



Canada-United States Law Journal

Volume 20 | Issue

Article 28

January 1994

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Recommended Citation

Donald S. Macdonald Hon., *The Canadian Cultural Industries Exemption under Canada-U.S. Trade Law*, 20 Can.-U.S. L.J. 253 (1994)
Available at: <https://scholarlycommons.law.case.edu/cuslj/vol20/iss/28>

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The Canadian Cultural Industries Exemption Under Canada-U.S. Trade Law

*The Honorable Donald S. Macdonald**

American and Canadian trade negotiators have been active over the past decade in putting into place sets of rules to govern the trade relations between the two countries, the world's two largest trading partners. In the 1980's they created the Canada-U.S. Free Trade Agreement, and in the year past concluded negotiations establishing the North American Free Trade Agreement, joining Mexico with our bilateral relationship, as well as making substantial further changes in the rules between United States and Canada.

In the past ten days, our representatives have put the finishing touches on the Uruguay Round negotiations under GATT. While it was a multilateral negotiation, it was one in which the bilateral agenda with the neighbors played an important role in the negotiating aims of both the U.S. and Canada.

A point of difficulty for the U.S. in all three negotiations has been what is referred to as "the Canadian cultural industries exemption." My topic is to talk about that exemption, to explain to you what the Canadian position is and the reasons for it, and to indicate how the Canadian aspirations have been accommodated in the trade agreements.

The first thing to be said about the Government of Canada's rules for the cultural industries is that they have *not* imposed a substantial barrier to the entry and sale in Canada of American cultural products. An American visitor to Canada can recognize, at once, that most of the magazines on the newsstands are ones which she or he is familiar with at home. The visitor will notice as well that in television programming, many of the familiar series are to be found. The foreign share of the Canadian market for cultural products is impressive.

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The following text was compiled from the notes of the remarks made by The Honorable Donald S. Macdonald at the Conference.

The author would like to acknowledge his indebtedness in preparing these remarks to the unpublished LL.M. thesis of Duncan Cornell Card of the Ontario Bar, submitted to the Faculty of Law at the University of Toronto in 1987 entitled, *Canada-United States Free Trade and Canadian Cultural Sovereignty*. He also expresses his indebtedness to Dr. William C. Graham, Q.C., M.P. for having drawn Mr. Card's thesis to his attention.

Let me offer a few statistics:

- 63% of Canadian television viewing time is spent watching non-Canadian programs, primarily programs from the U.S.;
- 85% of Canadian television viewing devoted to *drama* is spent watching non-Canadian programming, the great majority from the U.S.;
- slightly under two-thirds of books bought in Canada are foreign-authored;
- 82% of all newsstand periodicals sold in Canada originate from foreign countries, mostly the U.S.;
- foreign (mostly U.S.) films account for over 95% of distributors' revenue from Canadian movie theatres; and
- virtually all distribution of sound recordings in Canada is controlled by seven foreign-owned companies.

Evidently the Canadian rules have not been operated to prevent foreign access to the Canadian market. The rules have not attempted to keep foreign products out; they have attempted through ownership and other rules to ensure the survival of Canadian cultural industries. As a prominent Canadian journalist has written:

The Canadian struggle is not to keep U.S. cultural products out - that would be impossible as well as foolish - but to make sure there is a Canadian presence as well Canadian cultural policies do not prevent Americans from selling their books, magazines, records, T.V. programs and movies in Canada - their purpose is to ensure that there is also a place in the market for Canadian books, magazines, T.V. programs and movies. . . There is already virtual free trade in the cultural industries between Canada and the United States [*the article was written in 1986*] As evidenced by the domination of U.S. cultural products in Canada and a cultural trade surplus for the U.S. of about 1.5 billion dollars.¹

What then are the Canadian cultural rules? The rules vary from cultural field to cultural field, but the two principal instruments used in Canada have been control of the ownership of productive facilities within Canada, and government financial assistance to production. Let us look at a number of the principal fields.

I. RADIO AND TELEVISION BROADCASTING

The broadcasting media are regulated in Canada by the Canadian Radio-television and Telecommunications Commission (CRTC) which has as its primary responsibility the allocation of spaces on the broadcasting spectrum as does the FCC in the United States. The CRTC has the further responsibility of enforcing Canadian ownership rules. Under

¹ David Crane, *TORONTO STAR*, August 4, 1986, at A-2, cited in Duncan Cornell Card, *Canada-United States Free Trade and Canadian Cultural Sovereignty* 78 (unpublished).

the *Broadcasting Act*,² a license to operate a broadcasting station, or permission to operate a *network* of broadcasting stations, can be granted only to a Canadian citizen, or to a Canadian corporation controlled by Canadians. I believe that American broadcasting regulations impose the same restriction on foreign broadcasters in the United States.

