CLOSE THE LOOPHOLE!

THE DEDUCTIBILITY OF FOREIGN INTERNET ADVERTISING

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with

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FRIENDS
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PRÉCIS

The thesis of this paper[1] is that advertising purchased on foreign **internet-delivered** media that act as, or akin to, broadcast and newspaper services[2] **should not continue to be deemed a deductible expense** under the Canadian *Income Tax Act (ITA)*.

Starting in the 1960s, government introduced a number of amendments to the *ITA* to eliminate or limit the deductibility of advertising expenses on foreign newspapers, periodicals and broadcasters, hence providing a material incentive for advertisers to choose Canadian alternatives. The purpose of these provisions of the *ITA* is socioeconomic - to protect Canadian media from unfair competition from foreign media, preserve Canadian jobs and voices, and keep Canadian media Canadian.

Today, the Canada Revenue Agency (CRA) allows full tax deductibility of advertising expenses on foreign internet-delivered media. This approach has not changed since 1996, and it is based on: (a) case law prior to that date (some of it from as early as 1935); and (b) definitions of "newspaper" and "broadcasting" that do not reflect a technologically neutral approach or developments in online media since 1996.

This paper takes the position that it is well past time to consider new developments and definitions, and work from a new interpretation reflecting current internet realities. Such realities include: (a) the fact that much if not most internet advertising by Canadians is on media that are, by reasonable modern definition, foreign broadcast and newspaper services or their modern equivalents; and, (b) the policy consequence of the direct and demonstrable negative impact this diversion of advertising revenue is having on Canadian owned and controlled broadcasters and print media.

A new interpretation need not necessarily require substantive amendment to the *ITA.*

The basic legal reasoning of the paper is:

1. The *ITA* states that *"no deduction shall be made for … an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking",* defined therein as *"a network operation or broadcasting transmitting undertaking located outside Canada"*.
2. The CRA's current interpretation of "broadcasting" is based on the *Interpretation Act*, which relying on a 1968 *Broadcasting Act* definition, narrowly limits broadcasting to "transmission, emission or reception … by means of electromagnetic waves … propagated in space without artificial guide".
3. The 2023 *Online Streaming Act*, amended the 1991 *Broadcasting Act,* and confirmed that:
    a. *Online undertakings* that deliver *programs* over the internet are engaged in "transmission" within the meaning of the *Broadcasting Act*, contrary to the CRA's current interpretation.
    b. *Online undertakings* include *foreign* online undertakings.

[1] Initial editions of this paper were released in 2017 and 2018. This edition incorporates updated economic data, and 2023 revisions to the *Broadcasting Act*. The authors acknowledge with appreciation the financial support of Friends of Canadian Media (formerly Friends of Canadian Broadcasting) in the Paper's preparation.
[2] Specific examples are discussed below.

c. Some services and online content is excluded – e.g. services whose content *"consists predominantly of alphanumeric text",* user generated programming on social media services, and video games[3] – but a significant portion of advertising carriers are online undertakings.

4. Therefore, by adopting the definition of broadcasting under the current *Broadcasting Act*, foreign online undertakings could be deemed "foreign broadcasting undertakings" for the purposes of the *ITA,* with the consequence that advertisements placed with foreign online undertakings directed primarily to a market in Canada would not be deductible expenses.

5. The *ITA* also establishes that advertising in foreign newspapers is not deductible. The CRA's reference definition of "newspaper" (it is not defined in the *ITA*) does not deal explicitly with the question of internet delivery.

6. Accordingly, the need for a new interpretation of the definition of newspaper and periodical is proposed here, reflecting the current reality that these media are increasingly delivered over the internet rather than through physical means. A new interpretation is justified and necessary because:

    a. the CRA's interpretation of "newspaper" under the *ITA* is also not based on definitions derived from legislation, but rather on Webster's Dictionary as it was in 1996.

    b. the CRA's interpretation also applies only to "web sites" as they existed in 1996, not to the current reality of media delivery.

    c. Most advertisers have already substituted placement on internet media for the physical forms, showing that they are functionally the same.

7. Alternatively, the *ITA* could be amended to eliminate or limit the deductibility of advertising expenses on all foreign internet media.

The basic policy reasoning of the paper is:

1. The original policy rationale behind the advertising tax deductibility provisions of the *ITA* remains equally as relevant, if not more relevant, with regard to internet media.

2. As was the case with border TV and radio stations and foreign newspapers targeting Canadians, foreign internet media operate in Canada with minimal investment in Canadian jobs, infrastructure, and Canadian content. Allowing tax deductibility for spending on foreign services results in unfair competition with Canadian equivalents and lost revenues and jobs, as well as losses of Canadian programming and news.

3. In the almost three decades since the CRA interpreted the *ITA* as permitting full tax deductibility for all internet advertising, internet advertising has risen from an inconsequential volume and percentage of overall Canadian advertising to more than $14.2 billion in 2022 – or over 70% of all Canadian advertising revenues. 92% of Canadian internet advertising accrues to foreign-owned internet sites and platforms, with almost 80% of revenues going to top U.S.-owned internet platforms, Google and Facebook.

4. When broadcast advertising deductibility rules were introduced in 1976 through Bill-C-58 (section 19.1 of the *ITA*), U.S. Border TV stations were estimated to be drawing $10 million annually from a total Canadian television advertising spend of then $100 million.

[3] See *Broadcasting Act S.C. 1991, c. 11,* section 2, and Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework), section 10.

5. If this 10% loss was considered a serious problem in 1976, todays over two-thirds loss should be considered a national media crisis.
6. The economic challenges currently facing Canadian broadcasters and newspapers, and the consequential cuts to local news coverage, in particular, suggest that Canadian local media is indeed in crisis.
7. There is a direct correlation between losses in Canadian media advertising revenue and gains in foreign-based internet media advertising revenue. Applying advertising tax deductibility restrictions in the *ITA* to foreign-based internet media would help reverse this trend.
8. In addition, there would be a net fiscal benefit in terms of increased tax revenues, to the extent that Canadian advertisers continued to advertise on foreign-based internet media, despite the lack of a tax deduction.

Depending on implementation approach, a re-interpretation or re-engineering of the advertising tax deductibility provisions of the *ITA* would result in as little as 15% or as much as 90% of current internet advertising expenditures being deemed fully or partially non-deductible.

A material percentage of these now non-deductible foreign internet advertising expenditures would shift back to Canadian media, representing an influx of hundreds of millions of dollars annually in incremental advertising revenue for a Canadian media sector that is under serious threat. Given the nature of the advertising marketplace, including the plethora of advertising and marketing options, any negative impact on Canadian advertisers would be minimal.

For federal and provincial governments, re-interpreting S.19 of the *ITA* as suggested could also bring demonstrable fiscal benefits.

Billions of dollars of advertising expenditures could be rendered non-tax deductible – representing significant potential gains in corporate tax payable. Monies would shift to various Canadian media without additional government measures. A massive policy problem (the loss of local media and news) could be resolved in a way that actually saved government money.

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THE POLICY RATIONALE

The purpose of the advertising deductibility provisions of the *ITA* are to protect Canadian media from unfair competition from foreign media, and thereby preserve Canadian jobs and voices.

They do this by limiting or eliminating the deductibility of advertising expenses on foreign newspapers, periodicals and broadcasters, hence providing a material incentive for advertisers to choose Canadian alternatives.

In the 1960s and 1970s, U.S. border TV and radio stations, as well as American newspapers and magazines, came to realize that they could lucratively target the Canadian market with zero to minimal incremental investment in content and infrastructure.

TV and radio stations in markets like Buffalo and Rochester, Bellingham and Burlington started to sell advertising in neighbouring major Canadian markets such as Toronto, Vancouver, and Montreal, undercutting Canadian stations, with no incremental investment other than the cost of sales. By the time broadcast advertising deductibility rules were introduced in 1976 through Bill-C-58 (section 19.1 of the *ITA*), U.S. Border TV stations were estimated to be drawing $10 million annually from a then total Canadian TV advertising spend of $100 million.[4]

Similar effects were suffered by print media, resulting in, among other things, Ottawa's efforts to shut down Time Magazine's "split run" – wherein the U.S. version of the magazine was reprinted and redistributed in Canada with Canadian advertisements.[5]

Note that none of these policy efforts were aimed at denying foreign media access to the Canadian market; they were merely aimed at addressing the unfair competition that arose from foreign media competing directly with Canadian media for advertising revenue, without the same investment in Canadian jobs and infrastructure, or its cultural and democratic value.

Essentially, the concept of 'dumping', historically applied in the case of goods sold in Canada for less than their true cost, found parallels in advertising on television and print intellectual property, where the incremental costs of providing content in Canada, and selling advertising on it directed to Canadians, was almost nil.

The advertising deductibility provisions were introduced as a focused measure to protect and advance Canada's economic, cultural and democratic interests.

In the absence of provisions to the contrary, it is typically assumed that legislation is intended to be technology-neutral.[6]

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[4] Value of Public Support for Broadcasters – Simultaneous Substitution and Tax-based Advertising Incentive, Nordicity, November 4, 2011. http://www.cbc.radio-canada.ca/_files/cbcrc/documents/latest-studies/nordicity-value-public-support-en.pdf

[5] See, for example, McCarthy Tétrault Analysis, at Appendix F: 'The purpose of section 19 was socioeconomic rather than fiscal in nature. Its original objectives were twofold: to place a curb on advertising by Canadian taxpayers in non-Canadian newspapers and periodicals aimed at Canadian markets via "split runs" (a practice which places Canadian publications at a competitive disadvantage) and to remove the likelihood of the control over newspapers and periodicals published in Canada falling into foreign hands (a situation considered prejudicial to Canada's national interests).'

[6] The so-called Supreme Court "copyright pentalogy" – five copyright judgments released concurrently by the Court in July 2012 – confirmed the importance accorded by the Court to the principle of technological neutrality. See for example, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231, where the court states at para 9:

> "SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to *both* a fee for reproducing the

In 1996, given the state of the internet at that time, the CRA determined that foreign web sites could not be considered foreign newspapers or broadcasters, and therefore allowed full tax deductibility of advertising expenses on such sites.

Unfortunately, while media has evolved, and the expert tribunal charged with regulating and supervising broadcasting in Canada, the CRTC, uses a modernized definition, the advertising deductibility provisions of the *ITA* have remained locked in a pre-internet era.

In the almost three decades since the CRA's interpretation, the internet has emerged as a direct and material competitor to traditional print and broadcasting media, as well as an aggregator and distributor of it.

Internet advertising has risen from an inconsequential volume and percentage of overall Canadian advertising to more than $14.2 billion in 2022 – or over 70% of all Canadian advertising revenues. By the end of 2024, Canadian internet advertising revenue is projected to have increased 18.8% to $17 billion annually. Double-digit percentage increases have been the norm for almost three decades.[7]

Meanwhile, as overall Canadian advertising spending tracks the economy at a relatively fixed ratio,[8] the growth of traditional media has stalled and collapsed. Print was the first traditional media segment to suffer, given that the first wave of the internet consisted primarily of alpha-numeric and static images, with advertising (search and classifieds) competing directly with newspapers. Newspaper advertising peaked in Canada at $2.66 billion in 2006 and has declined to under $950 million today.[9]

Television was the second traditional media segment to suffer, with private over-the-air television revenue declining from a peak of $2.14 billion in 2011 to $1.5 billion in 2022.[10] In aggregate, Canadian TV advertising revenue peaked at $3.55 billion in 2011 and declined to $3.35 billion in 2022.[11] These advertising revenue declines are now being accompanied by declines in subscription revenue as over-the-top television services like Netflix increase their penetration. These trends are reducing the capacity of the broadcasting system to support Canadian content.[12]

Radio was the final traditional media segment to see evidence of this impact. The CRTC reports a revenue decline of 32%, from a peak of $1.62 billion in 2013 to $1.1 billion in 2022.[13] Going forward, the growth of streaming audio, mobile advertising, smart phone usage and the connected car are expected to further increase downward pressure on radio advertising.

The decline of traditional media in favour of the internet should be of serious policy concern, as should the troubling economic reality that **92% of Canadian internet advertising accrues to foreign internet sites and platforms, with almost 80% of expenditures going to top U.S.-owned internet platforms Google and Facebook.[14]**

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work *and* a fee for communicating the work. The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the *method of delivery* of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies."

[7] Data from the 2022 Internet Advertising Bureau (Canada) (IAB) *Internet Ad Revenue* Survey. June 2023 (IAB Report). Online undertakings constitute leading growth areas: for example, video, which grew 44% in 2022, and audio, which grew by 28.6%.

[8] A ratio that has nevertheless declined over the last three decades. See, for example, *Progress Amid Digital Transformation*, Scotiabank Equity Research, November, 2013. p.18.

[9] IAB Canada Internet Advertising Reports 2012, 2016. thinkTV, *advertising revenue by media*.

[10] CRTC statistical summaries.

[11] IAB 2012 & 2017 Reports. thinkTV, *advertising revenue by media.*

[12] See for example, 2020 final report of the Broadcasting and Telecommunications Legislative Panel, *Canada's Communications Future: Time to Act*

[13] CRTC statistical summaries.

