical industry, and by extension, for the protection of Canada’s national identity. Copps declared, “We cannot allow foreign publishers to strip away at our capacity to tell our own stories....The stakes are enormously high. We are talking about cultural diversity in our world and we are also talking about the capacity of expression of a unique national identity.” While announcing its new approach, the Canadian government also revealed that it would remove its offending measures. Minister of trade Sergio Marchi declared, “We will honour our obligations...[But] we make no apologies for also being insistent on standing up for a national issue: our culture.”³²

On October 8, 1998 the Canadian government introduced Bill C-55, the *Foreign Publishers Advertising Services Act*, in the House of Commons. As was previously announced in July, the new legislation banned all Canadian advertising in foreign split-run periodicals, except for foreign publications operating in Canada in the year prior to the introduction of the act. This included *Time Canada* and *Reader’s Digest*. According to paragraph 3(1) of the Act, “No foreign publisher shall supply advertising services directed at the Canadian market to a Canadian advertiser or a person acting on their behalf.” The heritage minister was given the power to launch an investigation under the Criminal Code and to secure compliance with the bill in one of two ways. The minister could obtain a court order demanding the foreign publisher to cease the offending action. If the foreign publisher did not comply, it could be subject to a contempt of court charge.

31. Laura Eggertson, “Trade Body Sinks Magazine Policy,” *The Globe and Mail*, 1 July 1997.

The minister could also prosecute violators of the legislation with fines of up to \$100,000 for individuals and \$250,000 for corporations.³³

Bill C-55 had two primary objectives. First, as past measures had done for three decades, it was designed to preserve the revenues from Canadian advertising for Canadian periodicals. After tabling the legislation, Copps declared, “We need a solid base of advertising services to survive, and this law relating to services ensures that Canadian advertising services cannot be skimmed by foreign publishers who really do not intend to include or introduce any kind of Canadian content.”³⁴ Second, the bill was designed to target advertising services and thereby to be subject to the GATS (where Canada had no obligations in advertising services) and avoid the disciplines of the GATT. The past excise tax was deemed by the WTO to be subject to both the GATT and the GATS despite Canadian disagreement. With Bill C-55, Canada was careful to ensure that the legislation affected advertising services as precisely as possible. In short, the goal was to avoid another successful U.S. challenge under the GATT.

The United States responded quickly to the introduction of Bill C-55. From the American point of view, the new legislation was no more consistent with Canada’s international obligations than the measures the U.S. had successfully challenged in the WTO. After the legislation was introduced, USTR Barshefsky asserted:

Perhaps the most troubling feature of the bill is the signal it sends about Canada’s seriousness in abiding by its international obligations. By introducing a bill that would simply replace Canada’s current WTO-illegal magazine regime with another discriminatory regime, Canada risks undermining the very dispute settlement system it worked so hard to create.³⁵

32. Heather Scofield, “US Rejects Ottawa’s New Magazine Policy,” *The Globe and Mail*, 30 July 1998.

33. Canada, *Foreign Publishers Advertising Services Act* [online], 1998 [cited 10 March 2001]. Available from <http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/C-55/C-55_2/C-55_cover-E.html>

34. Heather Scofield, “Copps Warns Against US Challenge to Magazine Law,” *The Globe and Mail*, 9 October 1998.

35. United States Trade Representative, *USTR Criticizes Proposed Canadian Action to Continue Restrictions on Market Access for Magazines* [online], 9 October 1998, p. 1. [cited 10 March 2001]. Available from <<http://www.ustr.gov/regions/whemisphere/canada/releases.shtml>>

The U.S. was not willing to have its sweeping victory in the WTO wiped out by this 'new' legislation. It made it clear that it was prepared to act if Canada did not cooperate. On October 21, 1998, Deputy USTR Rita Hayes informed the WTO in Geneva, "We strongly urge the Canadian government to reconsider the course it has chosen and to withdraw C-55....The United States intends to react vigorously if this is not the case."³⁶

Talks between representatives from the two countries began immediately after the introduction of Bill C-55 and continued into November. Copps met regularly with Gordon Giffin, the U.S. Ambassador to Canada. In November 1998, Giffin revealed that his government expected Canada to withdraw or seriously amend its legislation and Washington would take action if Canada proceeded contrary to these expectations. According to Giffin, "Options are being examined by our government to be considered as a response to C-55 if C-55, as currently written, is enacted because our view is that it's contrary to the rules we all agreed to."³⁷

The U.S. was considering several options to respond to Canada's continued intransigence. The U.S. had the option to retaliate under the WTO on the basis that Canada had not complied with the WTO's ruling, or to delay retaliation and return to the WTO for a review of Bill C-55. Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* under the WTO allows member states recourse to an expedited 90-day review of the consistency of measures taken to comply with WTO recommendations and findings. The difficulty with these approaches, however, was that Canada was declaring Bill C-55 a new measure. According to Ottawa, the legislation was not designed to restrict imports of foreign periodicals. Rather, it was intended to regulate advertising *services* and thus the legislation was a new measure that fell within the disciplines of the GATS. Canada had removed its GATT-offending measures in October and it was not clear that the new measure amounted to a failure on

36. Heather Scoffield, "Reform Critic Objects to Magazine Bill's 'Culture Cops'," *The Globe and Mail*, 23 October 1998.

37. Robert Fife, "United States Will Fight Back on Magazine Law," *The Globe and Mail*, 30 November 1998.

Canada's part to comply with the WTO ruling. Thus, it was not obvious that the U.S. could legally retaliate under the WTO or even have recourse to Article 21.5. Instead, it was possible that the United States would have to initiate another lengthy WTO dispute settlement process in which a victory would not be guaranteed.

Another option for the U.S. was to retaliate under the NAFTA on the basis that the cultural exemption allowed it to retaliate with equivalent commercial effect if Canada adopted a measure inconsistent with the agreement. This would have meant raising tariff levels under the NAFTA to the higher WTO rates. By retaliating under the NAFTA in this manner, Washington could exert punitive pressure on Canada's policy without having to retaliate under the WTO on the basis that Canada had failed to implement the WTO's rulings. Therefore, if Bill C-55 was in fact determined to be a 'new' measure, it could avoid a Canadian challenge against illegal American unilateral retaliation under the WTO.³⁸

Canadian officials adamantly opposed U.S. threats and claimed that even American retaliation under the NAFTA would be illegal. Within the cultural exemption clause, the retaliation provision of "equivalent commercial effect" is specifically, "governed under this [NAFTA] agreement exclusively in accordance with the provisions of the *Canada-United States Free Trade Agreement*."³⁹ As trade in services is not regulated by the CUFTA, Canada maintained that Bill C-55 was not subject to American retaliation as it was entirely consistent with Canada's CUFTA/NAFTA commitments. Having asserted the legality of its new legislation, Ottawa warned the U.S. about the futility of its threats. Heritage minister Copps stated in December of 1998, "If the Americans think that this kind of speculative intimidation is going to somehow cause us to stop in our tracks, they don't understand Canada."⁴⁰

38. See, "US Considers Plans For Retaliation Against Canada in Magazine Fight," *Inside US Trade* 16, no. 44 (6 November 1998): 2.