In addition, the CRTC administers the "Canadian content" rules which stipulate the minimum amount of broadcast time which must be devoted by broadcasters to material of Canadian origin. There is a complex set of rules to determine which productions are defined as "Canadian" for the purpose of the content regulations and they include, not only the "Canadianness" of say, dramatic productions, but also the Canadian content of broadcast music.

An important feature of the Canadian broadcasting landscape ever since radio broadcasting began between the wars, has been the Canadian Broadcasting Corporation (CBC), the government's wholly-owned broadcasting corporation which maintains networks in both of the official languages, French and English, and extends its broadcasting network to all parts of Canada in both radio and television. An important mission of the CBC is to provide national and local programming in news and public affairs. The CBC also has a significant role in the production of feature broadcasts and particularly in Canadian musical productions, both classical and popular.

II. NEWSPAPERS AND PERIODICALS

Ownership controls are also important in the rules governing the publication of newspapers and periodicals in Canada. As already stated, these rules do not prevent the importation of American publications into Canada. On any business day in Canada, the *Wall Street Journal*, the *New York Times* and *U.S.A. Today* are on retail sale in major Canadian cities, and the whole range of American magazines, to suit every taste, is available on newsstands. The purpose of the ownership rules in newspaper and magazine publication is to ensure that the firms which carry on this business within Canada are Canadian-controlled and managed.

Many of you will have been familiar with the *Foreign Investment Review Act*³ in Canada during the years of the Trudeau government, a piece of legislation which was replaced in 1985 by the *Investment Ca-*

² Broadcasting Act, R.S.C. C.B-9 (1985). In relation to this and other Canadian measures involving the restriction on foreign investment the reader is directed to PETER R. HAYDEN, JEFFREY H. BURNS, SUSAN GOODEVE, *FOREIGN INVESTMENT IN CANADA*, (Prentice Hall Canada Inc., 3 vols. 1991). On broadcasting, see Vol. 2, para 60,301 *et seq.* On advertising restrictions, see Vol. 2, para 60,001 *et seq.* On the Investment Canada Act, R.S.C. c. 28 1st Supp. (1985), see Vol. 1, paras 6060 *et seq.*

³ Statutes of Canada, ch. 46 (1973-74).

*nada Act*⁴ which much reduced the power of the federal government agency to scrutinize the ownership and take-over of Canadian businesses in most sectors. One of the areas in which investment scrutiny is, however, alive, well, and strongly enforced, concerns Canada's cultural heritage or national identity including the following:

I. Publication, distribution or sale of books, magazines, periodicals, or newspapers in print or machine readable form,

II. production, distribution, sale or exhibition of film or video products,

III. production, distribution, sale or exhibition of audio or video music recordings, and

IV. publication, distribution or sale of music in print or machine readable form.⁵

I have said that the Canadian regulations do not purport to reach non-Canadian sources which are free to ship products into Canada, but in the case of magazines or periodicals that is not altogether true. Under the *Income Tax Act*,⁶ measures are in place to dissuade Canadian advertisers from placing advertising in "a non-Canadian newspaper or periodical" where the advertisement is directed primarily at a market in Canada. Expenses incurred by a Canadian advertiser to advertise in such a non-Canadian newspaper or periodical will be disallowed for the purposes of calculating the advertiser's income for tax purposes in Canada. Conversely, under these regulations, a Canadian newspaper or periodical would entitle the taxpayer to tax deduction, provided the publication meets three requirements; it must be: "(1) typeset in Canada, (2) edited in Canada by persons resident in Canada, and (3) published and printed in Canada."⁷ The tax measure, along with the ownership restrictions, have been effective to make certain that the daily press remains Canadian, both in ownership and in news judgment. The rules have also enabled a Canadian periodical press to continue; although faced as it is with extensive non-Canadian competition, it has continued to be a struggle.

III. CINEMA

One of the anomalies of the cross-border debate about Canadian cultural regulations is that the American industry which has the largest share of the Canadian market has been loudest and most strenuous in its opposition to Canadian cultural restrictions. The Hollywood film industry, through control of distribution and, of course, through its

⁴ Investment Canada Act, *supra* note 2.

⁵ Investment Canada Regulations, C. Gaz. pt. II, sched. IV, p. 3022, Oct. 7, 1985.

⁶ Income Tax Act, Statutes of Canada, ch. 63, § 19 (1970-71-72); Statutes of Canada, ch. 106, §1 (1974-75-76); Statutes of Canada, ch. 65, § 133 (1988).