[14] IAB Canada reports that only 8% (~$1.2 billion) of total internet advertising revenue in Canada is attributable to domestic companies. IAB *Internet Ad Revenue* Survey. June 2023. Google and Meta having a combined share of 79% of Canadian internet advertising revenues. https://canadagazette.gc.ca/rp-pr/p1/2023/2023-09-02/html/reg1-eng.html

The reason is not a failure on the part of Canadian media to transition to the internet age, or to meet Canadians' needs. The reason, adapting the well-known trade term, is the 'dumping' of advertising inventory into the Canadian marketplace by foreign-based internet conglomerates, which do not contribute the same level of investment, jobs and Canadian content as Canadian media.[15]

This is exactly what the advertising deductibility provisions of the *ITA* were designed to address.

Failure to update these provisions to reflect current reality has already caused significant losses to the Canadian economy in Canadian economic value, reduced support for Canadian content, and most alarmingly, has reduced the capacity of Canada's news media to cover and report news to Canadians, particularly local news.

Moreover, it is now evident that other government initiatives are insufficient to address the crisis in Canadian media. In particular:

- Current active measures to support newspapers, including the Journalism Tax Credit, have failed to appreciably stem the decline in sector revenues, with closures and consolidation continuing[16];
- Financial support arising from Bill C-18, the *Online News Act*, while expected to flow by the end of 2024, has been capped at $100 million from Google (with Meta exiting the news sharing market), far lower than originally anticipated. Private broadcasters have been further capped at $30 million;[17] and
- Financial support arising from Bill C-11, the *Online Streaming Act*, while also expected to flow as early as Fall 2024, is uncertain and will primarily be directed to support Canadian programming, not specifically Canadian broadcasters. For Canadian broadcasters, a plausible outcome is a requirement on foreign online undertakings to contribute to broadcaster news or local news. Even if the requirement was 2% of revenues, however, that would only bring in on the order of $100 million annually.[18]

In the face of the over $13 billion of advertising revenue lost to foreign internet media, these initiatives, while valued by Canadian media, are too little and almost too late.

Continued failure to update the advertising deductibility provisions of the *ITA* is more than a lost economic opportunity. Should current trends continue, the lack of a modernized advertising tax deductibility regime will genuinely call into question the ability of Canadian owned-and-controlled media to provide local news coverage in smaller markets across Canada, and result in even more dramatic reductions in the diversity and quality of news available to Canadians. For an independent democracy to lack a vibrant independent news media ecosystem should be unthinkable. And while the CBC does play a role in providing news to Canadians, loss of diversity of Canadian news services and the notion that the public broadcaster could become the primary, and in some

[15] While some foreign internet companies make investments in Canada, the *level* of such investment pales in comparison to Canadian companies. For example, Google, which has R&D and YouTube facilities in Canada, reportedly employed on the order of 1500 Canadians in 2023 before recent layoffs. Google's Canadian internet advertising revenues are estimated at approximately $7b in 2021, roughly half of all Canadian internet advertising revenues. Meanwhile, despite revenues declining to a fifth of that amount, or $1.5 billion, Canadian conventional TV alone still employs three times as many Canadians (4,600 people). CRTC Statistical Summaries; https://www.theglobeandmail.com/business/article-google-parent-alphabet-begins-layoffs-in-canada/

[16] See, generally, https://localnewsresearchproject.ca/ and, for example, https://globalnews.ca/news/10181530/local-newspaper-closures-canada/

[17] Backgrounder: Final regulations for the *Online News Act*, December 15, 2023. https://www.canada.ca/en/canadian-heritage/services/online-news.html The Parliamentary Budget Officer originally estimated C-18 would generate $329 million. https://www.pbo-dpb.ca/en/publications/RP-2223-017-M--cost-estimate-bill-c-18-online-news-act--estimation-couts-lies-projet-loi-c-18-loi-nouvelles-ligne It is also worth noting that in appearing before the Standing Committee on Canadian Heritage on October 21, 2022, then Minister of Canadian heritage, Pablo Rodriguez stated that "The *Online News Act* won't be a magic bullet …" https://www.canada.ca/en/canadian-heritage/corporate/transparency/open-government/standing-committee/pablo-rodriguez-bill-c18/speaking-notes.html

[18] Author estimate based on the record of the CRTC proceeding, Broadcasting Notice of Consultation CRTC 2023-138.

markets, only Canadian news source, is not one most Canadians (including Parliamentarians) are likely to find acceptable.

THE INCOME TAX ACT

Appendix A of this paper contains the full text of Section 19.1 and 19.01 of the *ITA*. There are many detailed provisions, but the essential meaning of these sections is:

For newspapers, advertising expenses are deductible only if the advertisement is placed in:

- an issue that is edited and published in Canada,
- and typeset and printed in Canada or the United States,
- of a newspaper whose publication rights are owned by a Canadian citizen, or corporation that is effectively controlled by Canadians,

or it is placed in

- an issue that is published less than twice a year, with editorial content devoted to Canada.

For broadcasting, advertising expenses are not deductible if:

- the advertising is placed in a "broadcasting transmitting undertaking" or network (two or more undertakings whose content is controlled by a network operator) located outside Canada, and
- the advertisement is directed primarily to a market in Canada.

The questions raised by these provisions are, within the meaning of the *ITA*: (a) should broadcasting still be deemed broadcasting when it is transmitted over the internet; and (b) is a newspaper or a periodical still a newspaper or periodical when it is delivered over the internet?

Several subsidiary questions need to be raised to determine the deductibility of an expense, for example, whether "located outside Canada" should be simply defined as foreign owned, but the primary question is one of definition of these changing media.

INTERPRETATION OF THE INCOME TAX ACT

Sections 19.1 and 19.01 of the *ITA*, governing broadcasting and newspapers respectively, date back to the 1960s and 1970s. As recently as 2001, when the *ITA* was amended to include Section 19.01(1) (on periodicals), internet advertising was not significant, and the issue of adapting definitions to reflect the internet was not discussed – only traditional media were part of the discussion at that time. It is therefore understandable that the *ITA* does not contain clarifying definitions explicitly including or excluding internet activities.

Two significant documents bear on the question of definitions. The first is a letter issued by the Income Tax Rulings and Interpretation Directorate on October 24, 1996 (First CRA Ruling, full text in Appendix B). The second, a technical interpretation issued May 25, 2017 (Second CRA Ruling, full text in Appendix C). Neither is an official advance ruling, but each provides *"general comments"* in response to a taxpayer request for clarification.

The issue in the First CRA Ruling was: *"Whether section 19 or 19.1 of the ITA applies to deny a deduction for expenses incurred by a Canadian taxpayer to advertise on a foreign owned World Wide Web site on the internet."*

The letter stated that Sections 19 and 19.1 did not apply, because *"A web site is not a newspaper, a periodical or broadcasting undertaking."*

Within the context of the time – almost 30 years ago – this interpretation made sense. A typical "web site" in 1996 did not perform the functions of print media or broadcasting. In 1996, web site generally contained content made up only of text and still images formatted with the HTML presentation language. Consumer internet speeds did not permit the reliable transmission of video and audio to most users; the widespread use of high-speed broadband internet connections came some years later. Moreover, the only effective means for using internet content was the personal computer. Mobile smartphones and tablets, which accelerated the popularity of online periodicals and newspapers, did not yet exist.

Therefore, while the interpretation is appropriate for 1996 technology, it does not apply to media today. Even the term "web site" is outmoded. It does not reflect current practice, in which content is distributed over the internet using a variety of technologies and program languages that permit extensive use of video and audio, and to a wide variety of devices. While a 1996 web site could not provide broadcasting, newspapers and periodicals, internet media have now done so for well over a decade. A new interpretation of the *ITA* that acknowledges this reality is long overdue.

The 1996 interpretation acknowledges that "newspaper" is not defined in the *ITA*. It therefore draws a definition from a then-current edition of Webster's Dictionary and from a court case decision written in 1935. These definitions were appropriate in their time but clearly could not reflect the reality of, for example, the online delivery of the Wall Street Journal, the New York Times, or the Toronto Star eight decades later. These current delivery mechanisms are unquestionably newspapers, and are branded as such – they are digital 'electronic editions', with the same name as their physical equivalents. They contain the same content as the physical editions, adapted to delivery over the internet and enhanced with audio, video, and applications, such as puzzles, that provide user assistance and the opportunity for comment. An interpretation that encompasses these changes is required.

The 1996 interpretation comments noted that their definition of broadcasting was based on "*diverse definitions of words used in paragraphs 19.1(1) and (4) of the Act."* This was appropriate, since no other source was readily available in 1996. As early as 1999, however, the CRTC provided a definition of broadcasting transmitted over the internet in its New Media Exemption Order.[19] Since the CRTC is the body charged with interpreting the meaning of 'broadcasting' in Canadian law, its definitions might have sensibly been used to interpret the *ITA.*[20]

Unfortunately, that has not been the case.

The Second CRA Ruling, issued in response to a Friends of Canadian Broadcasting request that the CRA revisit the First CRA Ruling, provided a different reason why section 19.1 did not apply to advertising on foreign internet broadcasters. Citing the definition of broadcasting in the *Interpretation Act*, the CRA noted that:

> The *Interpretation Act* defines "broadcasting" as any radiocommunication in which the transmissions are intended for direct reception by the general public. The *Interpretation Act* also defines "radiocommunication" as any transmission, emission or reception of signs, signals, writing, images,

[19] Called, at the time, the New Media Exemption Order but now known as the Exemption Order for digital media broadcasting undertakings or DMEO. See Broadcasting Order CRTC 2012-409 repealed per Broadcasting Order CRTC 2023-332.

[20] A limited number of other Canadian statutes (e.g. the federal *Copyright Act* or the Ontario *Libel and Slander Act)* contain definitions of broadcasting that parallel the *Broadcasting Act* or expand on it to suit their purposes, but it is reasonable to conclude that the legislation that governs broadcasting should provide the ruling definition.

> sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3000 GHz propagated in space without artificial guide.

This therefore confirms the First CRA Ruling that "a web site was not a broadcast by a "foreign broadcasting undertaking" and therefore not subject to the limitation in section 19.1".

Of note, this definition of "broadcasting" in the *Interpretation Act* has not changed since the current version of the Act was enacted in 1985.

Nevertheless, as a question of statutory interpretation, the CRA is all too correct. In the absence of definitions to the contrary, the *Interpretation Act* prevails as the legally appropriate definition of *"broadcasting"* as it pertains to the ITA.[21]

DEFINITION OF "BROADCASTING"

The lack of a specific definition of 'broadcasting' in the *ITA* is not itself particularly notable, given that there is other legislation that the *ITA* can rely on.

What is remarkable is that the default definition of 'broadcasting' relied on by the CRA (as found in the *Interpretation Act (1985)*) mirrors the language of the *Broadcasting Act (1968)*, rather than the modern, technologically neutral language of the *Broadcasting Act (1991)* now updated courtesy of the *Online Streaming Act (2023).*[22]

Whether the *Interpretation Act* was intentionally stranded with a narrow and limited 1968 definition of 'broadcasting' when the *Broadcasting Act* (1991) was updated to provide a detailed and technologically neutral definition is unclear.[23]

Nevertheless, it does seem strange that the legislation intended to govern the Canadian broadcasting system and the body – the Canadian Radio-Television and Telecommunications Commission (CRTC), whose role includes interpretation of that Act – plays no legal role in how the CRA defines broadcasting.

This is even more so when we examine how the CRTC's application of the definition of 'broadcasting' has evolved *in the public interest*, while the CRA's has remained stagnant.

Three years after the 1996 comments cited above, the CRTC dealt with the question of broadcasting over the internet, and issued a decision in Broadcasting Public Notice CRTC 1999-84 (or DMEO – text of the relevant section in Appendix D) in which the Commission determined that broadcasting over the internet was indeed broadcasting, since the internet represented simply another form of telecommunication:

> 'The Commission notes that the definition of "broadcasting" includes the transmission of programs, whether or not encrypted, by other means of telecommunication. This definition is, and was intended to be, technologically neutral. Accordingly, the mere fact that a program is delivered by means of the

[21] As an Act of general application, the Interpretation Act applies to every other federal enactment, "unless a contrary intention appears". Section 3(1).

[22] There are very slight differences in language as between the definition of 'broadcasting' in the *Interpretation Act (1985)* and the *Broadcasting Act (1968)*. The *Broadcasting Act, 1*968, defined radiocommunication as "any transmission, [excluding the word "emission"] reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide."

[23] As a matter of legislative presumption, for the definition of 'broadcasting' in the *Broadcasting Act (1991)* to have replaced that in the Interpretation Act (1985), there would have to have been a clear direction in the Cabinet Record of Decision, and a consequential amendment. That that didn't happen is evident. It is the why that is puzzling.

internet, rather than by means of the airwaves or by a cable company does not exclude it from the definition of "broadcasting".'

The CRTC's 'technology-neutral' approach was based directly on the *Broadcasting Act (1991)* and is both a principle of sound regulation and a basic principle of statutory interpretation. There is no policy basis for the CRA to interpret its own legislation differently.[24]

Moreover, with the passage of the 2023 *Online Streaming Act*, Parliament effectively confirmed the CRTC's approach. Online undertakings, including foreign online undertakings, have been specifically included within the ambit of the *Broadcasting Act*. In particular:

1. *Online undertakings* that deliver *programs* over the internet are engaged in "transmission" within the meaning of the *Broadcasting Act*, contrary to the CRA's current interpretation.
2. Some services and online content are excluded – e.g. services whose content *"consists predominantly of alphanumeric text",* user generated programming on social media services, and video games[25] – but most of the significant advertising carriers are online undertakings.