39. Canada, *North American Free Trade Agreement: Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America*, (Ottawa Minister of Supply and Services, 1993), Annex 2106, p. 21-11.

40. Heather Scofield, "Ottawa Shows Strength in Magazine Battle," *The Globe and Mail*, 14 December 1998.

The United States, however, persisted with its threats of retaliation against Canada's 'protectionist' legislation. It became apparent in January 1999 that the U.S. government would retaliate by withdrawing Canadian benefits under NAFTA and apply the higher tariff levels of the WTO to certain Canadian imports. On January 11, Deputy USTR Richard Fisher orally presented an informal list of possible targets of American retaliation to Raymond Chretien, Canada's Ambassador to the United States. The list included steel, textiles, plastics and wood products.⁴¹ Under U.S. law, the administration must publish a formal list subject to a 30-day public consultation period, after which a final list of targets can then be issued. By providing the informal list the U.S. moved closer to retaliation. It was clearly attempting to increase its pressure on Ottawa. Under the cultural exemption, the U.S. can target any Canadian import for retaliation, and as William Merkin, deputy chief negotiator of the CUFTA, explained at the time, "The intent [of the U.S. retaliation] is to include items that generate some interest in Canada. Representatives of U.S. steel and other lobby groups with an axe to grind with Canada will be knocking at the door and saying, 'use us'."⁴² Any review of Canada-U.S. trade history will show that the targets conveyed on January 11 were sources of conflict between the two countries. Moreover, and not coincidentally, the riding of Sheila Copps had more steel-making jobs than any other in the country.⁴³ Depending on one's vantage point, the U.S. approach could be considered cunning strategy, or lowly manipulation. Nevertheless, the U.S. administration declared its approach to be just and completely defensible. Speaking about the threat of retaliation a day after the targets were presented, a U.S. trade official stated, "Canada gave us that right when they signed the [Canada-

41. "US Warns Canada of Magazine Retaliation; US Industry Split on Idea," *Inside US Trade* 17, no. 2 (15 January 1999): 1.

42. Ian Jack, "Magazine War Fallout May Hit Textile and Steel Producers," *The National Post*, 1 December 1998.

43. Shawn McCarthy and Barric McKenna, "Chretien Backs C-55 Despite Corporate Outcry," *The Globe and Mail*, 22 January 1999.

U.S.] free trade agreement, and they reaffirmed that right when they signed the NAFTA.”⁴⁴

Copps asserted that Canada would not capitulate to such pressure saying, “They like to play hardball. It was to be expected....But we are not going to have our cultural policies dictated by the Americans.”⁴⁵ Instead, Ottawa began to consider its options to respond. It contemplated subjecting Bill C-55 to a review by an international tribunal to determine whether the legislation would be legal. But it would have needed U.S. consent to do so and the U.S. insisted that it had already won the case under the WTO. As Barshefsky put it, Canada would have to “live with the consequences of having lost a case and failed to comply with it.”⁴⁶

It was becoming increasingly difficult for Canada to oppose the United States. The informal retaliation list presented by the Americans served its purpose and prompted affected Canadian industries to mount a campaign against Bill C-55. By the end of January, Prime Minister Jean Chretien and key Cabinet Ministers were receiving hundreds of calls by Canadian corporations to remove the legislation. Indicative of the corporate opposition to Canada’s periodical measure, Roslyn Nugent, President of the Wholesale Remanufacturers Lumber Association asserted, “We want C-55 scrapped. We don’t want to get caught in a trade fight between the United States and Canada.”⁴⁷

No meaningful negotiations had taken place before the U.S. presented its targets for retaliation. Both Canada and the United States argued that the other had to be the first to offer alternatives. With the introduction of U.S. targets, the stakes had been raised and both sides began to consider entering into serious negotiations as a means of settling the dispute. In a January 20 letter to Ambassador Giffin, Copps stated:

44. Heather Scoffield, “Ottawa Braces for US Blow Against Magazine Bill,” *The Globe and Mail*, 13 January 1999.

45. Joel-Denis Bellavance and Giles Gherson, “Copps Says US Threats Won’t Stop Magazine Bill,” *The National Post*, 20 January 1999.

46. Barrie McKenna, “Ottawa May Seek WTO Ruling on Bill C-55,” *The Globe and Mail*, 21 January 1999.

47. McCarthy and McKenna, “Chretien Backs C-55 Despite Corporate Outcry.”

Several months ago you indicated interest in proposing new ideas in regards to Bill C-55, that would achieve the same goals and would meet our cultural policy concerns. We are still awaiting your ideas. If the Government of the United States is able to suggest ideas that meet these concerns, we look forward to reviewing them.⁴⁸

Ambassador Giffin replied to Copps on January 25 asserting that neither side, on its own, could provide a cure. Negotiations were the only option:

I have never expected that the delivery of a unilateral written proposal to you or undertaking to negotiate through the media would be constructive steps. It seems to me that, particularly in light of the short time frame created by your announced legislative schedule, a good faith, meaningful dialogue is the most productive way to proceed.⁴⁹

With both Giffin and Copps announcing their intention to seek dialogue, negotiations between the two sides began in earnest on January 29, 1999.

The talks, held on January 29, involved officials from the office of the USTR, the U.S. State Department, the Canadian Department of Heritage, and the Canadian Department of Foreign Affairs and International Trade. Canada used the meeting to make its case, while the U.S. made it clear that it would not accept complete prohibition of access to the Canadian advertising market. The U.S. suggested alternatives to Bill C-55, including the provision of a subsidy or tax credit to Canadian periodical publishers, and a circulation limit for American split-run magazines in Canada.⁵⁰ However, Canada remained firm in its plan to proceed with Bill C-55. The U.S. was becoming increasingly impatient. On February 5, Washington revealed that it was already drafting its formal retaliation list and warned Canada that it would have to work toward a compromise or face punitive U.S. measures. Expressing frustration with Canada's failure to compromise, the spokesman for USTR Barshefsky, Jay Ziegler, stated, "Obviously, we

48. Graham Fraser, "Copps Challenges US Envoy Over C-55," *The Globe and Mail*, 23 January 1999.

49. Graham Fraser, "No 'Silver Bullet' for C-55, US Says," *The Globe and Mail*, 26 January 1999.

50. Heather Scoffield, "Marchi Considering Range of Options on Split Runs," *The Globe and Mail*, 3 February 1999.

can't dance alone on this. We have to hear from our Canadian counterparts on what they intend to do to close the gap."⁵¹

In February, two of the most powerful economic committees in the U.S. Congress waded into the periodical row by throwing their support behind the administration's position and threats of retaliation. In a letter to Barshefsky dated February 5, the Chairman and ranking Democrat of the Senate Finance Committee, William Roth and Daniel Patrick Moynihan, offered support for the administration's hard-line approach to Bill C-55, stating, "We are dismayed to learn that the Canadian government now proposes to reinstate those same discriminatory practices in a more virulent form. We ask that you convey, at the earliest possible opportunity to your Canadian counterparts, our deep concern and strong opposition to Bill C-55."⁵² Four days later, the Chairman and ranking Democrat of the House Ways and Means Committee, Bill Archer and Charles Rangel, sent a letter to Ambassador Raymond Chretien in which they declared:

Bill C-55 imposes criminal penalties on individuals and corporations that sell advertising in foreign-owned magazines and, as such, operates as a ban on advertising in such magazines...We strongly oppose C-55 and will support [U.S. Trade Representative] Ambassador Charlene Barshefsky's intention to withdraw trade benefits if the bill is enacted.⁵³

U.S. opposition prompted Canada to make concessions. On February 10, the Canadian government decided to amend Bill C-55 to require the bill to come into force only after a direct decision by the Cabinet. This was done to allay American concerns of having to negotiate under a limited legislative time frame. By using its discretion as to when to enact Bill C-55, the Canadian government could hold off U.S. retaliation and, through negotiations, potentially prevent American punitive measures altogether.⁵⁴ Two

51. Barrie McKenna and Heather Scoffield, "Magazine Bill Pushed Despite US Threats," *The Globe and Mail*, 9 March 1999.

52. Robert Fife and Peter Morton, "Congress Backs Threat of Sanctions Over Magazine Bill," *The National Post*, 25 February 1999.

53. Ibid.

54. Graham Fraser and Heather Scoffield, "Ottawa To Amend Magazine Bill," *The Globe and Mail*, 10 February 1999.

days later the government, in a departure from its initial plans to fast track the bill through parliament, decided to delay the final debate on Bill C-55 in the House of Commons until March. It was another indication that Ottawa wished to reach a negotiated settlement of the dispute. As Deputy Prime Minister Herb Gray stated, “In view of the controversy with our major trading partner, I think it is appropriate to hear what the Americans have to say.”⁵⁵

Negotiations failed to make progress and by late February the U.S. Government was becoming increasingly frustrated. On February 24, Barshefsky, threatening one billion dollars in trade sanctions, asserted that the dispute was “not a cultural issue with respect to Canada. It has to do with very powerful publishing interests in Canada, which is quite a different matter from protecting the cultural integrity of Canada, which the U.S. would certainly support.”⁵⁶ For its part, the U.S. Congress was also growing impatient with its trading partners, including Canada. At a U.S. Senate Finance Committee hearing, Chairman Roth lamented:

I am fairly concerned about our ongoing disputes with Europe in particular, but Canada [and] others that have really exposed some very significant flaws in the current disputes procedure. By making some minor changes they really avoid decisions in our favor. They don't take the action that they're supposed to. And they're getting away with it.⁵⁷

In addition to its dispute with Canada, the U.S. was imposing retaliatory measures under Section 301 against the European Union (EU) for failing to comply with a WTO panel ruling on bananas. The panel found that the EU's tariff levels were set favourably for countries with European colonial links and clearly discriminated against American banana producers in Latin America. In late February and early March, the EU challenged the American retaliation, which consisted of 100 percent tariffs on 520 million dollars worth of EU goods, and Canada signed on as an observer, allowing it to express views

55. Robert Fife, “Ottawa to Delay Magazine Legislation,” *The National Post*, 13 February 1999.

56. Fife and Morton, “Congress Backs Threat of Sanctions Over Magazine Bill.”

57. Barrie McKenna, “US Under Gun to Retaliate if Magazine Bill Passes,” *The Globe and Mail*, 4 March 1999.

and obtain all related documentation. To the United States, it appeared as though Canada and the EU were thumbing their noses at its victories in the WTO. According to Susan Esserman, general counsel in the office of the USTR, “We are going to make it clear to the Europeans and to the Canadians that we expect compliance, and that if they do not comply, that there will be consequences to pay for it.”⁵⁸

In March, the WTO ruled that the U.S. retaliation against the EU was justified on the basis that it did not comply with the WTO ruling. The decision seemed to vindicate the U.S. position and to motivate the Canadian government to increase its negotiation efforts with the U.S. In contrast to his previous unbending stance on the magazine issue in the past, trade minister Marchi began to promote compromise and conciliation:

In the face of the banana dispute and the escalation there and the possibility of a trade war with Canada, I think we should be lowering the tension...We are willing to entertain various options that both protect our mission statement but also address American concerns, and I think we should be doing this.⁵⁹

Indicative of Canada’s eagerness to compromise, talks between the two countries, held on March 12, were bumped up from low level officials to the deputy ministerial level. As it had done previously, the U.S. suggested possible alternatives to Bill C-55, including circulation caps, reducing the threshold that determined what qualified as Canadian content, and relaxing the tax restrictions of Section 19.⁶⁰ Canada, represented by deputy trade minister Robert Wright and deputy heritage minister Suzanne Hurtubise, insisted that a resolution would have to address the issue of Canadian content, but revealed that it was willing to put all of its magazine policies (investment restrictions, Section 19, and

58. Barrie McKenna, “WTO Faces Its Biggest Challenge,” *The Globe and Mail*, 8 March 8 1999.

59. Robert Fife and Peter Morton, “Top Bureaucrats Dispatched to D.C. to Avert Trade War,” *The National Post*, 12 March 1999.

60. “US, Canada Push for Resolution of Longstanding Magazine Dispute,” *Inside US Trade* 17, no. 10 (12 March 1999): 6.

Bill C-55) on the table if the U.S. would refrain from publishing its retaliation list after Bill C-55 passed the House of Commons.⁶¹

On Monday March 15, Bill C-55 was passed by the House of Commons and was sent to the Senate. The U.S. did not publish its retaliation list. In the House, Copps made it clear that the bill would not necessarily be enacted as it was passed, but that the issue of majority Canadian content would be the key to future negotiations. In commenting on the proposals put forward by the United States, Copps declared, “None of those concepts were acceptable to Canada and what we’re suggesting to the Americans, and in particular to Mr. [Richard] Fisher (the deputy USTR), is that he should go back home and do his homework on content.”⁶² Initially Canada was seeking 80 percent Canadian content in foreign split-run magazines for those magazines to be free from the fines of Bill C-55. If American split-run magazines were forced to insert a significant level of Canadian content, their editorial expenses would increase, thereby lowering their competitive advantage. The overall availability of Canadian content in periodicals sold in Canada would also rise.

In May 1999, there was a flurry of activity between negotiators from both sides and an agreement slowly began to take shape. Top officials met on May 7 to discuss content requirements for American split-run magazines. In describing the negotiations, Copps continued to show resolve on the issue of majority Canadian content saying, “Having the table set for a deal does not mean our guests will bring the wine. Unless it is a wine with a majority Canadian vineyard, they should take a rain check on dinner.”⁶³ Although the U.S. did not like Copps’ proposal, after great reluctance, it finally agreed to the principle of Canadian content quotas during the May 7 discussions. However, there was still disagreement as to how Canadian content would be defined and how explicit the requirement would be made. The U.S. wanted material that was either first published in

61. Barrie McKenna and Heather Scofield, “Ottawa Bends on Magazines to Avoid US Trade War,” *The Globe and Mail*, 13 March 1999.