⁷ HAYDEN, BURNS, GOODEN, *supra* note 2, at Vol. 2, paras 60,001 and 60,002.

highly competitive product, has gained the largest Canadian market share. Hollywood's representatives have been strenuous in trying to increase that percentage at every set of Canada-U.S. trade negotiations. While Canadians have been successful at beating off the barbarians at the gates, including at the most recent GATT negotiations, we have no doubt that the redoubtable Mr. Kantor, the U.S. Special Trade Representative, or "Mr. L.A. Law" as he is referred to in Canada, will be returning to the attack on behalf of his Los Angeles constituents.

Government intervention in the movie sector in Canada for the production of feature films has principally been by way of a publicly-owned company, the National Film Board, or through public subsidy, either directly through a public corporation called Telefilm Canada, or by tax incentives made available through the income tax system. Those measures have been successful in maintaining a certain place in the sun for Canadian productions, although Canadian cinema producers have not attained the same international success or recognition as have, for example, those of Australia. The fact of the matter is that, because of geographical proximity and similarity of accent, it is simply too attractive for talented Canadians, like Norman Jewison, Michael J. Fox and the late John Candy, to pursue successful careers in Hollywood rather than at home in Canada.

IV. BOOK PUBLICATION

The area of book publication has been a particularly sensitive one for Canadian policy. Historically, the book sector in Canada was dominated by foreign-owned companies, principally British firms, in earlier years, although American book publishers have always had an important role in the Canadian market. The area has been seen as particularly sensitive by Canadians who are concerned firstly about the production of school texts which should reflect Canadian experience and Canadian values rather than those of any other country, and secondly by the difficulties, real or perceived, of Canadian authors being able to publish and be recognized in their own country, never mind in the rest of the world. The Canadian policies which have been put in place over the past 30 years are seen as having been effective first, in making sure that the Canadian fact is recognized in educational materials and secondly, in enabling a whole generation of Canadian authors - like Robertson Davies, Margaret Atwood and Alice Munro - to achieve recognition and readership, both in Canada and in other countries.

In the sphere of book publishing, there is a *cause celebre* currently burning its way through the Canadian cultural community which indicates just how sensitive politically these questions of culture are. A small educational publisher, Ginn Publishing Canada, was acquired by Paramount Communications during the '80s. Pursuant to the book publishing ownership regulations administered by Investment Canada, Par-

amount was required to sell off 51 % ownership of Ginn. At that point, Article 1607.4 of the Canada-U.S. Free Trade Agreement came into play.⁸ When Paramount could not find a Canadian purchaser for the Ginn business, Paramount then invoked that provision of the FTA which requires the Government of Canada to purchase the enterprise at fair open market value. Through a wholly-owned government corporation, Canada Investment Development Corporation, the Government of Canada acquired the 51 % ownership in 1989.

It is alleged that the Mulroney Government in 1989 made a secret agreement with Paramount whereby Paramount would be entitled to buy back its interest if it entered into certain undertakings that would be of benefit to Canada. Exit the Mulroney Government in 1993 and enter the Liberal Government which took the position that it was under an obligation to carry out the undertakings of its predecessor to Paramount and allowed the sale, to the outspoken dismay of the Canadian cultural community. I made reference earlier to Mr. Kantor's Beverly Hills constituents and their ability to attract attention to their interests. They are met on the northern side of the border by an equally articulate and equally strenuous group of defenders of Canadian, and incidentally their own, interests in the cultural field.

Let me then turn to the international trade law governing the cultural industries and particularly the trade agreements between United States and Canada.

Firstly, let us turn back to GATT where we will find that, with the minor exception of cinematographic films, the GATT makes no reference to the products of cultural industries at all. Article IV of the GATT⁹ "Special Provisions relating to Cinematograph Films" re-

⁸ In the event that Canada requires the divestiture of a business enterprise located in Canada in a cultural industry pursuant to its review of an indirect acquisition of such business enterprise by an investor of the United States of America, Canada shall offer to purchase the business enterprise from the investor of the United States of America at fair open market value, as determined by an independent, impartial assessment.

⁹ If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

- (a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;
- (b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;
- (c) Notwithstanding the provisions of sub-paragraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of sub-paragraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; *Provided* that no such

strains, rather gently, screen quotas requiring the exhibition of cinematograph films of national origin during a specified minimum portion of the total screened time. Another article, Article XX(f) of the "General Exceptions" permits any contracting party to take measures "imposed for the protection of national treasures of artistic, historic or archaeological value". So far as I know, no one has ever attempted to justify the Canadian cultural exemption under that heading.