DETERMINATION OF "FOREIGN"

The *ITA* defines "foreign broadcasting undertaking" as a network operation or a broadcasting transmitting undertaking located outside Canada. The term "located outside Canada" is not defined and therefore must be defined based on broader current and historic context.

When broadcasting solely involved over the air transmission, the location of the transmitter along with the majority of originating broadcasting operations easily defined the location of the undertaking. The fact that a foreign broadcasting undertaking might have had some physical presence in Canada, such as a sales team or even journalists, did not change this determination. The absence of an actual transmitter would not change this determination either, if the CRA accepted the Commission's conclusion that that "the delivery of data signals from an origination point (e.g. a host server) to a reception point (e.g. an end-user's apparatus) by means of the internet involves the "transmission" of the content" and thus constitutes broadcasting.[26]

The test for "located outside of Canada" under the *ITA*, might, therefore, appropriately start with the location of the originating servers. In 2009, the Federal Court of Appeal dealt with a reference from the CRTC on whether ISPs were engaged in broadcasting. In its decision, the Court quoted Paragraph 95 of the Supreme Court's CAIP decision, which contained a conclusion on location:

> *95. Having properly instructed itself on the law, the [Copyright] Board found as a fact that the "conduit" begins with the host server. No reason has been shown in this application for judicial review to set aside that conclusion.*[27]

In other words, while a transmission on the internet can take many routes from origination to user, including temporary storage in a Content Delivery Network, the transmission begins with the first server in the content chain

[24] See note 5, supra.
[25] See *Broadcasting Act S.C. 1991, c. 11,* section 2, and Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework), section 10.
[26] DMEO, cited above.
[27] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 ("*SOCAN v. CAIP*")

– if that is outside Canada, then so is the broadcasting transmitting undertaking. When the origination point of the transmission is outside Canada, though it may be cached on facilities and have advertisements inserted inside Canada, it does not originate here. As before with over the air broadcasting, the mere presence of some physical facilities or infrastructure in Canada does not make an internet broadcaster Canadian. However, in cases of some doubt, a multi-layered test, that also factors in ownership and control, where corporate headquarters are located, and where the majority of employees work, could help ensure "located in Canada" is given an ordinary and appropriate meaning.

Alternatively, the *ITA* could be amended to make ownership the sole factor in determining whether an online undertaking is deemed to be foreign, as is the case under the *Broadcasting Act.*[28]

TARGETED TO A CANADIAN MARKET

This is a subject on which there is already case law, which need not be different because the transmission takes place over the internet.

As a practical matter, the way advertising on the internet is now sold – the micro-targeting of specific geographies, and (not demographics, but) specific interest profiles – allows Canadian advertisers on both foreign and domestic media to target Canadians with immense precision. By definition, Canadian advertisers advertising on such foreign media are targeting Canadians.

Of course, there are many forms of advertising on the internet that target specific groups of consumers based on their internet activity, with or without the consumers' knowledge. One can imagine that the argument will be made that these are not directed to a Canadian market, because people may receive them anywhere in the world. And as a matter of fact, it would be possible – though probably impractical – without the co-operation of all parties to the transmission, to determine the location of those who received the advertisements.

However, the situation is no different from that of a business buying an ad in one television market, knowing that the ad will 'spill' into another market via on the station's cable and DTH carriage. In such cases, it is fair to say that the ad is also directed at the second market if people in that market can avail themselves of the service being advertised, because of the Canadian advertiser's ability to serve that market, whether through physical or e-commerce means.

Appendix E contains text of an analysis by McCarthy-Tétrault of a court decision on this general question. It is useful in that it establishes that "directed to the Canadian market" is not dependent on the use of technology that ensures the ad can only be seen by Canadians, or even content in the ad identifying the product or the service as Canadian. Instead, it can be based on some part of the content of the ad or the service itself that makes it more useful to Canadian customers – in this case a Canadian telephone number.

DEFINITION OF NEWSPAPER AND PERIODICAL

The issue here is whether the applicable definitions restrict the terms "newspaper" and "periodical" to physical media, and exclude internet-delivered media.

[28] Section 3(1)(a) of the Broadcasting Act states that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians, and it is recognized that it includes foreign broadcasting undertakings that provide programming to Canadians". Specific rules on Canadian ownership are set out in the Direction to the CRTC (Ineligibility of Non-Canadians) P.C. 1997-486, 1997-04-08.

"Newspaper" is not defined in the *ITA*. The *ITA* refers to the *Foreign Publishers Services Act* for the definition of "periodical". It is defined there in Section 2:

> ***periodical*** *means a printed publication that appears in consecutively numbered or dated issues, published under a common title, usually at regular intervals, not more than once every week, excluding special issues, and at least twice every year. It does not include a catalogue, a directory, a newsletter or a newspaper. (périodique)*[29]

The only restrictive element of this definition is the word "printed", which is not itself defined. We might make the argument that the term does not necessarily imply the use of paper or other physical media, since many dictionary definitions do not include that element. For example, Merriam-Webster provides this (somewhat circular) definition of "printing":

> *the process of producing books, magazines, etc. by using machinery*

but the Cambridge Dictionary, like some other apparently older definitions, makes reference to physical product:

> *the activity or business of producing writing or images on paper or other material with a machine:*

On one level, the distinction between physical and digital media is beside the point. The "New York Times" is clearly a newspaper. It has a physical edition and an electronic edition. Both are branded the same, both are produced from the same content created by the same journalists, though formatted differently and in some cases enhanced by video – which is not in the physical edition. Its online edition is simply called "The New York Times". The periodical, the "New Yorker" also has identical names for online and physical editions.

At minimum, therefore, technological neutrality should require that a periodical or newspaper that is in both physical and digital form should be deemed a "printed publication" in either or both formats.

Beyond this, however, some aspects of the existing definitions become more difficult in the absence of a physical product. Under s. 19(1) and (5) of the *ITA*, the determination of what is "foreign" activity depends to some degree on the location of the activities that produce the physical editions, e.g. typesetting activity and printing on paper. Digital electronic equivalents of these functions exist: physical typesetting is replaced by digital typesetting (or formatting), which requires human design decisions which take place in a physical location.[30]

While some of these latter algorithm-based "digital typesetting" activities might arguably occur in Canada on content delivered to Canadians, if the initial or primary human design decisions for aggregating content within a publication occurred in a foreign jurisdiction, then the publication might reasonably be considered foreign.

What is clearly needed is an interpretive practice that, as in the past, relies on contemporary common-sense definitions derived from sources outside the *ITA*. It should not be necessary to rewrite the definitions, since those parts that are relevant to digital media should be deemed technologically neutral. The existing definitions of Canadian newspapers and periodicals can be interpreted for digital media by reframing those elements that, to date, have been deemed applicable only to physical media and considering:

- The requirements for 80% original (i.e. Canadian) content;
- Canadian ownership as detailed in the *ITA* (see Appendix A); and

[29] http://laws-lois.justice.gc.ca/eng/acts/f-29.6/FullText.html
[30] One could also reasonably argue that these latter digital activities are not even "typesetting" within the analogous meaning to that of analogue typesetting.

- Editorial control by Canadians.

DEFINITION OF BROADCASTING: WHERE TO AMEND

It is clear that the definition of broadcasting used in the *ITA* needs to be amended to reflect current reality.

Even if the CRA might be prepared to adopt modern definitions of "newspaper" and "periodical" without amendment to the *ITA*, its 2017 pronouncement on "broadcasting" eliminated any ambiguity that "the CRA is not able to apply the rules in section 19.1 to advertising on foreign internet web sites without an amendment to the law".[31]

How best to do this?

The *ITA* is only one of many pieces of legislation in Canada that use the term "broadcasting". A search of the Justice Canada Laws web site reveals 209 Acts of Parliament that use the term "broadcast" or "broadcasting". In a number of these, there could be concern that legislation does not achieve its intended aims, as while Canada's view of broadcasting has evolved starting in 1991, its legal definition in the Act in question may not have – as is the case for the *ITA.*

In several Acts, the concern has been resolved by amendments that changed the definition of "broadcasting", either by making reference to the *Broadcasting Act*, or by introducing new language to resolve any issues. In many others, no adjustment has been made. This is not material where the use of the term "broadcasting" is incidental, but in some cases there is risk that the outmoded definition could affect the scope or functioning of the Act.

There are three options available to ensure that the *ITA* achieves its intended goals and avoids the unintended consequences of the *Interpretation Act's* narrow definition of broadcasting:

1. Amend the *Interpretation Act* so that a single consistent definition of "broadcasting" applies across the Canadian legislative landscape, consistent with the *Broadcasting Act;*
2. Amend the *ITA* to refer to the definitions in the *Broadcasting Act; or*
3. Amend the *ITA* to add general language that covers the real-world activities of current broadcasting and newspaper operations, as in the *Investment Canada Act.*

The *ITA* could also be amended to simply eliminate or limit the deductibility of advertising expenses on all foreign internet media. This would recognize that all internet media, including social media and search, have become substitutes for Canadian media in terms of advertising and, to at least some extent, use.

The following will first examine definitional approaches.

THE INTERPRETATION ACT

The *Interpretation Act's* definition of "broadcasting" stems from the *Broadcasting Act* of 1968, which states:

> *Broadcasting means any radiocommunication in which transmissions are intended for direct reception by the general public.*

[31] Second CRA Ruling, Appendix C.

Radiocommunication means any transmission, emission or reception of signs, signals, writing, sounds or intelligence of any nature by mans of electromagnetic waves of frequencies lower than 3000 Gigacycles per second, propagated in space without artificial guide.

This definition of "radiocommunication" is still used by the International Telecommunications Union and remains serviceable. The problem arises from insisting that "broadcasting" must be radiocommunication – an approach that was abandoned by the *Broadcasting Act of 1991,* which adopted a technology-neutral wording in order to remain adaptable to exactly the kind of technological change that has occurred.

It is not clear why the *Broadcasting Act of 1968* employed this narrow definition of broadcasting: it may have been an attempt to protect free public access to broadcast content by excluding cable television from the definition. However, public policy and regulation in Canada quickly moved to include cable and satellite within the purview of broadcasting. The 1968 definition became outdated quite rapidly and was ultimately replaced in 1991 by a definition which could also include fibre transmission and transmission over the internet.[32]

Those Acts which still rely on the *Interpretation Act* may be affected by the use of an outdated definition, as is the case with the *ITA.*

DEFINITIONS THAT RELY ON THE BROADCASTING ACT

These are Acts of Parliament which are materially concerned with broadcasting, and in some of these, Parliament moved to modernize definitions consistent with the *Broadcasting Act 1991*. One strategy was to insert language in each Act that referred explicitly to the *Broadcasting Act*. These include the:

- *Copyright Act*
    - Defines "broadcasting undertaking", "programming undertaking", "distribution undertaking" and "new media retransmitter" by reference to the *Broadcasting Act*.
- *Canada Elections Act*
    - defines "broadcaster", "broadcasting", and "distribution undertaking" in this way.
- *Referendum Act*
    - defines "distribution undertaking", and the role of the CRTC in determining obligations under the *Broadcasting Act*.
- *Telecommunications Act*
    - defines "broadcasting undertaking", "the carrier of programs" and "unjust discrimination" by references to the *Broadcasting Act*.
- *Canadian Radio-television and Telecommunications Commission Act*
    - "The objects and powers of the Commission in relation to broadcasting are as set out in the *Broadcasting Act*"
- *Radiocommunication Act*

[32] An additional restriction arises from the term "without artificial guide". This term excludes transmission over a wire, but it may also exclude microwave and satellite transmission, since these use technologies to focus signals into a narrow beam. i.e. they use "artificial guides". Even over-the-air transmissions which are shaped to cover a desired market or avoid interference could be excluded. And yet that cannot be the intention of the Income Tax Act, since that would exclude the very services that were intended to be captured, i.e. American services broadcasting over the border into Canada by satellite and cable, and whose over-the-air transmissions were frequently shaped for that very purpose.

- "broadcasting undertaking", "distribution undertaking", "network" and "programming undertaking" are defined by reference to the *Broadcasting Act*.

It is interesting that this last Act, centrally concerned with radiocommunication, does not use the old definition that insisted that "broadcasting" must be a form of radiocommunication, but updated its terms to reflect the *Broadcasting Act.*

Any of the above examples might provide guidance for an amendment to the *ITA* or the *Interpretation Act.*

NEW DEFINITIONS OF BROADCASTING

For some other legislation, the strategy to avoid the narrowness of the *Interpretation Act* was to add language to the narrow definitions and therefore extend the force of the relevant Act.

- *Criminal Code*

Section **672.501** protects the identities of various accused persons by specifying that information that might identify them *"shall not be published in any document or broadcast or transmitted in any way."*

The use of "broadcast" instead of "broadcasting" may render the *Interpretation Act* inapplicable directly, but in any case, the *Code* solves any problem by adding the broad general term, "or transmitted in any way" that make the definition of "broadcast" essentially irrelevant i.e. the provision would have the same force if the term "broadcast" was omitted.

- *Investment Canada Act - R.S.C., 1985, c. 28 (1st Supp.) (Section 14.1)*

This Act resolves any problem by adding to its definitions all the elements that the *Interpretation Act* does not cover, but which this Act is intended to cover.

> *(6) In this section and section 14.2,*
>
> ***cultural business** means a Canadian business that carries on any of the following activities, namely,*
> *(a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers,*
> *(e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services;*

By adding terms like video, audio and machine-readable text, this Act ensures that it covers internet distributed forms as well.