62. James Baxter, “Magazine Bill Passes, But Copps Still Ready To Deal,” *The Calgary Herald*, 16 March 1999.

63. Ian Jack, “Top Officials Chase Elusive Compromise in Magazine Row,” *The National Post*, 7 May 1999.

Canada or produced by Canadians, regardless of its existence in another magazine published outside Canada, to be considered Canadian content. It also wanted the Canadian content requirement to be made implicitly, such as in a memorandum of understanding or in a policy statement. The U.S. opposed an explicit requirement on the basis that it could serve as a damaging precedent. It could be an admission that the U.S. is willing to accept limitations in the cultural industries. This could have serious implications for its dealings with Canada and other countries, particularly the countries of the EU, which have consistently advanced content quotas in the audiovisual sector in the face of U.S. opposition.⁶⁴

On May 18 and 19, negotiators from both sides addressed another key controversial issue during discussions in Ottawa. The U.S. wanted some amount of Canadian advertising to be exempt from the punitive effects of Bill C-55. The talks focused on the threshold level of this exemption. The Canadian government was requesting an upper limit of 10 percent while the U.S. wanted a minimum of 22 percent of Canadian advertising to be exempt.⁶⁵ The two sides could not reach an agreement and the negotiations seemed headed for failure. Senior U.S. negotiator Fisher left Ottawa and according to an American trade official, the U.S. was “waiting to hear back from Canada, but at this juncture, we’re not optimistic we can find a solution.”⁶⁶

The failure to reach a negotiated solution also caused concern in Canada. As one Canadian official described the motivation for resolution, “They [U.S.] can always hurt us more than we can possibly dream of hurting them. We don’t have a lot of cards, so we have to play them very well.”⁶⁷ Top level Canadian officials soon began indicating that

64. “US, Canada Agree on Outline of Magazine Deal but Fight Over Details,” *Inside US Trade* 17, no. 19 (14 May 1999): 21-22.

65. “US, Canada Magazine Talks Break off Over Possible Exemption,” *Inside US Trade* 17, no. 20 (21 May 1999): 24.

66. Ian Jack and Peter Morton, “US Poised to Declare Trade War,” *The National Post*, 20 May 1999.

67. John Geddes, “Mad About Magazines,” *Maclean’s*, 10 May 1999, 25.

Canada was willing to compromise further. Ambassador Chretien and Sergio Marchi called Fisher and Ambassador Giffin in an attempt to get negotiations back on track.⁶⁸

It was clear that Canada wanted to reach a deal. The threats of American retaliation created discord within the Canadian government and the resolve to resist U.S. pressure weakened significantly. Canadian trade officials and the Canadian heritage department - the former promoting conciliation and the latter determination - were publicly opposing each other by the time of the failed discussions in Ottawa. *The National Post* reported a trade official's observation, "Keeping on message has been a constant problem. Every time Sheila would come forward and say something particularly strident, the U.S. would fluff out their feathers. We'd have to smooth that out."⁶⁹ Meanwhile, a source from the Heritage Department was quoted as saying of Sergio Marchi, "He's just willing to take any deal in order to say, 'I've made a deal'."⁷⁰

By the end of May a negotiated solution was imminent. According to the *Globe and Mail*, in order to cushion what could have been perceived as a Canadian fall, the Prime Minister's Office and Canadian trade officials were directing the targets of U.S. retaliation to "get the message out that thousands of jobs would be in jeopardy if Ottawa took on the Americans."⁷¹ Not surprisingly, on May 26, 1999 trade minister Marchi and heritage minister Copps announced that they had reached a deal with the United States.

The Deal

Canada agreed to enact Bill C-55 with several amendments that reflected the settlement it had reached with the United States. The amended legislation set out the terms of American access to the Canadian advertising and magazine sectors. A foreign publication would be exempt from Bill C-55 if it satisfied one of two conditions – the magazine had been operating in Canada in the year prior to the introduction of the act or,

68. Shawn McCarthy, "PM Moved to Stop a Trade War," *The Globe and Mail*, 27 May 1999.

69. Ian Jack, "Copps, Marchi Battle Over C-55," *The National Post*, 21 May 1999.

70. Ibid.

if it was exported to Canada, the magazine carried advertising directed at the Canadian market within a permissible level. Foreign publishers were immediately allowed to carry up to 12 percent Canadian advertising, with the threshold increasing to 15 percent after eighteen months and 18 percent after thirty-six months. If foreign publishers wished to publish more Canadian advertising than the legislated limits, they would have to provide majority Canadian editorial content and establish a new periodicals business in Canada. For the purposes of Bill C-55, Canadian editorial content is considered to consist of material that is either authored by a Canadian or is created for the Canadian market, and does not appear in other editions published outside Canada. Should any foreign periodical contravene any of the terms set out in the agreement, it would then be subject to the fines contained within the legislation.⁷²

Canada also made changes to its tax and investment restrictions in the magazine sector. It agreed to amend the *Income Tax Act* to allow Canadian advertisers to deduct half their expenses for advertising in foreign periodicals. If a foreign magazine contained at least 80 percent Canadian content, however, a full deduction would be allowed. The agreement also liberalized Canada's investment restrictions to allow complete foreign ownership of a Canadian magazine after one year of the signing of the agreement – up from 25 percent. The authority to review and approve such investments in the cultural industries was transferred from the Canadian Department of Industry to the Department of Canadian Heritage. All investments in the cultural industries, including the periodical sector, would be subject to a net benefits review under Section 38 of the *Investment Canada Act*, a consideration of an investment's "contributions to the Canadian economy, the effect of the investment on competition, and compatibility with Canada's cultural

71. Shawn McCarthy, "Ottawa Sweetens Offer in Bid to Avert US Trade War," *The Globe and Mail*, 21 May 1999.

72. Department of Canadian Heritage, *Ottawa and Washington Agree on Access to the Canadian Advertising Services Market* [online News Release], 26 May 1999 [cited 13 October 2001]. Available from <<http://167.33.61.72/bin/News.dll/View?Lang=E&Code=9NR029E>>

policies.”⁷³ In exchange for all of the concessions granted by the Canadian government, the United States gave written assurances that it would not undertake trade action against Bill C-55 under the agreements of the WTO, the NAFTA or section 301 of the *US Trade Act*.⁷⁴

The Canada-U.S. Agreement on Periodicals was signed on June 4, 1999 and came into force on July 1. Reactions from the governments of Canada and the United States reflected the cultural disconnect so prevalent in Canada-U.S. relations. Canadian officials highlighted the cultural aspects of the issue, while the U.S. interpreted the agreement through a commercial lens. Copps announced a Canadian victory in the periodical fight, telling the House of Commons that it represented, “the first time in history the Americans have recognized that we have the right in trade to protect our culture.”⁷⁵ USTR Barshefsky said the agreement, “will increase market access in clear and predictable ways [as well as] address anti-competitive regulatory concerns.”⁷⁶ A senior U.S. official described the Canada-U.S. compromise by stating, “Our right, of course, under normal rules of trade, is to have full and open and fair competition. But we’ve been willing to temporize out of respect for the dynamics of this issue in Canada and especially out of the respect President Clinton has for the Prime Minister.” When asked if the U.S. had just recognized the right to protect culture internationally, the same official declared, “this issue has nothing to do with culture. This was simply a matter of ensuring competition. The issue is one of commerce.”⁷⁷ This suggests that Copps overstated the significance of the cultural aspect of the accord. The U.S. had granted Canada its demand of Canadian content quotas, but it certainly did not recognize this as a general right. The limitations to