Another article which conceivably could bear on Canadian measures contemplated or taken to protect the cultural industries is Article III concerning National Treatment on Internal Taxation and Regulation. Article III.4 provides that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Reflecting on the quick review of the Canadian legislation that I have already given, I think it will be clear that in the main, the Canadian provisions do not offend Article III under the heading of failing to accord national treatment in sale or distribution.

What has been the experience under GATT of this question of restrictions in the cultural field? In 1961, the U.S. initiated GATT examination of restrictions on T.V. programming under Article IV.¹⁰ In a proposal to a Working Party established to consider the U.S. initiative, the U.S. recommended the following two preambular paragraphs as defining the principles in play on television program content. Firstly, the U.S. proposed that GATT:

Declare that it is the sense of the contracting parties that restrictions on international trade in television programmes should be limited to a minimum and that in the selection of television programmes broadcasting organizations should be allowed the greatest possible freedom of choice as between domestic and imported material.

But also acknowledged that:

Recognizing, however, that for reasons of public policy contracting parties may find it necessary to assure that television

minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;

- (d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

¹⁰ See Card, *supra* note 1, at 152-161.

programmes include a proportion of domestically-produced materials *inter alia to reflect the traditions and cultures of their countries.*" (Emphasis added)

At that time the United States was prepared to accept a balanced statement of principle with which the Canadian cultural regulators also should find it possible to live.

But two decades later the U.S. administration showed itself to be less tolerant of Canadian foreign-ownership provisions by launching a GATT application that produced a Panel report critical of the then existing Foreign Investment Review procedures.¹¹ The *Foreign Investment Review Act* was subsequently amended, and the thrust of the GATT panel's report was inserted into the provisions of the Canada-U.S. Trade Agreement. Canadian restrictions on broadcasting content remain, and are preserved by the cultural industries exemption.

The Canadian cultural industries exemption gained very high political prominence during the negotiation of the Canada-U.S. Free Trade Agreement but in the main, the Canadian regulations were left untouched. Article 2005.1 states baldly: "Cultural industries are exempt from the provisions of this agreement. . . ." It then sets out a number of exceptions (one of which has already been referred to in the *Ginn* case above) which along with exceptions concerning re-transmission rights, Article 2006, and print-in-Canada requirements, Article 2007, are the only limitations put on Canadian action. The definition of cultural industry under Article 2012 leaves ample scope for the continuation of the Canadian regulations; indeed, it echos the Canadian regulations:

"CULTURAL INDUSTRY means an enterprise engaged in any of the following activities:

- a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing,
- b) the production, distribution, sale or exhibition of film or video recordings,
- c) the production, distribution, sale or exhibition of audio or video music recordings,
- d) the publication, distribution, or sale of music in print or machine readable form, or
- e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services."

The North American Free Trade Agreement equally left the Ca-

¹¹ See Card, *supra* note 1, at 159 to 161.

nadian cultural industries exemption untouched. Annex 2106 - Cultural Industries, states as follows:

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 in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada - United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

The reference to Article 302 in the Annex is the reference to the general tariff elimination provision of the Free Trade Agreement. As noted already, tariffs have not been a part of Canadian cultural policy.

The cultural industries exemption was very much before the contracting parties negotiating at the Uruguay Round, but in this case, the principal protagonists were the European union, mainly on behalf of France, and the United States. Canada played a supporting role to the European community in those negotiations doing its best, to borrow a phrase from our national game, to keep its stick in Mr. Kantor's skates, and with some success. At the final siren, Mr. Kantor had to leave the ice without success but muttering threats of "wait until next time."

The relevant agreement negotiated under the Uruguay Round is the General Agreement on Trade in Services. Canada made no express commitments under that agreement to change its policy concerning the cultural industries. In effect, Canadian policies on the cultural industries continue to be exempted as they are under the FTA and NAFTA.

What can be said in conclusion then is that the Canadian restrictions which have been put in place over the last 30 years have been accepted in the framework of trade law between our two countries. To say they have been accepted in trade law is not to say they have been accepted by some elements of American industry. This will mean of course that in future international discussions, the issues may be raised again by American negotiators.

An abiding concern of the U.S. in trade negotiations has always been the national security exception, important to preserve freedom of American action as a super-power. The Mexican preoccupation has been about energy; because of the historical significance of the petroleum industry in Mexico, it is specially protected by the Constitution.

The Canadian concern has been to keep a place in the sun for Canadian cultural industries. What Canadians ask is that our trading partners reciprocate the courtesy of the restraint which we have shown them.