APPLICATION & IMPLEMENTATION

Applying the advertising tax deductibility provisions of the *ITA* to foreign internet-based media would be a non-trivial exercise.

With billions of dollars at stake, and the possibility of litigation and threats of trade retaliation, the temptation to side with the "certainty" of the *status quo* (the CRA and Revenue Canada's *de facto* position) remains high.

Nevertheless, advancing the Canadian public interest in a strong Canadian media sector should be the greater imperative.

Whichever route was adopted, determinations on the applicability and/or extent of applicability of the advertising deductibility provisions to different types of internet media would be required. We do not, however, believe that the latter would be unduly onerous or difficult. Specific examples of determining deductibility for some of the major internet media are provided further below.

TRADE ISSUES

Notwithstanding the fact that advertising tax deductibility is strictly a matter of domestic tax policy, it is safe to assume that a new interpretation of the advertising tax deductibility provisions of the *ITA* could raise trade objections.[33]

The U.S. advances its economic interests aggressively, and the potential that billions of dollars accruing to U.S. internet conglomerates may be at risk could attract immediate attention and reaction at the highest levels. The possibility that Canada's moves could set a precedent for other nations would not be lost in this equation.

We have gone down this road before.

The inclusion of the 'cultural exemption' in the FTA, and subsequently NAFTA and the Canada-U.S.-Mexico Agreement (CUSMA), was hard fought and yet does not offer full protection to Canada.[34]

The ultimate negotiated compromise on split-run magazines may be a more direct analogy to the current situation. In that trade dispute, Canada held firm and achieved a compromise that stands today[35].

The authors acknowledge that some kind of compromise might ultimately be sought in this situation. Such a compromise may be driven by Canadian interests as well as U.S. – for example, Canadian advertisers may argue that there is no real Canadian equivalent to the reach and rating points achievable on U.S. internet media.

However, our view is that while such considerations may ultimately temper, they should not preclude serious consideration of the need for new or re-interpreted advertising tax deductibility provisions, and their adoption.

This is based both on the economic, cultural and democratic importance of the issue to Canada, and because we believe that the advertising tax deductibility provisions of the *ITA* have always been, and would remain under a new interpretation, consistent with Canada's obligations under CUSMA and other international trade agreements.

As taxation is generally carved out of both CUSMA and GATS, and this is clearly a tax matter, the cultural industries exemption should not come into play.[36]

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[33] The current provisions, as they relate to traditional newspapers and broadcasters have been an irritant since their introduction. They have been raised by the National Association of Broadcasters as a "discriminatory" Canadian tax law in the current NAFTA negotiations. http://www.insideradio.com/free/nab-wants-new-nafta-deal-to-shift-ties-to-mexico/article_10f0dd6c-5bc5-11e7-b419-2f58b6bfcad5.html

[34] This is because, if invoked, it permits retaliation of equivalent commercial effect.

[35] Bill C-55, which was amended to allow foreign publishers limited access to the Canadian market, provided they establish a majority of Canadian content and new periodicals businesses in Canada. See http://www.lop.parl.gc.ca/content/lop/researchpublications/prb9925-e.htm

[36] The taxation carve out in CUSMA does not, however, apply to non-discriminatory treatment of digital products. See Article 32.3: Taxation Measures. It is not clear whether these provisions would apply to internet advertising, and the Authors offer no opinion on the matter. The fact that the enactment of the advertising tax deductibility provisions of the ITA preceded the coming into force of NAFTA (January 1, 1994) also comes into play. While detailed analysis of Trade Law implications is beyond the scope of this paper, it is also worth noting that tax measures favouring Canadian cultural industries, such as tax credits for film and television production, have withstood trade scrutiny.

Moreover, to re-interpret/amend the *ITA* would be no more discriminatory than the existing enforced rule, that has stood up, and moreover been sanctioned in an explicit U.S.-Canada agreement. After all, the rule does not specifically apply to U.S. media interests, it applies only to the tax treatment of expenses incurred by Canadian companies in acquiring advertising inventory from such U.S. interests.

This does not mean that if the CRA or the Department of Finance were to move to update the advertising tax deductibility provisions of the *ITA* as suggested in this paper, there would not be trade concerns. It does, however, mean that Canada would be able to respond from a firm legal position.

DEDUCTIBILITY OF SPECIFIC SITES AND SERVICES

This paper does not argue that all foreign internet-delivered advertising expenses should necessarily be non-deductible. The benefits of a single blanket rule of non-deductibility on foreign internet-delivered advertising are evident, and the government should consider amendments to legislation to bring this about.

Assuming the chosen approach was to modernize current definitions, however, deductibility would be decided on a case-by-case basis, depending on the content of the site or service that presents the advertising.

This section of the paper looks at how these cases might play out with advertising on popular sites. We estimate that a minimum of $2 billion or roughly 15% of internet advertising could reasonably be considered to be on broadcasting, a newspaper or a periodical, as newly defined.[37]

It is significant that the form of advertising is not important; the only consideration is whether it is provided alongside content that constitutes broadcasting, a newspaper or a periodical. Of course, in current practice, much internet advertising is a mix of media, and those ads that appear as simple text often link to other media.

- Section 19.1 of the *ITA* uses the language, "for advertising space in an issue of a newspaper", and does not limit non-deductibility based on what goes into that space. The wording in Section 19.1(1) is, "for an advertisement … broadcast by a foreign broadcasting undertaking". All that matters is that it is an advertisement, and that it is transmitted by a service that is a foreign broadcasting undertaking. The form of the advertisement itself is not a consideration.

- Another general question is whether the ads are targeted to a Canadian market. With all of these services, algorithms that track users' internet behaviour can ensure that ads by local retailers in Canada are targeted to their domestic market.

FACEBOOK

Facebook is the second-largest internet ad revenue generator in the U.S., after Google, and is the venue for many advertisements directed at Canadians.

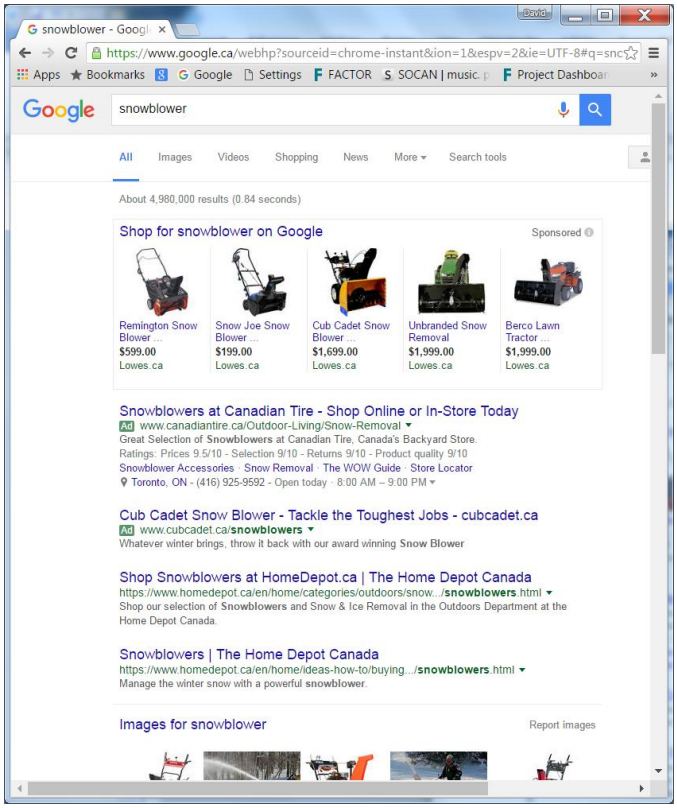
[37] According IAB Canada, in 2022 video represented $1.75 billion of internet advertising and audio $0.2 billion, the vast majority of which would be foreign. The lower bound $2 billion estimate assumes these would be the only categories rendered non-deductible.

Ads appear throughout the site's various pages and are a mix of static images placed to one side of the screen and dynamic ads that are inserted into the user's news feed, where most users spend the largest proportion of their Facebook time.

The news feed is a mix of text and images, and the images are a mix of video and static, non-alphanumeric pictures, with an occasional alphanumeric image. But for subsections 2(2.1) & (2.2) of the *Broadcasting Act*, Facebook could reasonably be considered an online undertaking.

GOOGLE SEARCH

Google Search is also a major generator of ad revenue. It is a difficult case to analyze, as can be seen by the sample screenshot to the right.



In this example, a search for "snowblower" on the "All" setting, has resulted in a returned screen that contains:

1. Five images with accompanying text, all of them from a ".ca" address.
2. Four paragraphs of text, two from advertisements tagged as "paid", two from retailers (all Canadian)
3. Five more images of snowblowers, these without text.[38]

When the same search is done under the setting, "Images", the entire screen is images but the advertising is less apparent – though there are branded retailers across the top of the screen.

Using the settings for "Videos" or "Shopping" the screen gives roughly equal prominence to images and text, though one might argue that the user's interest, in this case, is primarily in the information contained in the text.

Given the CRA's definitional approach, Google Search is not a periodical, since it does not produce regular issues. Some informational aspects are akin to a newspaper.

Could it be broadcasting?

According to the *Broadcasting Act*, it is broadcasting if the content transmitted fits the definition of "program", i.e. *"sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text."*

[38] This example is unchanged from 2018. A search today would have higher prices and more images.

The page shown above apparently contains both program and non-program content. The non-alphanumeric images are programs, and those images that are predominantly alphanumeric text are not. The *ITA* establishes that ads are non-deductible when carried by a foreign broadcaster – but what is Google Search? According to the *Broadcasting Act*, it is a broadcaster when it transmits programs, and some part – but not all – of each page it transmits is programming. So, can Google Search be both – a broadcaster and a non-broadcaster – simultaneously with the same page of content?

We note that a typical licensed broadcasting undertaking such as a television station may spend some part of its time transmitting images that are alphanumeric – e.g. a weather prediction, or a 'Jeopardy' question slide – but the undertaking does not cease to be a broadcaster for that time and purpose. Only services that are exclusively alphanumeric, like the service "Text-TV" (now defunct) have been permitted to operate without a broadcast licence or authorization.

In addition, the CRTC determined over the course of a number of decisions in the late 1990s and early 2000s (as to whether certain services should be deemed alpha-numeric) that the term 'predominantly', "has no special legal definition and is used in its ordinary sense, i.e. that which is more influential or more powerful." In examining program guide channels, which combined video and text in a fixed format, it decided that even where an image occupies only one-quarter of the screen, if it is "the focus of attention," it is a "program."[39]

In that case, of course, the "image" the CRTC was examining was a TV screen in a fixed format. Services on the internet, however, provide a stream of content in an ever-changing format. Images are often combined with text or alternated with text. It is therefore worth noting that the predominance test for "program" in the *Broadcasting Act* does not apply to a service as a whole but rather, in the case of screen based content, to the visual images that the service provides. A literal interpretation of the *Broadcasting Act* would therefore determine that a service is broadcasting if it transmits any "programs" within the stream; a less demanding interpretation would use the CRTC's test that a service is broadcasting if the images are the "focus of attention".

Thus, absent the *Interpretation Act*, it would appear that the CRA would have the discretion to deem Google Search an online undertaking in its entirety because at least some of its search pages are legally "programs". Therefore, the ads on those pages are broadcast by a foreign broadcasting undertaking, and their costs are non-deductible.

Alternatively, in the absence of detailed analysis of Google Search usage patterns, we are left with at least two indices that suggest that the CRA should exercise its discretion to deem Google Search to be predominantly broadcasting (assuming a new definition of broadcasting were adopted):

1. By the CRTC's measure of "the focus of attention", even relatively little on-screen use of video or images renders the service non-alphanumeric; and
2. As Canadians' internet use gravitates more and more to audio and video content, use of search is gravitating in the same direction.

Under such an interpretive approach, the CRA might deem Google Search an online undertaking only in respect of those searches that can be deemed "programs", and a "newspaper" in respect of many if not most of those searches that are not.

[39] Broadcasting Decision CRTC 2005-120.

Notwithstanding the foregoing, current evidence suggests that the CRTC is not inclined to categorize Google Search as "broadcasting". Rather, it appears the CRTC intends to take a narrow approach to interpretation and only deem services that are clearly audio and video based as online undertakings.[40]

YOUTUBE

The content provided on YouTube is primarily audio-visual: video is what internet consumers go to YouTube to see. There is a section of text comments attached to each video, but the comments are clearly supplementary to the video – without the video the comments are meaningless, whereas the video itself is meaningful content even if there are no text comments.

Pursuant to subsections 2(2.1) & (2.2) of the *Broadcasting Act*, YouTube would only be an online undertaking in respect of professional content (music videos, films, TV shows), and the cost of advertising placed on that content would be non-deductible.

MUSIC STREAMING SERVICES AND FAST CHANNELS

Foreign services such as Spotify, Google Play, and Apple Music provide streaming music. Free Ad Supported Television (FAST) Channels, such as Pluto TV and Tubi, stream TV shows and movies. The content of such services is clearly comprised of 'programs' within the meaning of the *Broadcasting Act*, and any advertising on them that is directed to a Canadian market would be non-deductible.

MAGAZINES

Online magazines are the functional and literal equivalents of paper magazines and should be considered periodicals for the purposes of the *ITA.* Subject to the current definitions of 'foreign"' as applied to paper magazines, their advertising, if directed to a market in Canada, would be considered non-deductible. Examples abound, from Harpers to Yachting Monthly.