73. See, United States Trade Representative, *United States and Canada Resolve ‘Periodical’ Differences*, 26 May 1999, p. 3. [cited 10 March 2001]. Available from <<http://www.ustr.gov/regions/whemisphere/canada/releases.shtml>>

74. Ibid. 1-3.

75. Heather Scoffield, “‘Canada Won,’ Copps Insists,” *The Globe and Mail*, 27 May 1999.

76. United States Trade Representative, *United States and Canada Resolve ‘Periodical’ Differences*, p. 1.

77. Hugh Winsor, “Bill C-55? Think Commerce, Not Culture,” *The Globe and Mail*, 31 May 1999.

access that the U.S. accepted happened to involve a cultural industry, but they were not accepted *because* a cultural industry was involved. The latter reflects recognition of the inherent value of cultural industries, and the right of the state to protect them; the former does not. There is nothing to suggest that the U.S. recognized this right in the periodicals case, much less that it will extend such a recognition to cultural industries generally. For the U.S., the issue was solely commercial in nature, and the provision of content quotas was simply necessary to reach a commercial solution. Thus, Prime Minister Chretien's low key description of the situation was perhaps more accurate than that of Copps, "We have a better deal than we ever expected to have."⁷⁸

The deal resulted in a significant devolution of Canada's long-standing policies to protect its periodical industry from foreign split-run magazines. One might consider the agreement a success in that it managed to avert American retaliation while still according Canadian magazines some modicum of protection. Yet, this protection came at a price. Canada was forced to liberalize its investment restrictions in the periodical industry, and to reduce the effectiveness of Section 19 of the *Income Tax Act* – two areas that were not initially challenged by the United States. Even the protection that was maintained through these concessions is questionable. The deal replaced what amounted to a total ban on foreign split-run editions in Canada, with a framework that provides much less protection to the Canadian periodical industry. Indeed, U.S. magazines tend to be larger, and to be distributed in greater frequency than Canadian magazines. Thus, the allowable threshold of 18 percent Canadian advertising in such magazines could translate into a huge share of total advertising revenues. For example, Canadian publishers have noted that if the 13 most popular American women's magazines sold 18 percent of their available advertising pages to Canadians, they would siphon off 70 percent of all advertisements contained in Canada's seven largest women's magazines.⁷⁹ In the end, every measure designed to protect the Canadian periodical industry was significantly weakened. Canada was left with something, but it certainly did not obtain anything. If,

78. Heather Scofield, "Publishers Greet Split-Run Deal With Dismay," *The Globe and Mail*, 27 May 1999.

in a game of marbles, one loses half his stock, it is difficult to argue that he won. At best, Canada had stopped the bleeding.

To offset the inevitable economic costs of the agreement, particularly the losses of advertising revenues to Canadian publishers, the Canadian government instituted the Canadian Magazine Fund. This fund, announced in December 1999, would distribute \$150 million over a three-year term to Canadian publishers in an effort to support the development of Canadian editorial content, to assist small Canadian publishers, and to facilitate infrastructure development to benefit the Canadian magazine industry as a whole.⁸⁰ The government also announced its intention to review the effects of the Canada-U.S. Agreement on Periodicals on the health of the Canadian magazine industry.

The devolution of Canada's periodical policies after 1993 has serious implications for Canadian cultural protection in general. The erosive effects of advances in information technology, and the restrictions imposed by international trade agreements to which Canada is party, have severely limited Canada's capabilities. The following final Chapter addresses these implications in more detail and discusses the merits of an international instrument to regulate trade in cultural products.

79. John Geddes, "A Run for the Money," *Maclean's*, 7 June 1999, 55.

80. See, Department of Canadian Heritage, *Canada Magazine Fund - First Year (2000-2001)* [online], 31 March 2001 [cited 13 October 2001]. Available from <<http://www.pch.gc.ca/culture/pubs/cmffcm/english.htm>>

CHAPTER 4 – IMPLICATIONS AND DISCUSSION

The case of foreign split-run magazines clearly illustrates that advances in information technology have made it difficult for Canada to protect its cultural industries. It also shows that Canada's ability to protect these industries, from the erosive effects of technological advances or otherwise, is seriously limited by its international trade agreements. In examining Canada's periodical policies, the WTO was charged with determining if those policies violated that country's international obligations. It did this unequivocally. Despite the fact that the panel declared that "cultural identity was not at issue," the fundamental question was whether the WTO could recognize the distinctive nature of cultural products, namely, that their end uses are significantly different than other articles of trade and that the cultural products of dissimilar cultural communities have qualitative differences. This distinction was not made and, according to the Appellate Body, periodicals of any national origin, and presumably other cultural products, were directly substitutable products in so far as they were part of the same market segment. In short, the case of split-run periodicals "taught us that economic factors drive the WTO analysis."¹

The cultural exemption in the CUFTA/NAFTA, strongly endorsed by Canadian cultural industries and heralded by the Canadian government as a major achievement, also placed constraints on Canada's cultural objectives. This was evident in two ways. First, by initially dealing with the periodicals case under the WTO rather than the CUFTA/NAFTA, the U.S. challenged the notion that Canada could take protectionist measures if it were willing to pay the price. After the WTO panel's interim ruling, which declared all but one Canadian measure to be in violation of the GATT, Art Eggleton, the Canadian trade minister at the time, stated candidly, "We don't have any cultural protections under the NAFTA. That's a myth. We never did...An exemption doesn't

1. Hamilton Loeb, "Telecommunications and Culture: Transborder Freedom of Information or Cultural Identity?" *Canada-United States Law Journal* 26 (2000): 308.

equal protection.”² Eggleton’s statements were further proven in the second round of the dispute when the U.S. chose to rely on the NAFTA for Bill C-55.

Even if Bill C-55 could be considered to have been consistent with Canada’s WTO obligations, and there are reasons to doubt this³, the cultural exemption in the NAFTA proved to be a serious limitation. The exemption’s allowance for a party to adopt protectionist measures at a price was shown to be hollow and ineffectual. The U.S. simply targeted politically sensitive sectors of the Canadian economy with the threat of retaliation and let the resulting internal disruptions weaken Canadian resolve. It was an effective strategy, one that was completely justified under the terms of the cultural exemption. Indeed, the cultural exemption implemented in the CUFTA in 1989 was simply a codification of this U.S. trade practice. Standard Section 301 trade law in place prior to 1988 allowed the U.S. to retaliate with equivalent commercial effect, in any sector of its choosing, against unreasonable foreign practices.⁴

The challenges highlighted in the periodicals case suggest that there is reason to question Canada’s traditional approach in handling the relationship between culture and trade. Clearly, Canada’s strategy of simply exempting culture from international trade agreements and leaving culture ‘off the table’ altogether does not afford sufficient protection to Canadian cultural industries. The trust that the 1994 *Task Force on the Canadian Magazine Industry* put in the WTO when it said that the excise tax would be compliant with Canada’s obligations, and the trust put in the cultural exemption in the NAFTA were misplaced. A new approach is necessary if Canada wants to continue to protect its cultural industries in an era of globalization.

