

retroactive application. The grandfathering provision was adopted to ensure fairness to foreign publishers who have vested rights in the publication of split-run editions of their magazines in Canada. The exemption for existing split-run editions applies to publishers that distributed split-run editions in Canada before March 26, 1993. This is not an arbitrary choice made by the Government of Canada since it is the date on which the Task Force on the Canadian Magazine Industry was established.

24. The Panel also asked about the significance of the domination of the Canadian market by foreign magazines. The penetration of the Canadian market by foreign magazines is an undisputed fact.²⁰ Canada is neither controlling market access nor limiting the penetration of foreign magazines into the Canadian market. Respect for freedom of expression has always be very strong in Canada. Canadian readers enjoy their unrestricted access to imported magazines. At the same time, Canadian readers have demonstrated that they value magazines that address their distinct interests and perspectives. It is only access to the advertising services market that is being controlled, not access to the magazine market. Access to the advertising market is being controlled to ensure that magazines created for the Canadian market exist. The continued existence of such magazines is vital to ensure that Canadians have a choice that includes vehicles where ideas are expressed from a Canadian perspective. Notwithstanding the demand for such products, the size and nature of the market – not the least characteristic of which is the very real presence of the United States as an English-speaking neighbour and the very open border that Canada insists on maintaining – requires a Canadian magazine policy that favours conditions in the marketplace that promote the economic viability of Canadian magazines and that allow them to compete for readers with foreign publications.²¹

(b) The Excise Tax Act does not discriminate against imported products

25. The tax is in any event non-discriminatory in form and in fact – *de jure* and *de facto*. It is therefore consistent with Article III:2, first sentence, whose object and purpose, like that of Article III as a whole, is to prevent discrimination against imported products.

26. That the tax is free from any taint of overt discrimination is clear from the terms of the legislation, which make no distinction between domestic and imported products. It could hardly be suggested that the tax is discriminatory in its practical operation, since it was designed to prevent the production in Canada of split-runs. Even in the hypothesis of a removal of Code 9958, there is no reason to believe that imported split-runs would dominate the market. The economics of local production and distribution, combined with the ease and economy of digital transmission (shown by the existing practice of *TIME Canada*), point

²⁰ Foreign English-language magazines aimed at the general public dominate the Canadian market, accounting for half of the circulation of English-language magazines, both subscription and newsstand, and for over 80 per cent of newsstand sales. See Canada's First Submission, para. 22.

²¹ Paragraphs 23 and 24 address issues raised by the Panel in Questions 10 and 11.