COMMENTARY ON IMPLEMENTATION OPTIONS

Since the last version of this paper was released in March 2018, industry economic trends and changes to the broadcasting policy and legal environment have significantly increased the range of implementation options and their potential impact. The most material developments are:

1. The almost three-fold increase in foreign internet advertising revenues, and continued decline in Canadian media advertising. In 2016, foreign internet advertising revenues were $4.4 billion, or under a third of all Canadian advertising revenues; in 2022, foreign internet advertising revenues were almost three times the size, or $13.1 billion, and represented over two-thirds of all Canadian advertising revenues;[41] and

[40] See record of the CRTC proceeding, Broadcasting Notice of Consultation CRTC 2023-138.
[41] Total internet advertising revenues in 2016 were $5.5 billion with foreign internet advertisers representing an estimated 80%. Total internet advertising revenues in 2022 were $14.2 billion with foreign internet advertisers representing an estimated 92%. IAB Canada.

2. The narrowing of what is defined as broadcasting under the *Broadcasting Act* (for example, to exclude user generated social media) and decision to impose contribution requirements on foreign online undertakings.[42]

These developments are particularly relevant given observations may by each of the CRA and the CRTC on the subject of advertising tax deductibility since March, 2018.

First, *Harnessing Change*, a report issued by the CRTC in June 2018, and the first significant public recognition by the CRTC of the need to impose contribution requirements on foreign internet broadcasters, specifically recommended as a "key incentive":

> clarifying the eligibility for advertisers to claim advertising expenses: advertisers on services subject to an agreement could be eligible to claim advertising expenses as deductible expenses for income tax purposes; however, advertising expenses on audio/video platforms not subject to an agreement would not be deductible[43]

Further to this logic, there would be a policy argument in favour of allowing internet advertising on foreign online undertakings that have contribution requirements to remain tax deductible, while denying it on all other internet platforms, including newspaper equivalents.

Second, following a review of the issue, in August 2018, a Senate Committee recommended that the "Government of Canada study the tax deductibility of foreign Internet advertising" but, based on testimony of the Department of Finance, the Committee also expressed a concern that the measure could "place an undue tax burden on Canadian businesses".[44]

The relevant testimony from the Department of Finance was:

> Estimates provided by the Friends of Canadian Broadcasting indicate that roughly 10 per cent of foreign Internet advertising expenditures would shift back to Canada and that their proposal would increase the tax burden on Canadian businesses by more than $1 billion. This suggests the measure would likely not change firms' behaviour to a significant degree. As such, it seems it would mainly result in a tax increase on Canadian businesses. In this context, it is not clear that in itself the measure would represent a complete solution to the problem facing Canadian media.
>
> …
>
> The point raised is really to highlight the objective pursued and the result of the proposal. From what we understand, the proposal would have the effect of increasing the firm's costs, and the result would in fact be a tax increase, particularly if there are few substitutions. In the circumstances, raising taxes in this way doesn't solve the primary problem for broadcasters. The point raised is to highlight this key issue of the proposal.[45]

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[42] Precise CRTC determinations of which are pending. See Broadcasting Notice of Consultation CRTC 2023-138.

[43] The Commission's thinking at the time was the notion of concluding "service agreements" with foreign internet broadcaster rather than using traditional regulatory instruments. Thus, the notion of an incentive to conclude service agreements – advertising tax deductibility. https://crtc.gc.ca/eng/publications/s15/pol1.htm#p2

[44] *The Tax Deductibility of Foreign Internet Advertising in Canada,* August 2018. https://sencanada.ca/content/sen/committee/421/TRCM/reports/TRCM_13thRpt_ForeignIntAdv_Web_e.pdf

[45] Miodrag Jovanovic, Associate Assistant Deputy Minister (Analysis), Tax Policy Branch, Department of Finance Canada, May 19, 2018, before the Standing Senate Committee on Transport and Communications. https://sencanada.ca/en/Content/Sen/Committee/421/TRCM/54106-e

Notwithstanding the apparent mischaracterization of the "estimates provided" in the 2018 version of this paper,[46] the issue of how much foreign internet advertising would be able to shift back to Canadian media, and how much would result in increased tax collection by the CRA, is a pertinent one.

At first blush, the fact that foreign internet advertising revenues are three times larger today than they were six years ago would appear to compound the problem. If the concern in 2018 was that Canadian media could not absorb foreign internet advertising revenue rendered non-deductible when it was two times the size, how could it possibly do so when it is now half the size?

On closer examination, however, this development can be seen to open up new opportunities for implementation that ensure material benefits for Canadian media, while minimizing any negative impact on Canadian advertisers.

As a starting point, key dynamics of the Canadian advertising marketplace strongly suggest minimal negative impact on advertisers:

- Businesses typically spend between 5 and 10% of revenues on marketing,[47] of which advertising is a large but not exclusive proportion. Given that advertisers have the same media available and operate by the same rules – including rules of tax deductibility, competitive neutrality would be preserved. No Canadian business would have an advantage over another due to the new rules. In the unlikely event that a business retained exactly the same advertising approach after the introduction of limits on advertising tax deductibility, it would see an overall increase in corporate taxes of only 2 to 4%.

- Foreign internet platforms, which have highly expandable advertising inventories, would likely drop advertising rates in lower demand categories in attempt to maintain market share. Corporate taxes would be payable on non-deductible foreign internet advertising that would cost less.

- Available/unused inventory on Canadian media can amount to 30% of advertising sales. If all such inventory was bought by Canadian advertisers who were redirecting moneys from foreign internet sites, the total redirection would amount to $1.95 billion as at 2021, an amount that would grow over time, as Canadian media return to greater financial health.

Any remaining "burden" on Canadian advertisers, could be further reduced in a number of ways:

1. As is the case for entertainment expenses, the government could choose to limit rather than eliminate tax deductibility for foreign internet advertising;[48]
2. As is the case with corporate taxes, the government could set different rules for larger vs. smaller corporations;[49] and/or
3. A portion of the incremental tax revenues received by government in limiting tax deductibility of foreign internet advertising could be channeled into tax credits for the use of Canadian media.[50]

New advertising deductibility restrictions can appropriately balance benefit to Canadian media, impact on Canadian advertisers and potential gain in tax revenues. With foreign internet advertising revenues at $13.1 billion

[46] The 2018 paper provided no specific estimate to the effect that "10 per cent of foreign Internet advertising expenditures would shift back to Canada". It simply stated, by way of illustration, "Conservatively estimating that 10% of these now non-deductible foreign internet advertising expenditures shift back to Canadian media, this would represent an influx of $275 to $440 million annually in incremental advertising revenue". This revision avoids using such language.

[47] See for example https://www.bdc.ca/en/articles-tools/marketing-sales-export/marketing/pages/survey-what-businesses-are-doing.aspx

[48] In the 1994 Paul Martin Budget, the federal government decided to limit tax deductibility of entertainment expenses to 50% from 80% effective February 22, 1994. (Section 67.1 of the *ITA.)* Evidently, the government looked to contain such expenses, but felt it could not reasonably rule them ineligible in their entirety.

[49] Canadian-controlled private corporations with less than $500,000 pay a net tax rate of only 9% https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/corporation-tax-rates.html

[50] A suggestion made by Louis Audet, chairman of Cogeco Inc., in an article *To save Canadian local media, end tax deductions for advertising on foreign digital media*, January 22, 2024 Https://www.theglobeandmail.com/business/commentary/article-to-save-canadian-local-media-end-tax-deductions-for-advertising-on/

as at 2022, implementation based on either a new broad-based limit on deductibility or an elimination of deductibility on foreign internet newspapers and broadcasters could be designed to achieve the right balance.

CONCLUSION

The conclusion of this paper is that the CRA's interpretation of "web sites" needs revisiting, and that, under a technologically neutral approach, advertising purchased on foreign **internet-delivered** media acting as, or akin to, broadcast and newspaper services **would not be a deductible expense** under the Canadian *Income Tax Act (ITA).*

This new interpretation of the advertising tax deductibility provisions of the *ITA* would, at minimum, require either an amendment to the definition of 'broadcasting' in the *ITA*, to update it in accordance with the *Broadcasting Act* or a similar amendment to the *Interpretation Act* so that a single consistent definition of "broadcasting" applies across the Canadian legislative landscape.

A policy decision to revise the advertising tax deductibility provisions of the *ITA* to apply to all foreign internet media, whether deemed broadcast, print or not, is also worthy of consideration.

The adoption of this paper's conclusion would be of major benefit to Canadian media, and Canadians generally.

For Canadian media, it would be the single greatest factor in reversing revenue declines and ensuring viability for Canadian local print, TV and radio. Hundreds of millions, if not billions, of dollars would move back from foreign to Canadian owned-and-controlled media companies – stabilizing and growing their revenues, and allowing these companies to re-invest in Canadian news, programming and jobs.

Depending on implementation approach, a re-interpretation or re-engineering of the advertising tax deductibility provisions of the *ITA* would result in as little as 15% or as much as 90% of current internet advertising expenditures being deemed fully or partially non-deductible.

A material percentage of these now non-deductible foreign internet advertising expenditures would shift back to Canadian media, representing an influx of hundreds of millions of dollars annually in incremental advertising revenue for a Canadian media sector that is under serious threat. Given the nature of the advertising marketplace, including the plethora of advertising and marketing options, any negative impact on Canadian advertisers would be minimal.

For federal and provincial governments, re-interpreting S.19 of the *ITA* as suggested would also bring demonstrable fiscal benefits.

Billions of dollars of advertising expenditures could be rendered no non-tax deductible – representing significant potential gains in corporate tax payable.[51] Monies would shift to various Canadian media without additional government measures. A massive policy problem (the loss of local media and news) could be resolved in a way that actually saved government money.

[51] For example, given $13.1 billion in foreign internet advertising in 2022, and assuming, an average corporate tax rate of 26% (15% Federal; 11% provincial), if only 50% of foreign internet advertising would retain advertising deductibility, the gain in corporate tax payable would be $1.7 billion.

APPENDIX A – SECTION 19 OF THE INCOME TAX ACT (CURRENT)

Limitation re advertising expense — newspapers

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

(a) the issue is a Canadian issue of a Canadian newspaper; or

(b) the issue is an issue of a newspaper that would be a Canadian issue of a Canadian newspaper except that

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

(ii) it has been wholly printed in the United States or has been partly printed in the United States with the remainder having been printed in Canada.

Marginal note: Where s. (1) does not apply

(3) Subsection 19(1) does not apply with respect to an advertisement in a special issue or edition of a newspaper that is edited in whole or in part and printed and published outside Canada if that special issue or edition is devoted to features or news related primarily to Canada and the publishers thereof publish such an issue or edition not more frequently than twice a year.

Marginal note: Definitions

(5) In this section,

Canadian issue of a newspaper means an issue, including a special issue,

(a) the type of which, other than the type for advertisements or features, is set in Canada,

(b) all of which, exclusive of any comics supplement, is printed in Canada,

(c) that is edited in Canada by individuals resident in Canada, and

(d) that is published in Canada; (*édition canadienne*)

Canadian newspaper means a newspaper the exclusive right to produce and publish issues of which is held by one or more of the following:

(a) a Canadian citizen,

(b) a partnership

(i) in which interests representing in value at least 3/4 of the total value of the partnership property are beneficially owned by, and

(ii) at least 3/4 of each income or loss of which from any source is included in the determination of the income of,

corporations described in paragraph (e) or Canadian citizens or any combination thereof,

(c) an association or society of which at least 3/4 of the members are Canadian citizens,

(d) Her Majesty in right of Canada or a province, or a municipality in Canada, or

(e) a corporation

(i) that is incorporated under the laws of Canada or a province,

(ii) of which the chairperson or other presiding officer and at least 3/4 of the directors or other similar officers are Canadian citizens, and

(iii) that, if it is a corporation having share capital, is

(A) a public corporation a class or classes of shares of the capital stock of which are listed on a designated stock exchange in Canada, other than a corporation controlled by citizens or subjects of a country other than Canada, or

(B) a corporation of which at least 3/4 of the shares having full voting rights under all circumstances, and shares having a fair market value in total of at least 3/4 of the fair market value of all of the issued shares of the corporation, are beneficially owned by Canadian citizens or by public corporations a class or classes of shares of the capital stock of which are listed on a designated stock exchange in Canada, other than a public corporation controlled by citizens or subjects of a country other than Canada,

and, for the purposes of clause (B), where shares of a class of the capital stock of a corporation are owned, or deemed by this definition to be owned, at any time by another corporation (in this definition referred to as the "holding corporation"), other than a public corporation a class or classes of shares of the capital stock of which are listed on a designated stock exchange in Canada, each shareholder of the holding corporation shall be deemed to own at that time that proportion of the number of such shares of that class that

(C) the fair market value of the shares of the capital stock of the holding corporation owned at that time by the shareholder

is of

(D) the fair market value of all the issued shares of the capital stock of the holding corporation outstanding at that time,

and where at any time shares of a class of the capital stock of a corporation are owned, or are deemed by this definition to be owned, by a partnership, each member of the partnership shall be deemed to own at that time the least proportion of the number of such shares of that class that

(E) the member's share of the income or loss of the partnership from any source for its fiscal period that includes that time

is of

(F) the income or loss of the partnership from that source for its fiscal period that includes that time,

and for this purpose, where the income and loss of a partnership from any source for a fiscal period are nil, the partnership shall be deemed to have had income from that source for that period in the amount of $1,000,000; (*journal canadien*)

substantially the same [Repealed, 2001, c. 17, s. 11(2)]

United States means

(a) the United States of America, but does not include Puerto Rico, the Virgin Islands, Guam or any other United States possession or territory, and

(b) any areas beyond the territorial sea of the United States within which, in accordance with international law and its domestic laws, the United States may exercise rights with respect to the seabed and subsoil and the natural resources of those areas. (*États-Unis*)

Marginal note: Interpretation

(5.1) In this section, each of the following is deemed to be a Canadian citizen:

(a) a trust or corporation described in paragraph 149(1)(o) or (o.1) formed in connection with a pension plan that exists for the benefit of individuals a majority of whom are Canadian citizens;

(b) a trust described in paragraph 149(1)(r) or (x), the annuitant in respect of which is a Canadian citizen;

(c) a mutual fund trust, within the meaning assigned by subsection 132(6), other than a mutual fund trust the majority of the units of which are held by citizens or subjects of a country other than Canada;

(d) a trust, each beneficiary of which is a person, partnership, association or society described in any of paragraphs (a) to (e) of the definition *Canadian newspaper* in subsection (5); and

(e) a person, association or society described in paragraph (c) or (d) of the definition *Canadian newspaper* in subsection (5).