2. Laura Eggertson, “‘Culture Not Safe Under Nafta’,” *The Globe and Mail*, 29 January 1997.

3. The initial rulings from the WTO on Canada’s excise tax made it clear that GATS and GATT obligations can coexist and if a service measure affects a good, even where there is no GATS commitment on the part of the country involved, there can still be a violation of the GATT. Bill C-55, though it targets advertising services more specifically than did the excise tax, its effects on a good are similar to those of the excise tax and the latter was found to violate the GATT. The fact that Canada obtained American assurances that the U.S. would not retaliate under the NAFTA or the WTO also suggests that the legality of Bill C-55 is questionable.

4. Loeb, 308.

Free Trade?

One option is to remove some, or all, of Canada's restrictive policies and have its cultural products compete freely in the international marketplace. According to Keith Acheson and Christopher Maule, "The best way to assist domestic industries, cultural and other, is to ensure that they are internationally competitive."⁵ Taking the free trade argument a step further, Charles Doran has asserted, "Restrictions on market access only serve to encourage the less competent and the more expensive while placing extra cost burdens on the more competent." Furthermore, "Competing and accessing the U.S. market will make Canadian cultural industries more productive" and allow them to produce and disseminate even more Canadian content.⁶

There are several problems with the free trade argument. First it is fallacious to claim that Canada's cultural producers do not already compete. They are forced to compete with a massive presence of American cultural products for the attention of the Canadian audience. Canadian cultural producers simply cannot afford to be "less competent." Second, a cultural product, by its very nature, contains intellectual content that is often most appealing to cultural communities that identify with that content. For example, American cultural products will be more desirable to Americans than to Canadians and vice-versa. Thus, free trade in the cultural industries tends to place cultural producers with a large domestic audience at an advantage as they have a solid base from which to export from at reduced per unit cost. Third, under free trade conditions, to make up for a small domestic market, cultural industries in small countries are forced to make their products more appealing to larger foreign markets. It is necessary, or at least advantageous, for cultural producers to remove reflections of national origin and perhaps even to assume the cultural characteristics of the targeted market. This is commonly reflected in the Canadian book industry. For example,

5. Keith Acheson and Christopher Maule, *Much Ado About Culture: North American Trade Disputes* (Michigan: University of Michigan Press, 1999), 334.

according to Doug Saunders of the *Globe and Mail*, “Most book editors acknowledge privately that they now routinely reject book proposals that would be reasonably successful in Canada simply because they wouldn’t find U.S. buyers. Or if they do accept the proposals, they often ask authors to modify their work to suit U.S. buyers.”⁷ Canadian stories are often a liability in the U.S. market and without the incentives to produce Canadian content provided by subsidies and protectionist measures, one could easily foresee the practice of removing Canadian stories for U.S. stories becoming even more common than it is today. Finally, free trade ignores the socio-cultural aspect of cultural products and simply transforms them into “products and services, and redefine[s] the public as consumers rather than citizens.”⁸

A significant portion of the free trade argument is based on a neoliberal view that it is impossible for states to oppose globalization. Globalization is an irreversible trend and states must recognize that intervention is not only unproductive, but futile. According to David Rothkopf, states that fail to realize this “are the heirs of King Canute, the infamous monarch who set his throne at the sea’s edge and commanded the waves to go backward.”⁹ The same commentator asserts that, in the Information Age:

it is in the economic and political interests of the United States to ensure that if the world is moving toward a common language, it be English; that if the world is moving toward common telecommunications, safety, and quality standards, they be American; that if the world is becoming linked by television, radio, and music, the programming be American; and that if common values are being developed, they be values with which Americans are comfortable.¹⁰

6. Charles Doran, “The Social and Economic Rationales for Domestic Cultural Policies [Commentary],” in *The Culture/Trade Quandary: Canada’s Policy Options*, ed. Dennis Browne (Ottawa: Centre for Trade Policy and Law, 1998), 50, 51.

7. Doug Saunders, “Exporting Canadian Culture,” *The Globe and Mail*, 25 January 25 1997.

8. Paul Audley, “Cultural Industries Policy: Objectives, Formulation, and Evaluation [online],” *Canadian Journal of Communication* 19, no. 3/4 (1994) [cited 30 May 2001]. Available from <<http://www.wlu.ca/~wwwpress/jrls/cjc/BackIssues/19.3/audley.html>>

9. David Rothkopf, “In praise of Cultural Imperialism?” *Foreign Policy* (Summer 1997): 44.

10. Ibid., 45.

The point, however, is not that states like Canada oppose globalization to make “the waves to go backward.” They are simply attempting to protect their distinctive character. The trends contained within the rubric of globalization have many advantages, but they also have harmful effects and saying that states must simply ride the wave of globalization with no control over their destination is a hazardous mistake to make. There is a pressing need to address the concerns surrounding globalization, including the threat of acculturation presented above.

An International Cultural Instrument

If Canada is to maintain its cultural character it must work with other countries to make cultural products a distinctive article of trade and to legitimate the role of states in promoting and protecting the development of such products in an international instrument. The fact that screen quotas were included in the GATT in 1947, a time when only films had international scope, suggests that culture is not an illegitimate issue to be discussed under the WTO’s agreements, especially now, given the proliferation of cultural products facilitated by advancements in information technology.

An international cultural instrument was suggested in February of 1999 by the Canadian Cultural Industries Sectoral Advisory Group on International Trade (SAGIT). According to Kenneth Stein, the Chairman of the SAGIT, the proposal for an international instrument was guided by the idea that the cultural exemption approach is insufficient.¹¹ The objective of the instrument recommended by the SAGIT would be to provide overarching recognition of the importance of cultural diversity and the capacity of governments to protect their domestic cultural industries. It would set out the rules for cultural intervention and establish the relationship between these rules and existing international trade agreements. For example, the cultural framework could make explicit allowances for specific policy instruments, such as subsidies, tax credits, and restrictions

11. Kenneth C.C. Stein, “Telecommunications and Culture: Transborder Freedom of Information or Cultural Identity?” *Canada-United States Law Journal* 26 (2000): 314.

on investment and market access.¹² Included within the aegis of the WTO, this instrument could serve as an interpretive guide to dispute resolution procedures where culture is involved. Such an approach was followed when, after the Uruguay Round of WTO negotiations, GATT members implemented the Agreement on Subsidies and Countervailing Duties and thereby clarified what is and what is not acceptable in respect to these measures.¹³