Marginal note: Trust property

(6) Where the right that is held by any person, partnership, association or society described in the definition *Canadian newspaper* in subsection (5) to produce and publish issues of a newspaper is held as property of a trust or estate, the newspaper is not a Canadian newspaper unless each beneficiary under the trust or estate is a person, partnership, association or society described in that definition.

Marginal note: Grace period

(7) A Canadian newspaper that would, but for this subsection, cease to be a Canadian newspaper, is deemed to continue to be a Canadian newspaper until the end of the 12th month that follows the month in which it would, but for this subsection, have ceased to be a Canadian newspaper.

Marginal note: Non-Canadian newspaper

(8) Where at any time one or more persons or partnerships that are not described in any of paragraphs (a) to (e) of the definition *Canadian newspaper* in subsection (5) have any direct or indirect influence that, if exercised, would result in control in fact of a person or partnership that holds a right to produce or publish issues of a newspaper, the newspaper is deemed not to be a Canadian newspaper at that time.

NOTE: Application provisions are not included in the consolidated text;

see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 19;

1994, c. 7, Sch. II, s. 14;

1995, c. 46, s. 5;

2001, c. 17, s. 11;

2007, c. 35, s. 13.

Previous Version

Marginal note: Definitions

19.01 (1) The definitions in this subsection apply in this section.

advertisement directed at the Canadian market has the same meaning as the expression ***directed at the Canadian market*** in section 2 of the *Foreign Publishers Advertising Services Act* and includes a reference to that expression made by or under that Act. (*annonce destinée au marché canadien*)

original editorial content in respect of an issue of a periodical means non-advertising content

(a) the author of which is a Canadian citizen or a permanent resident of Canada within the meaning assigned by the *Immigration Act* and, for this purpose, "author" includes a writer, a journalist, an illustrator and a photographer; or

(b) that is created for the Canadian market and has not been published in any other edition of that issue of the periodical published outside Canada. (*contenu rédactionnel original*)

periodical has the meaning assigned by section 2 of the *Foreign Publishers Advertising Services Act*. (*périodique*)

Marginal note: Limitation re advertising expenses — periodicals

(2) Subject to subsections (3) and (4), in computing income, no deduction shall be made by a taxpayer in respect of an otherwise deductible outlay or expense for advertising space in an issue of a periodical for an advertisement directed at the Canadian market.

Marginal note: 100% deduction

(3) A taxpayer may deduct in computing income an outlay or expense of the taxpayer for advertising space in an issue of a periodical for an advertisement directed at the Canadian market if

(a) the original editorial content in the issue is 80% or more of the total non-advertising content in the issue; and

(b) the outlay or expense would, but for subsection (2), be deductible in computing the taxpayer's income.

Marginal note: 50% deduction

(4) A taxpayer may deduct in computing income 50% of an outlay or expense of the taxpayer for advertising space in an issue of a periodical for an advertisement directed at the Canadian market if

(a) the original editorial content in the issue is less than 80% of the total non-advertising content in the issue; and

(b) the outlay or expense would, but for subsection (2), be deductible in computing the taxpayer's income.

Marginal note: Application

(5) For the purposes of subsections (3) and (4),

(a) the percentage that original editorial content is of total non-advertising content is the percentage that the total space occupied by original editorial content in the issue is of the total space occupied by non-advertising content in the issue; and

(b) the Minister may obtain the advice of the Department of Canadian Heritage for the purpose of

(i) determining the result obtained under paragraph (a), and

(ii) interpreting any expression defined in this section that is defined in the *Foreign Publishers Advertising Services Act*.

Marginal note: Editions of issues

(6) For the purposes of this section,

(a) where an issue of a periodical is published in several versions, each version is an edition of that issue; and

(b) where an issue of a periodical is published in only one version, that version is an edition of that issue.

NOTE: Application provisions are not included in the consolidated text;

see relevant amending Acts. 2001, c. 17, s. 12.

Marginal note: Limitation re advertising expense on broadcasting undertaking

19.1 (1) Subject to subsection 19.1(2), in computing income, no deduction shall be made in respect of an otherwise deductible outlay or expense of a taxpayer made or incurred after September 21, 1976 for an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking.

Marginal note: Exception

(2) In computing income, a deduction may be made in respect of an outlay or expense made or incurred before September 22, 1977 for an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcasting undertaking pursuant to

> **(a)** a written agreement entered into on or before January 23, 1975; or
>
> **(b)** a written agreement entered into after January 23, 1975 and before September 22, 1976 if the agreement is for a term of one year or less and by its express terms is not capable of being extended or renewed.

Marginal note: Definitions

(4) In this section,

foreign broadcasting undertaking means a network operation or a broadcasting transmitting undertaking located outside Canada or on a ship or aircraft not registered in Canada; (*entreprise étrangère de radiodiffusion*)

network includes any operation involving two or more broadcasting undertakings whereby control over all or any part of the programs or program schedules of any of the broadcasting undertakings involved in the operation is delegated to a network operator. (*réseau*)

NOTE: Application provisions are not included in the consolidated text;

see relevant amending Acts. 1974-75-76, c. 106, s. 3;

1977-78, c. 1, s. 13;

1985, c. 45, s. 126(F).

APPENDIX B – THE 1996 INTERPRETATION DOCUMENT

Source: Taxnet Pro TM © 2016 Thomson Reuters Canada Limited.

Legislation

9618735 -- Deductibility of advertising expenses — internet

Date: October 24, 1996

Reference: 19, 19.1

SUMMARY: Whether section 19 or 19.1 of the Income Tax Act applies to deny a deduction for expenses incurred by a Canadian taxpayer to advertise on a foreign owned World Wide Web site on the internet.

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the Department.

PRINCIPAL ISSUES:

Whether section 19 or 19.1 of the Act applies to deny a deduction for expenses to be incurred by a Canadian taxpayer to advertise on a foreign owned web site.

POSITION:

No

REASONS:

A web site is not a newspaper, a periodical or broadcasting undertaking.

5-961873 XXXXXXXXXX L. Roy Attention: XXXXXXXXXX

October 24, 1996

Dear Sir\Madam:

Re: Deductibility of advertising expenses

This is in reply to your facsimile of May 24, 1996 in which you requested a ruling on whether expenses by a Canadian taxpayer to advertise on a foreign owned web site would be deductible under the Income Tax Act (the "Act").

Advance income tax rulings, in addition to there being a charge for the service, are given only in respect of proposed transactions involving specific taxpayers and will only be provided in response to a request for an advance income tax ruling submitted in accordance with the Information Circular 70-6R2 dated September 28, 1990, and the Special Release thereto issued on September 30, 1992, issued by Revenue Canada, Customs, Excise and Taxation. Nevertheless, we can provide you with the following general comments.

Advertising expenses related to the income earning process are generally deductible. However, pursuant to section 19 of Act, no deduction shall be made in respect of an otherwise deductible expense of a taxpayer for advertising

space in an issue of a non-Canadian newspaper or periodical for an advertisement directed primarily to a market in Canada.

Also, subsection 19.1(1) of the Act provides that in computing income, no deduction shall be made in respect of an otherwise deductible expense of a taxpayer for an advertisement directed primarily to a Canadian market and broadcast by a foreign broadcasting outlet.

The words "newspaper" and "periodical" are not defined in the Act. The Webster's Ninth New Collegiate Dictionary has the following meaning for the word "newspaper":

"a paper that is printed and distributed usu. daily or weekly and that contains news, articles of opinion, features, and advertising".

The Supreme Court, in the King v. Montreal Stock Exchange, (1935) 4 D.L.R. 630 (S.C.C.), gave the meaning of newspaper for the purposes of the Excise Tax Act as follows:

"a paper printed and distributed at stated intervals... to convey news... and other matters of public interest".

The Department has taken the position that a periodical is a publication, other than a newspaper, the issues of which appear at regular intervals of less than a year.

Consequently, based on those definitions, it is our view that generally section 19 of the Act would not apply to expenses incurred by a Canadian taxpayer to advertise on a foreign owned web site, since the web site would not be a newspaper or a periodical.

Concerning the issue of broadcasting, subsection 19.1(4) of the Act defines "foreign broadcasting undertaking" to mean a network (as defined under subsection 19.1(4) of the Act), operation or a broadcasting transmitting undertaking located outside Canada or on a ship or aircraft not registered in Canada. Based on diverse definitions of words used in paragraphs 19.1(1) and (4) of the Act, it is our view that section 19.1 of the Act would not apply to expenses incurred by a Canadian taxpayer to advertise on a foreign web site since a web site is not a broadcast by a "foreign broadcasting undertaking".

As explained in paragraph 21 of Information Circular 70-6R2 dated September 28, 1990, the above comments do not constitute an advance income tax ruling and are not binding on the Department. We trust that our comments are of assistance to you.

Yours truly,

for Director Financial Industries Division Income Tax Rulings and Interpretations Directorate Policy and Legislation Branch

APPENDIX C – THE 2017 INTERPRETATION DOCUMENT

Canada Revenue Agency | Agence du revenu du Canada

Mr. Ian Morrison
Friends of Canadian Broadcasting
200/238 - 131 Bloor Street West
Toronto, ON
M5S 1R8

2017-068435
K. Robinson

May 25, 2017

Dear Mr. Morrison:

Re: Advertising expenses - broadcasting

This is in reply to your correspondence dated January 20, 2017, wherein you requested our views on whether section 19.1 of the *Income Tax Act* ("Act") would apply to deny expenses incurred by Canadian taxpayers to advertise on foreign internet websites.

In your submission, you referenced technical interpretation #9618735 dated October 24, 1996 (the "1996 technical interpretation"), wherein we concluded that a website was not a broadcast by a "foreign broadcasting undertaking" and therefore not subject to the limitation in section 19.1.

You indicate that it is the Friends of Canadian Broadcasting's contention that the 1996 technical interpretation no longer conforms to the current reality of internet media and the rich audio-visual broadcasting now common on broadband. Specifically, you are asking us to reconsider the position taken in the 1996 technical interpretation.

Our Comments

This technical interpretation provides general comments about the provisions of the Act and related legislation (where referenced). It does not confirm the income tax treatment of a particular situation involving a specific taxpayer but is intended to assist you in making that determination. The income tax treatment of a particular transaction proposed by a specific taxpayer will only be confirmed by this Directorate in the context of an advance income tax ruling request submitted in the manner set out in Information Circular IC 70-6R7, Advance Income Tax Rulings and Technical Interpretations.

Advertising expenses related to the income-earning process are generally deductible. However, subsection 19.1(1) of the Act provides that in computing income, no deduction shall be made in respect of an otherwise deductible expense of a taxpayer for an

...cont'd

Canada
Income Tax Rulings Directorate
Place de Ville
11th floor, Tower B
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Ottawa ON K1A 0L5
Fax/Téléc.: (613) 957-2088

Direction des décisions en impôt
Place de Ville
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Ottawa ON K1A 0L5

advertisement directed primarily to a market in Canada and broadcast by a "foreign broadcasting undertaking."

Subsection 19.1(4) of the Act defines a "foreign broadcasting undertaking" as a network operation or a broadcasting transmitting undertaking located outside Canada or on a ship or aircraft not registered in Canada. "Network" is also defined in subsection 19.1(4) and includes any operation involving two or more broadcasting undertakings whereby control over all or any part of the programs or program schedules of any of the broadcasting undertakings involved in the operation is delegated to a network operator.

The *Interpretation Act* defines "broadcasting" as any radiocommunication in which the transmissions are intended for direct reception by the general public. The *Interpretation Act* also defines "radiocommunication" as any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3000 GHz propagated in space without artificial guide.

The rules in section 19.1 of the Act, as they are currently written, clearly prohibit the deduction of expenses for advertising directed primarily to the Canadian market by foreign radio and television broadcasters. While we appreciate today's digital broadband and the mobile internet age, in our view, the CRA is not able to apply the rules in section 19.1 to advertising on foreign internet websites without an amendment to the law. As such, the 1996 technical interpretation continues to represent our views on this matter.

We trust that these comments will be of assistance.

Yours truly,

Michael Cooke

Michael Cooke, CPA, CA
Manager
Business Income and Capital Transaction Section
Business and Employment Division
Income Tax Rulings Directorate

APPENDIX D – EXCERPTS FROM BROADCASTING PUBLIC NOTICE CRTC 1999-84

Is new media "broadcasting"?

Statutory Definitions

33. "Broadcasting" is defined in section 2 of the Broadcasting Act as follows:

[a]ny transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.

34. The term "program" is in turn defined in section 2 of the Act as:

[s]ounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

Explicit statutory exclusions from the definition of broadcasting

35. The Commission notes that, as stated above, much of the content available by way of the internet, Canadian or otherwise, currently consists predominantly of alphanumeric text and is therefore excluded from the definition of "program". This type of content, therefore, falls outside the scope of the Broadcasting Act. Accordingly, the remainder of this section contemplates internet content that consists only of audio, video, a combination of audio and video, or other visual images including still images that do not consist predominantly of alphanumeric text.

36. It was submitted, among other things, that information displayed on the internet can be considered to be solely for display in a public place and therefore excluded from the definition of "broadcasting". Certainly, the Canadian public expressed its view that the internet has a unique ability to foster citizen engagement and public discourse. While the Commission agrees, it considers that the internet is not in and of itself a "public place" in the sense intended by the Act. Programs are not transmitted to cyberspace, but through it, and are received in a physical place, e.g. in an office or home.

37. The Commission considers, however, that the exception to the definition of "broadcasting" for programs transmitted for display in a public place would apply, as suggested by one participant, to a particular service delivered via the internet that is

accessible by end-users only in a terminal or kiosk located in a public place, such as a public library.

Technological neutrality of "broadcasting"

38. The Commission notes that the definition of "broadcasting" includes the transmission of programs, whether or not encrypted, by other means of telecommunication. This definition is, and was intended to be, technologically neutral. Accordingly, the mere fact that a program is delivered by means of the internet, rather than by means of the airwaves or by a cable company, does not exclude it from the definition of "broadcasting".

39. Some parties argued that there is no "transmission" of content over the internet, and therefore, there is no "broadcasting". The fact that an end-user activates the delivery of a program is not, in the Commission's view, determinative. As discussed below, on-demand delivery is included in the definition of "broadcasting". Further, the Commission considers that the particular technology used for the delivery of signals over the internet cannot be determinative. Based on a plain meaning of the word, and recognizing the intent that the definition be technologically neutral, the Commission considers that the delivery of data signals from an origination point (e.g. a host server) to a reception point (e.g. an end-user's apparatus) by means of the internet involves the "transmission" of the content.

40. Some parties submitted that the definition of "broadcasting receiving apparatus" was not intended to capture devices such as personal computers or Web TV boxes when used to access the internet. The Commission notes that the definition of "broadcasting receiving apparatus" includes a "device, or combination of devices, intended for or capable of being used for the reception of broadcasting". The Commission considers that an interpretation of this definition that includes only conventional televisions and radios is not supported by the plain meaning of the definition and would undermine the technological neutrality of the definition of "broadcasting". In the Commission's view, devices such as personal computers, or televisions equipped with Web TV boxes, fall within the definition of "broadcasting receiving apparatus" to the extent that they are or are capable of being used to receive broadcasting.

Transmission of programs for reception by the public

41. It is therefore necessary to consider whether the transmission of sounds or visual images (or a combination of sounds and visual images) that do not consist predominantly of alphanumeric text by means of the internet can be said to involve the transmission of programs for reception by the public.

42. A number of parties submitted that content that is "customizable" does not constitute "broadcasting". The Commission notes that parties have used the term "customizable" to mean different things. For example, some parties cited the non-simultaneous characteristic of internet services as a basis for which such services cannot be considered to be "broadcasting".

43. The Commission considers it important to distinguish between the ability to obtain internet content "on-demand" - the non-simultaneous characteristic of internet services - and the ability of the end-user to "customize", or interact with, the content itself to suit his or her own needs and interests.

44. In the Commission's view, there is no explicit or implicit statutory requirement that broadcasting involve scheduled or simultaneous transmissions of programs. The Commission notes that the legislator could have, but did not, expressly exclude on-demand programs from the Act. As noted by one party, the mere ability of an end-user to select content on-demand does not by itself remove such content from the definition of broadcasting. The Commission considers that programs that are transmitted to members of the public on-demand are transmitted "for reception by the public".

45. The Commission considers, however, that some internet services involve a high degree of "customizable" content. This allows end-users to have an individual one-on-one experience through the creation of their own uniquely tailored content. In the Commission's view, this content, created by the end-user, would not be transmitted for reception by the public. The Commission therefore considers that content that is "customizable" to a significant degree does not properly fall within the definition of "broadcasting" set out in the Broadcasting Act.

46. By contrast, the ability to select, for example, camera angles or background lighting would not by itself remove programs transmitted by means of the internet from the definition of "broadcasting". The Commission notes that digital television can be expected to allow this more limited degree of customization. In these circumstances, where the experience of end-users with the program in question would be similar, if not the same, there is nonetheless a transmission of the program for reception by the public, and, therefore, such content would be "broadcasting". These types of programs would include, for example, those that consist of digital audio and video services.

APPENDIX E - MCCARTHY TÉTRAULT ANALYSIS, 19.1

Analysis/Commentary — Canada Tax Service — McCarthy Tétrault Analysis, 19.1 -- Limitations re Advertising Expense, published by Thomson Reuter Canada (Taxnet Pro (c))

Advertising on Foreign Broadcasts

Last Updated: 2016-01-12

Overview

Section 19.1, proclaimed in force from September 22, 1976, prohibits the deduction of expenses for advertising directed primarily to the Canadian market by foreign radio and television broadcasters. This provision applies only to advertising expense incurred on or after September 22, 1976, subject to certain transitional relief relevant to advertising contracts already entered into on that date.

Application

In terms similar to those in section 19, section 19.1 extends the ban on foreign advertising directed primarily at Canadian consumers by Canadian taxpayers to advertisements appearing on foreign radio and television broadcasts. The cost of any such commercials on or after September 22, 1976 will not be deductible as advertising expense by Canadian taxpayers (subsection 19.1(1)). Excepted, however, are outlays or expenses made or incurred before September 22, 1977 in respect of commercials aired pursuant to a written contract dated prior to January 24, 1975, or to certain short-term written agreements entered into after January 23, 1975 and before September 22, 1976 (subsection 19.1(2)).

In Ontario Craftmatic Ltd v MNR, [1989] 2 C.T.C. 2342, Canadian dealers of Craftmatic products attempted to deduct payments made as their share of costs in connection with the broadcasting of certain advertisements by U.S. television stations, contending that such expenses were not for “advertising” but for purchase of customer “leads” resulting from responses to the toll-free number displayed in the ads for Canadian residents. Alternatively, the taxpayers maintained that the expenses were not directed primarily to a market in Canada. Even though neither the name of the Canadian dealer nor its telephone number appeared in the ads, the Tax Court of Canada ruled that the costs incurred constituted expenses for advertisement which, because of the Canadian telephone number, were directed specifically at the Canadian market. Accordingly, the expenses were held to be non-deductible by virtue of subsection 19.1(1).

APPENDIX F - MCCARTHY TÉTRAULT ANALYSIS, 19

Analysis/Commentary — Canada Tax Service — McCarthy Tétrault Analysis, 19 -- Limitations re Advertising Expense, published by Thomson Reuter Canada (Taxnet Pro)

Limitations re Advertising Expense

Last Updated: 2015-10-13

Overview

The purpose of section 19 was socioeconomic rather than fiscal in nature. Its original objectives were twofold: to place a curb on advertising by Canadian taxpayers in non-Canadian newspapers and periodicals aimed at Canadian markets via “split runs” (a practice which places Canadian publications at a competitive disadvantage) and to remove the likelihood of the control over newspapers and periodicals published in Canada falling into foreign hands (a situation considered prejudicial to Canada's national interests). Both of these initial objectives were sought by means of the single expedient of disallowing as an expense of Canadian taxpayers the cost of advertising in foreign publications aimed at the Canadian market or in Canadian publications not effectively owned by Canadian citizens. The measure was expected to render both practices so unprofitable as to be prohibitive.

As a result of the Canada-United States Free Trade Agreement, which came into effect on January 1, 1989, however, section 19 was amended so that it became inapplicable with respect to newspapers and periodicals dated after December 31, 1988 which would meet the qualifications of a Canadian issue of a Canadian newspaper or periodical except that they were printed, or their type was wholly set, in the United States, or partly printed or set in that country and the remainder in Canada. The anti-avoidance rule in subsection 19(8) was enacted by SC 1995, c 46 (Bill C-103) which also amended the Excise Tax Act to impose an excise tax on split-run editions of periodicals. See Finance Canada News Release 95-050 reproduced below.

Section 19 partially implemented the recommendations of the O’Leary Royal Commission while at the same time enlarging the scope thereof to embrace newspapers as well as periodicals.

Following the May 26, 1999 announcement of an agreement-in-principle between the government of Canada and the government of the United States concerning the access of foreign periodicals to the Canadian advertising services market, it was announced in a Canadian Heritage News Release dated June 4, 1999 that the governments had signed a formal Agreement on Periodicals. As part of this Agreement, Canada agreed to amend Bill C-55 (the Foreign Publishers Advertising Services Act) as well as the Income Tax Act. Accordingly, section 19 was amended in 2001, applicable in respect of advertisements placed in an issue dated after May 2000, so that advertisements in periodicals are excluded from the ambit of section 19. Rules concerning the deductibility of expenses for certain advertisements in periodicals containing specified levels of original editorial content are now set out in section 19.01. **Section 19.01 permits full deductibility of expenses for advertisements published in issues of periodicals that contain at least 80 per cent original editorial content, and 50 per cent deductibility for advertising expenses in other periodicals, regardless of the ownership of the periodical.** Section 19 will not preclude the deduction of an otherwise deductible advertising expense for an advertisement in a non-Canadian newspaper or periodical that is directed at a market located outside Canada (see for example CRA Views Doc No 2004-0071381E5).

Application

As already explained, section 19 is intended to preclude objectionable practices with social or economic consequences**. If its objectives are attained, it follows that it will have no income tax consequences whatever and will be without application in practice, being prohibitive in nature rather than operational.** However, the principal features of this provision—which applies to any issue of a "non-Canadian" newspaper—are briefly reviewed below.

Statutory Exceptions

A "Canadian issue" of a "Canadian newspaper" (discussed below) is excepted from the operation of section 19 by paragraph 19(1)(a). A most significant exception to the section is found in paragraph 19(1)(b) applying to an issue of a newspaper which would qualify as a Canadian issue of a Canadian newspaper except for the fact that: (i) its type was wholly set in the United States, or was partly set in the United States and the remainder in Canada, or (ii) it was wholly printed in the United States, or partly printed in that country and the remainder in Canada. For the purposes of section 19, "United States" does not include Puerto Rico, the Virgin Islands, Guam or any other United States possession or territory but includes areas beyond the territorial seas of the United States within which it may exercise rights with respect to the seabed and subsoil and the natural resources thereof according to international and United States law.

Prior to the amendments made applicable in respect of advertisements placed in an issue dated after May 2000, the introductory words to subsection 19(1) referred to an issue of a newspaper or periodical, paragraph 19(1)(a) referred to a Canadian issue of a Canadian newspaper or periodical dated after 1975, and paragraph 19(1)(b) referred to an issue of a newspaper or periodical dated after December 31,1988 that would be a Canadian issue of a Canadian newspaper or periodical except for the circumstances described in subparagraphs 19(1)(b)(i) and (ii) discussed above.

Excepted from the effect of section 19 prior to January 1, 1976 was any newspaper or periodical which, though foreign-owned, was regularly publishing special Canadian editions throughout the 12 months preceding April 26, 1965 (the Budget date) and continued to do so thereafter without interruption, provided that the Canadian editions were at least partly edited in Canada and were printed and published in Canada (former subsec 19(2)).

Also excepted from the application of section 19 are special twice-yearly (or less frequent) issues of foreign publications (subsec 19(3)).

"Canadian Issue"

Applicable in respect of advertisements placed in an issue dated after May 2000, a "Canadian issue" of a newspaper is defined in subsection 19(5) to mean an issue (including a special issue) meeting the following four conditions:

(iv) **its type (except the type for advertisements or features) must be set in Canada;**

(ii) all of the issue (exclusive of any comics supplement) must be printed in Canada;

(iii) it must be edited in Canada by individuals resident in Canada; and

(iv) it must be published in Canada.

As formerly defined in subsection 19(5), a "Canadian issue" of a newspaper or periodical was one of which the type (except for advertisements or features) was set in Canada and which was printed in Canada (except for comics),

edited in Canada by Canadian residents, and published in Canada (former para (a) of the definition). Two exclusions applicable to periodicals were provided for in former subparagraphs (b)(v) and (vi) of the definition, notably in the case of an issue of a periodical the contents of which, excluding advertisements, were more than 20 per cent the same as the contents of one or more issues of one or more periodicals printed, edited or published outside Canada.

"Canadian Newspaper"

For a newspaper to qualify as Canadian, the exclusive right of publication must belong to Canadian citizens, Her Majesty in right of Canada or a province, a municipality in Canada, or other entities meeting specified requirements. If the publication right is held by an association or society, at least three-fourths of its members must be Canadian citizens. In general terms, if such right is held by a partnership or corporation, at least three-fourths of the real ownership must belong to Canadian citizens or qualifying corporations. (Further discussion is provided below under separate headings.) If such right is the property of a trust or estate, it does not qualify unless each beneficiary thereof falls into one of the foregoing categories (subsec 19(6)).