The interest in developing an international cultural instrument has not been limited to Canada. Traditionally, Canada has been affected by American cultural influences much more than other countries because of its close geographical and cultural proximity to the United States. As technological advances have increasingly catapulted cultural products to an international stage, other countries have experienced the same kind of pressure that Canada has encountered throughout most of its history. In France, 70 percent of all theatre ticket sales are for American films.¹⁴ Only a year ago, 60 percent of films shown in Italy, 77 percent in Spain, 82 percent in Germany, and 95 percent in Greece and Portugal were American.¹⁵

Canada has actively sought alliances with these countries to work toward establishing protections for cultural industries. In June 1998, Ottawa hosted an international meeting of cultural ministers to address such concerns. The goal of the meeting, which “marked the first time a globally representative ministerial-level group has come together outside of a formal context to discuss international cooperation on cultural policy,” was to “strengthen cultural policies so that the world might create an

12. See, Cultural Industries Sectoral Advisory Group on International Trade, *Canadian Culture in a Global World: New Strategies for Culture and Trade*, February 1999 [cited 6 April 2001]. Available from <<http://www.dfait-maeci.gc.ca/tna-nac/canculture-e.asp>>

13. Daniel Schwanen, “A Room of Our Own: Cultural Policies and Trade Agreements [online],” *Choices* 7, no. 4 (April 2001): 17-18. [cited 25 April 2001]. Available from <<http://www.irpp.org/choices/index.htm>>

14. Ray Conlogue, “Culture is a Blood Sport,” *Globe and Mail*, 10 May 2001.

15. Patricia M. Goff, “Invisible Borders: Economic Liberalization and National Identity,” *International Studies Quarterly* 44 (2000): 557.

environment that values diversity of identity, creativity and freedom.”¹⁶ The participants agreed that “viewing globalization as purely economic and technical ignores the social impacts related to globalization. A balance needs to be achieved between national and international cultural objectives and ongoing trade liberalization.”¹⁷

To this end, the Ottawa meeting established the International Network on Cultural Policy (INCP). The INCP serves as an international forum for the cultural ministers of 45 countries (See Appendix I) to discuss issues and work toward common goals. To date, the INCP has had four ministerial meetings. At the second meeting, the Working Group on Cultural Diversity and Globalization (WGCDG) was established to explore ways of addressing the negative impacts of globalization on cultural diversity. As part of its work, the WGCDG has explored the development of an international instrument to govern the relationship between trade and culture. According to the WGCDG:

The objective of the instrument should be to articulate a consensus, and a commitment to sustain and promote cultural diversity as key to the prosperity, security and participation of citizens in the social, economic and cultural life of societies. A [sic] instrument should recognize the special role played in societies by cultural goods and services, and should enable countries to maintain policies that promote their culture. It should also be grounded in the fundamental human rights of individuals, while respecting the collective rights of communities.¹⁸

The ministers of the INCP have accepted the concept of such an international instrument. At the third ministerial meeting, held in Santorini, Greece on Sept 27, 2000, it was agreed that an instrument allowing states to protect their cultures against the effects of globalization was necessary. The agreement “was based on the principle that each citizen of the world has the right to participate in the cultural life of his/her community

16. International Network on Cultural Policy, *Final Report of the International Meeting on Cultural Policy - Putting Culture on the World Stage*, 1998, p. 4. [cited 18 October 2001]. Available from <http://64.26.177.19/meetings/1998/ottawa/index_e.shtml>

17. Ibid., 4.

18. International Network on Cultural Policy. Working Group on Cultural Diversity and Globalization, *Discussion Paper for Ministerial Consideration: International Responses to the Challenges Facing Cultural Diversity*, 29 September 2000 [cited 18 October 2001]. Available from <http://64.26.177.19/meetings/2000/santorini2/consid_e.shtml>

and that countries and governments have the right to freely establish their cultural policies.”¹⁹

No concrete international cultural instrument has yet come out of the INCP. Indeed, though the SAGIT report is informative, it is premature to outline the precise form of such a cultural instrument as it would depend on many factors, including the needs of various states and the limitations imposed by those who benefit from the free trade of cultural products. It is clear, however, that a number of overarching factors must be addressed for any international cultural instrument to be fair and effective.

An international instrument governing trade in cultural products must address the role that technological advances play in both the facilitation of cultural products and the erosion of cultural policies. It must be technologically neutral in the sense that a state’s right to protect its cultural industries, while subject to the limitations spelled out in the instrument, is not limited by unforeseen technological advances. The flexibility to renegotiate where technology makes it necessary must be obtained and maintained. Second, as the periodicals case revealed, advances in information technology have obscured the distinction between goods and services. Therefore, an instrument would have to take into account the possible cross-linkages between different agreements and establish rules in cases where they overlap. Third, an instrument must address the relationship between regional trade agreements and international trade disciplines. This is particularly important for Canada. As the periodicals case revealed, even if the WTO were to allow certain protectionist measures in the cultural industries, the NAFTA would remain as a serious impediment to the implementation of such policies. Ideally, such regional agreements would also be subject to the international cultural instrument. Finally, an international cultural instrument, wherever it may be housed, would have to be enforceable and not take the form of a simple declaration. Without enforceability, an instrument would lose its meaning and its effect.

19. Department of Canadian Heritage, *Canada Marks an Important Step in the Recognition of Cultural Diversity* [online News release], 28 September 2000 [cited 18 October 2001]. Available from <<http://167.33.61.72/bin/News.dll/View?Lang=E&Code=0NR123E>>

In addition to addressing these factors in a cultural instrument, there must be specific principles to guide its formation and implementation. One of these principles should prevent states from adopting policies to protect their cultural industries in ways that arbitrarily affect other states' interests. States should be subject to the same requirements for general exceptions in the GATT and GATS, namely, that policies "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."²⁰ Specifically, state policies should genuinely contribute to the development of national culture and must not be money-making enterprises, aimed solely at favouring domestic over foreign firms. The deletion of American-owned Country Music Television (CMT) from Canadian channel listings by the CRTC in the mid-1990s, simply because it was in competition with a Canadian alternative, is an example of measures that should be deemed contrary to the purposes of an international instrument.²¹

An additional principle would require that protectionist measures be consistent with the objective of achieving cultural diversity. There must be a recognition that the primary objective of state intervention should not be to maintain or produce 'purity of culture', but to ensure that citizens have sufficient cultural choices.²² This should serve as a guiding criterion and not domestic cultural advantage as such. Obviously, determining the level of protection that is necessary is a difficult issue to resolve.

20. Quoted in, Ivan Bernier, "Cultural Goods and Services in International Trade Law," in *The Culture/Trade Quandary: Canada's Policy Options*, ed. Dennis Browne (Ottawa: Centre for Trade Policy and Law, 1998), 147.

21. The CRTC, in an effort to advance Canadian culture, regulates the list of available domestic and foreign television channels for the Canadian audience. On January 1, 1995, after ten years of authorized service as a non-Canadian channel, CMT was removed from this menu by the CRTC and replaced by a Canadian specialty channel, New Country Network (NCN). The action represented a long-standing CRTC practice of denying market access to foreign television services that are considered to be in direct competition with a Canadian alternative. However, CMT was already providing as much Canadian content as that proposed for NCN, and the former's established international connections better-served Canadian artists. Thus, no real cultural objective was achieved and the CRTC was simply replacing American ownership with Canadian ownership. For a discussion of the CMT case see, Acheson and Maule, *Much Ado About Culture*, 206-219.

22. Schwanen, 16-17.

‘Culture’ is an amorphous term and the successful achievement of ‘cultural diversity’ is extremely difficult to quantify in theoretical and practical terms. However, market share for indigenous content could serve as a useful indicator and states could address the issue by establishing general or specific commitments. Such agreements could incorporate, for example, agreed upon levels of ownership or indigenous content quotas in each particular cultural sector.

The final principle, which is related to the first two, should establish that state intervention in cultural industries be as least disruptive as possible to free trade and market forces. Maintaining cultural diversity does not necessitate complete or even partial restrictions on international trade. If a particular market provides sufficient cultural choices, then state intervention should not be justified. Moreover, there may be cases where foreign cultural producers are able to achieve a country’s cultural objectives as well as, or better than, domestic firms. Generally, in such circumstances, state protection of domestic industries at the expense of foreign producers should not be justified.

“Systems Tension” and American Reluctance

There are many challenges that countries like Canada will confront in any attempt to promote culture as a unique area of trade on the international level. Canada would have to build a consensus to undertake what would be long, complicated negotiations. Perhaps the most important limitation to the cultural instrument approach, however, would be the reluctance of the United States.

The United States would likely be strongly opposed to any effort to afford culture a distinct status. The *systems tension* surrounding culture, which has been so prevalent in the Canada-U.S. relationship, would play a significant role in the success or failure of the development of an international instrument. For the United States, culture is big business and it will not let its business interests be negatively affected by a cultural instrument. It is unlikely that the United States would wholeheartedly accept Canada’s view of culture as a social good worthy of state protection. As the world’s most successful cultural

exporter, the U.S. would have much to lose should states be granted a free hand in their cultural policies. However, by limiting the scope of an international cultural instrument, and adopting the principles already discussed, the U.S. might be willing to cooperate with the effort to develop such an instrument.

Although the ambiguity of culture's international treatment is hazardous for those concerned about cultural diversity, it is also undesirable for large cultural exporters such as the U.S. By adopting the principles discussed above, and clearly delineating the rules of the game in the international trade of cultural products and services, an international instrument could provide increased transparency for those countries that derive a significant portion of their wealth from such trade. Consider the example of Bill-C55. The fact that Canada found a measure that maintained its past objectives, yet was technically consistent with its WTO Panel-imposed obligation to reform its illegal policies, meant that U.S. action through the WTO would require a new dispute procedure. Though the U.S. could rely on a regional trade agreement instead of the WTO in its dispute with Canada, it is conceivable that conflicts with other countries would not contain such an alternative. In addition, as illustrated by the Canada-U.S. Agreement on Periodicals and the case of CMT, much of Canada-U.S. cultural relations consist of periodic disputes and ad hoc arrangements. An international instrument in which the 'rules of the game' were clearly defined could avoid such irritants for the U.S.

Having the most powerful and influential economy, the U.S. would also have a considerable impact in determining what the rules would be, and in the process, would receive some concessions it currently does not have. Within Canada, for example, there are numerous measures favouring elements of domestic cultural production that could be considered unjustifiable under an international instrument guided by the three principles proposed above. In the film industry, for instance:

Canadian taxpayers incur costs of \$60 million each year to fund the Film Production Services Tax Credit. It subsidizes the labour costs associated with various productions that, although made in Canada, mostly involve American personnel in key creative positions, are aimed at the U.S.

market, and indeed actively attempt to make their Canadian filming locations look like places in the United States.²³

The exodus of large-scale film productions to Canada, motivated in part by such incentives, has increasingly become a serious issue in Washington due to the loss of employment and revenues associated with these productions in the United States. The abandonment of such policies, in Canada and elsewhere, could serve as an inducement for U.S. cooperation on a cultural instrument.

Finally, although it strongly advocates non-discriminatory treatment in the policies of other states, even the U.S. itself recognizes the principle behind state protection of cultural industries. For example, section 310 of the Federal Communications Act states that “no foreigner can be the licensee, partner, officer, or director of any radio or television station in the United States, and foreign participation in the ownership of any such station is restricted to 20 percent.”²⁴

In any case, American reluctance should not lead to inaction. As the periodicals case has revealed, Ottawa’s ability to protect Canadian culture with domestic policy instruments is vulnerable to the challenges of international trade law and the effects of advances in information technology. If cultural products are going to be recognized as distinct articles of trade, and if the capacity of states to advance the benefits that these products confer on communities is to be accepted, Canada must continue to work with like-minded countries to develop an international instrument. The work of the INCP is encouraging and indicates that support for such an approach is increasing.

The form of the preceding international cultural instrument is suggestive only. However, by embracing the principles presented above, the path to implementing such an instrument may be made easier. These principles reflect the practical limitations imposed by the present environment of international relations. They also highlight the fact that the effort to carve out a space for culture within international trade does not necessarily represent an ideological opposition to free trade or globalization. It simply rejects the

23. Ibid., 10.

24. Roger Swanson, “Canadian Cultural Nationalism and the US Public Interest,” in *Canadian Cultural Nationalism*, ed. Janice L. Murray, (New York: New York University Press, 1977), p. 58.

increasingly popular view that there is no place for the state in the economic affairs of its communities, regardless of the societal benefit conferred. Proponents of the interventionist approach to culture are best described in a statement by Lionel Jospin, the Prime Minister of France: "I am for a market economy but not for a market society."²⁵

As the world becomes increasingly integrated by technology and international trade liberalization, the strain on domestic cultural industries will become more intense. Securing a balance between free trade and the value of cultural diversity will be an enormously important task for the Canadian government. If Canada is to achieve its long-standing objectives of protecting Canadian cultural choices, this balance must be established. Without it, Canada's cultural industries will be vulnerable to those same laissez-faire forces of globalization that dismantled Canada's long-standing periodical policy regime.

25. Alan Freeman, "Shaping a Country in Shadow of the US.[Interview with PM of France Lionel Jospin]," *The Globe and Mail*, 18 December 1998.

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**APPENDIX A: MEMBERS OF THE INTERNATIONAL
NETWORK ON CULTURAL POLICY ***

Argentina	Mexico
Armenia	Morocco
Austria	Netherlands
Bahamas	New Zealand
Barbados	Norway
Brazil	Philippines
Burkina Faso	Poland
Cameroon	Russia
China	Senegal
Canada	Slovakia
Colombia	South Africa
Croatia	Spain
Cuba	Saint Lucia
Finland	Sweden
France	Switzerland
Greece	Trinidad and Tobago
Guyana	Tunisia
Hungary	Ukraine
Iceland	United Kingdom
Italy	Vietnam
Ivory Coast	
Jamaica	
Kingdom of Jordan	
Latvia	
Malaysia	

* As of March 2001