Prior to amendments made applicable in respect of advertisements placed in an issue dated after May 2000, subsection 19(5) defined the term "Canadian newspaper or periodical" in the same manner.

Deemed Canadian Citizens

A special deeming rule was added in subsection 19(5.1), applicable generally in respect of advertisements placed in an issue dated after June 1996. However, in its application to advertisements placed in an issue dated after June 1996 and before June 2000, references in the subsection to "Canadian newspaper" are to be read as references to "Canadian newspaper or periodical".

According to the March 16, 2001 Explanatory Notes, subsection 19(5.1) extends the meaning of Canadian citizen for section 19 purposes to ensure that Canadian pension funds and certain other entities (as described in paragraphs (a) to €) that may own Canadian newspapers are considered to be Canadian citizens for the purpose of the ownership requirements. In the case of periodicals, the amendment applies from July 1996 to May 2000, as nationality of ownership ceases to be relevant in the context of periodicals after May 2000.

The following entities are deemed to be Canadian citizens for purposes of section 19:

• pension trusts or pension corporations described in paragraph 149(1)(o) or (o.1) formed in connection with a pension plan existing mainly for the benefit of Canadian citizens;

• an RRSP or RRIF trust having a Canadian citizen as its annuitant;

• a mutual fund trust, except where the majority of its units are held by citizens or subjects of a foreign country;

• a trust of which each beneficiary is a person, partnership, association or society described in any of paragraphs (a) to € of the definition "Canadian newspaper"; and

• a person, association or society described in paragraph € or (d) of the definition "Canadian newspaper" (ie, the federal or provincial government or a municipality in Canada and associations or societies of which at least ¾ of the members are Canadian citizens).

Exclusive Right to Publish Held by a Partnership

Where a partnership holds an exclusive right of publication, paragraph (b) of the definition "Canadian newspaper" requires that interests in the partnership representing in value at least three-fourths of the total value of the partnership property be beneficially owned by Canadian citizens, corporations described in paragraph € of the definition, or a combination of Canadian citizens and such corporations, and that at least three-fourths of the income or loss of the partnership from any source must be included in determining the income of such persons or combinations of such persons. Prior to the 2001 amendments made applicable as described above, paragraph (b) of the definition "Canadian newspaper or periodical" set out these requirements in respect of a partnership holding an exclusive right of publication that was acquired after July 13, 1990. These requirements could have applied with respect to rights referred to in paragraph (b) that were acquired after 1988 where the acquirer of the right so elected by notifying the Minister of National Revenue in writing before 1992 (by section 159 of SC 1993, c 24, if such an election was made before December 11, 1993, it was deemed to have been made before 1992).

Prior to the 1991 amendments, it was required that at least three-fourths of the members of a partnership owning an exclusive right to publish be Canadian citizens and that interests in the partnership representing at least three-fourths of the total value of the partnership property be beneficially owned by Canadian citizens.

Exclusive Right to Publish Held by a Corporation

Where the exclusive right to publish is held by a corporation, paragraph € of the definition "Canadian newspaper" requires that the corporation be incorporated under Canadian or provincial laws and that its chairperson or other presiding officer and at least three-fourths of its directors (or similar officers) be Canadian citizens. In addition, subparagraph €(iii) sets out requirements concerning ownership of the corporation's share capital. These requirements were formerly set out in the definition "Canadian newspaper or periodical". With respect to rights that are acquired after July 13, 1990 (or acquired after 1988 where the acquirer makes a timely election in writing) a public corporation must have a class or classes of its shares listed on a designated stock exchange in Canada (formerly a prescribed share exchange in Canada; see the commentary to section 262) and may not be controlled by citizens or subjects of a country other than Canada. See the special application rule discussed below concerning the acquisition of rights by citizens or subjects of a country other than Canada or corporations controlled by such individuals.

If the corporation is not a public corporation, at least three-fourths of its shares with full voting rights and shares having a total fair market value of at least three-fourths of the fair market value of all the corporation's issued shares must be beneficially owned by Canadian citizens or by public corporations described above. A special "see-through" rule is provided for these purposes where shares of a class of a corporation's capital stock are owned or deemed to be owned by a holding corporation other than a public corporation with shares listed on a designated stock exchange (formerly a prescribed stock exchange; see the commentary to section 262). The rule treats each shareholder of the holding corporation as owning that proportion of the corporation's shares of that class that the fair market value of the holding company shares the shareholder then owns is of the fair market value of all the issued and outstanding shares of the holding company. Similarly, where shares of a class of a corporation's capital stock are owned or deemed to be owned by a partnership, each member thereof is deemed to own the least proportion of shares of that class that the member's share of the partnership's income or loss from a particular source for the relevant fiscal period is of the partnership's income or loss from that source for that fiscal period. Furthermore, for purposes of determining this proportion, where the partnership's income and loss from any source for a fiscal period are nil (so that the member's income interest would not be determinable), the partnership is deemed to have had income from that source for that period equal to $1,000,000.

Prior to these amendments, it was merely required that at least three-fourths of the shares having full voting rights and shares representing at least three-fourths of the corporation's paid-up capital be beneficially owned by Canadian citizens or by corporations other than corporations controlled by citizens or subjects of a country other than Canada.

Special Application Rule

Where after July 13, 1990 an individual who is a citizen or subject of a country other than Canada (or a corporation controlled by such an individual or individuals) acquires in an arm's length transaction more than one-fourth of a corporation's shares having full voting rights or shares having a total fair market value of more than one-fourth of the fair market value of all the corporation's issued shares, the corporation of which such shares are acquired and any corporation controlled by it are deemed to have acquired at that time any publication/production right referred to the definition that it then owns.

Saving Provision

Because the status of "Canadian newspaper" (previously, of "Canadian newspaper or periodical" might be unavoidably, if temporarily, lost (for example through the death of the owner or one of the part owners of the publication right), a 12-month grace period is allowed throughout which the preferred status is regarded as continuing, thus affording an opportunity for the publication to regain its Canadian status without interruption, if possible (subsec 19(7)). See for example the CRA Views Doc No 2003-0048425.

Anti-avoidance Rule (subsection 19(8))

Subsection 19(8) deems a newspaper not to be a Canadian newspaper at any time that a person or partnership not described in para (a), (b), (c), (d) or € of the definition "Canadian newspaper" has any influence (direct or indirect) that would result in control in fact of a person or partnership holding a publication right. Prior to the amendments made applicable in respect of advertisements placed in an issue dated after May 2000, subsection 19(8) deemed a newspaper or periodical not to be a Canadian newspaper or periodical where such a person or partnership had any such influence. This rule applied generally after December 15, 1995. However it did not apply where the influence that would result in control in fact arose as a consequence of a transaction or series of transactions completed before April 1993.

The following Finance Canada News Release (No 95-050, dated June 15, 1995) explains the context in which former subsection 19(8) was enacted.

NOTICE OF WAYS AND MEANS MOTION TO AMEND THE EXCISE TAX ACT AND THE INCOME TAX ACT TABLED IN THE HOUSE OF COMMONS

Minister of National Revenue, David Anderson, on behalf of Finance Minister Paul Martin, today tabled in the House of Commons a Notice of Ways and Means Motion to amend the Excise Tax Act and the Income Tax Act.

The amendments proposed in the motion will implement two measures that were announced by Canadian Heritage Minister Michel Dupuy in December 1994 in the government's response to the Report of the Task Force on the Canadian Magazine Industry. These measures maintain the government's long-standing policy respecting Canadian magazines and underscore the federal commitment to support the continued existence of a viable and original Canadian magazine industry. They include an excise tax on split-run editions of periodicals and an anti-avoidance rule relating to the deductibility of advertising expense in non-Canadian newspapers and periodicals.

The proposed amendments to the Excise Tax Act will impose an excise tax at the rate of 80% of the value of all the advertisements contained in a Canadian split-run edition. A split-run edition is an edition that is distributed in Canada, that contains more than 20% editorial material that is not original to the Canadian market and that contains one or more advertisements directed at Canadians.

The tax will be payable by the responsible person in respect of the split-run edition. Depending on the circumstances, the responsible person will be the publisher, a person connected with the publisher, the distributor, the printer or the wholesaler of the edition. Persons connected with the responsible person will be jointly and severally liable for payment of the tax.

Certain existing split-run periodicals will be given limited grandfathering treatment. They will be exempted from the tax based on the number of split-run editions that were distributed in Canada during the twelve-month period ending on March 26, 1993.

The new excise tax will apply to split-run editions that are published after the legislation implementing the tax receives Royal Assent [December 15, 1995]

The proposed amendment to the Income Tax Act will add an anti-avoidance role to section 19 of the Act. That section provides rules restricting the deductibility of expenses of taxpayers in respect of advertising in non-Canadian newspapers or periodicals where the advertising is directed primarily to a market in Canada. The purpose of the new anti-avoidance provision is to ensure that Canadian newspapers and periodicals are controlled in fact by Canadians.

APPENDIX G - ABOUT THE AUTHORS

DAVID KEEBLE, B.A. (POLI SCI); B.MUS. (COMPOSITION)

David Keeble was an independent consultant from 1998 to 2020. Prior to that he was Senior Director of Strategic Planning and Regulatory Affairs for the CBC, and before that, an Executive Producer at CBC Radio. He also served as Senior Vice-President of Policy and Regulatory Affairs at the Canadian Association of Broadcasters (CAB) from 2004 to 2006.

His consulting practice included major studies for government departments and agencies, as well as broadcasters and digital media companies, public and private. For the Ontario Ministry of Tourism and Culture ("MTC"), he wrote a major study of digital media, co-wrote with Peter Miller a recent (2010) study on the future of broadcasting, assisted with strategy and presentation materials for CRTC appearances, analyzed broadcasting business plans and, with Peter Miller, developed a five-year strategic plan for the Ontario Media Development Corporation ("OMDC").

For the CRTC, he undertook many studies, which included a paper on the potential extension of the simultaneous substitution regime, genre definition, and two studies on community television. From 1999-2006, he provided the *Executive Technology Impact Analysis* to the Commission and also to the Department of Canadian Heritage and Bell Canada. This regular series of studies and presentations, which synthesized interview material and hard data and provided independent analysis, projected future business and policy implications in both traditional and interactive digital media, among other topics.

For the Department of Canadian Heritage, he co-researched and co-wrote a major study of the transformation of the value networks of cultural products as a result of digital technology, as described above.

He also provided several papers to the Lincoln Committee (the Parliamentary Standing Committee on Canadian Heritage) during their two-year study of the broadcasting system and contributed to their final report.

In the area of new media, in addition to the CRTC and Ministry of Culture studies noted above, Keeble developed the first new media strategy for the CBC, several papers on online and interactive strategy for the CAB, and worked with Astral Media on their submissions to the CRTC's 2011-12 review of the New Media Exemption Order and their response to the Digital Economy consultation.

PETER MILLER, P. ENG., LL.B.

Peter Miller is a communications lawyer and engineer with over 30 years of creative and telecommunications industry experience, in both private practice and senior executive positions. Since 2006, he has acted as an advisor to select clients in the public and private sectors, specializing on the impact of digital technology.

Peter's practice is largely focussed on media, but is wide ranging in terms of the types of clients and nature of assignments. Clients have included numerous private entities, such as Bell, CHCH-TV, CMPA, Corus, Shaw, Astral, Acadia, Newcap, Rogers Media and smaller independent and ethnic broadcasters, as well as numerous public entities, including the CRTC, Canadian Heritage, CMF, Competition Bureau, City of Mississauga, OMDC and the Ontario Ministry of Tourism, Culture and Sport. Assignments themselves have included legal and regulatory advocacy through public policy, strategic planning and economic impact exercises.

Over the past two decades, Peter has researched and authored a number of public and private reports relating to creative industries, digital media trends, convergence and the future production and media landscape. These include five studies on the Canadian Program Rights Market (2007, 2011, 2012, 2014 & 2022), three broadcasting environmental scans (2014 & 2016 on TV; 2014 on radio), three studies of over-the-air OTA Television (2009, 2015 & 2019), one on genre protection (2013), one on over the top (OTT) television (2015), and two on New Media and Convergence (2007), in addition to studies undertaken with Mr. Keeble.

Additional Background

Peter's professional background includes private practice in communications law, and senior broadcast executive positions.

From June 2008 to May 2009, Peter was Chief Operating Officer for S-VOX, the Vision TV group of companies. In this capacity he oversaw the organization's operations and broadcast infrastructure as well as its marketing, communications, advertising sales, business development, legal, regulatory and affiliate relations functions.

From 2002 to 2005, Peter held the position of Vice President, Planning and Regulatory Affairs for CHUM Limited, where he was the key strategic advisor on industry developments and growth opportunities for CHUM Limited, as well as being responsible for all facets of CRTC regulatory affairs and government relations. Prior to joining CHUM in 1998, Peter was Senior Vice-President and General Counsel to the Canadian Association of Broadcasters (CAB), responsible for all policy and legal issues for radio, specialty and television.

Peter Miller began his career in telephone network design at Bell Northern Research in Ottawa. His experience also includes serving as a Parliamentary Assistant in the House of Commons.

Peter is a past Chair of Interactive Ontario, past chair of the CAB Specialty & Pay Services Board, past treasurer of Canadian Digital Television and a past member of the Toronto Film Board and Centre for Addiction and Mental Health Constituency Council and Toronto Film Board.