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### **Cultural Issues in Trade Agreements: multiculturalism, liberalism and the NICD initiative**

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#### **Abstract**

The development of an appropriate regime for trade, investment and the movement of creative and professional workers in the cultural industries will be among the issues for negotiation at the WTO in 2002 and beyond. One proposal calls for a New Instrument on Cultural Diversity (NICD), an international agreement outside the WTO. Cultural diversity at the international level is akin to a domestic policy of multiculturalism adopted by some countries. We examine the rationale and enforcement of multicultural policies within Canada, a country that historically has been committed to biculturalism, English and French, and to the concerns of aboriginal cultures. The Canadian multicultural budget is insignificant in comparison to government expenditure encouraging better communication and understanding among the two established cultures and multiculturalism has had almost no effect on the complex of regulatory, tax, and subsidy policies supporting the Canadian cultural industries. The Canadian case illustrates that a modern democracy is unlikely to support multicultural policies that do more than recognize and integrate immigrant cultures into the polity.

An international trade agreement cannot impose by force the cultural preferences of a majority, as a country can opt out of the agreement. There is more diversity, both of a good and bad type depending on the perspective, among those countries opting in than would occur if a global democratic state existed. A cultural industry agreement negotiated under the WTO would permit more degrees of bargaining freedom in accommodating different cultural interests among members and be enforceable on members. The NICD, in contrast, consists of gratuitous promises and fails to address the problems at issue. Proponents of the NICD believe that policies of its member countries could not be challenged under international law. Since the United States would surely retaliate to restrictions imposed on it, either the NICD's interpretation of international law is incorrect or international law has the same status as the Ten Commandments and far less moral authority.

## Introduction

The international economic system operates in the framework of three principal regimes--the WTO, the IMF and the World Bank--each with a distinct responsibility. These standalone regimes have expanded their reach and undertaken more complex responsibilities over the past five decades. The continuing functional and institutional separation among them is a reminder that international governance systems do not offer the same opportunities (some might say the temptation) for launching complex policies as a nation state. There is no world government with the legitimacy and authority to integrate the policies of international agencies to better pursue a mix of goals. International cooperation within an agency results from difficult negotiations among countries. The resulting agreements must be self-enforcing, given the absence of a sufficiently developed international law.

We are concerned with the agreements and institutions governing trade and trade-related activities. From a modest beginning as the outcome of a stillborn International Trade Organization, the GATT provided the framework for significant reductions in tariffs and other barriers to international trade. Over time, it developed a workable system of adjudicating disputes and a process of consolidation and renewal through successive rounds of negotiation. The last of these extended its responsibilities to include services and trade-related copyright and investment issues. Its institutional structure was revamped to accommodate this wider domain of responsibilities and renamed the World Trade Organization (WTO). The WTO is more like a club than a state. It cannot coerce a country to join nor stop a member from leaving. Its authority derives solely from the gains that its system of constraints generates for its members. Individual members or coalitions of members must do better within than without or they will decamp.<sup>1</sup>

In 2002, the WTO is preparing for a new round of international trade and investment negotiations. The rules governing trade, investment, and movement of creative and professional workers of the cultural industries<sup>2</sup> are one of the issues that will be on the negotiating table. The mix of economic characteristics in these activities and the important influence that cultural consumption and participation in creative processes have on the development of individuals and cultures make designing an appropriate regime for these activities a significant challenge.

There are a number of sectors considered to have a sufficiently unique set of characteristics to warrant special arrangements in international trade agreements. Designing rules that take into account the economic characteristics of the cultural industries presents no more of a challenge than that which was overcome for the financial and telecommunications sectors under GATS or for the copyright industries under TRIPS. What is more difficult to assess is the implication for international governance of

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<sup>1</sup> There is, of course, a potential for gaming among members about how the overall gains may be shared within these constraints.

<sup>2</sup> The cultural industries produce and distribute television and radio programming, broadcast signals, films, books, magazines, and recorded music.

a vaguely understood link between the consumption and production of cultural goods and services and national cultures.

One of the responses to this aspect of the problem is a call for a New Instrument on Cultural Diversity (NICD). Part of the discourse concerning a NICD addresses the overall impact of globalization and has the following flavour:

Even though cultural considerations per se were not centre stage at the events in Seattle (in contrast to the final months of the negotiation of the Uruguay Round in 1993 and the negotiation of MIA in 1998), much of the anti-globalization discourse was still fuelled for many observers by the pace and extent of the changes imposed on society by globalization and the consequent feeling that cultural references are being lost. Far from dying down after Seattle, this discourse has only increased in intensity. Which gives to think, as suggested by Faouzia Zouari, that "[translation] the precedence that economic imperatives take over social and political values, backed by the prodigious expansion of the information highway, is challenging national identities, sometimes driving them into retreat and even into aggressively asserting counter-models." (Ivan Bernier, "A New International Instrument on Cultural Diversity: Questions and Answers" presented at the second annual conference of the INCD, Lucerne, Switzerland, May 21-23, 2001)

This concern with commercialism, modernity and rapid change is the subject of extensive email campaigns and web postings, none of which would be currently possible without all three of these elements. Addressing the expressed concerns requires not only changing all parts of the international system but the policies and organizational modes of many countries. In this paper, we examine a more narrowly focused proposal, an instrument that would apply only to the cultural industries. In this more limited setting, a special instrument, it is claimed, would promote a permanent legal foundation for cultural diversity. Proponents describe the proposed regime as encouraging cultural production within nations and authentic exchange among them while promoting the dynamic coexistence of a diversity of cultures.

The Canadian government has been a significant promoter of this idea. The roots of this support lie in a frustration at the ineffectiveness of an earlier strategy of exempting the cultural industries from trade agreements. As events transpired, the cultural industries were not immune from action under trade agreements but more importantly, the exemption put policy conflicts, almost all of which were with the United States, out of the rules-based diplomatic boxing ring and into a bilateral back alley. A government sponsored committee of advisers on the cultural industries recommended a special instrument governing sectoral trade but was agnostic about whether it should be inside the WTO or a standalone agreement.<sup>3</sup>

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<sup>3</sup> Canada, Report of the Cultural Industries Sectoral Advisory Group on International Trade (February, 1999). *Canadian Culture in a Global World, New Strategies for Culture and Trade*.

The government responded to the committee's recommendation on a special instrument by stating that "the purpose of the agreement would be to set out clear ground rules to enable Canada and other countries to maintain policies that promote their culture while respecting the rules of the international trading system and ensuring markets for cultural exports. One department, Foreign Affairs and International Trade, supported the negotiation of a special agreement within the GATS<sup>4</sup> while another, Canadian Heritage, actively promoted a standalone arrangement. Canadian Heritage acted as a catalyst in forming the International Network on Cultural Policy (INCP)<sup>5</sup> linking the cultural ministers of a set of countries, hosting its first meeting in 1998, and in subsequently promoting and nurturing a supporting umbrella organization of cultural interest groups, the International Network for Cultural Diversity (INCD),<sup>6</sup> to develop enthusiasm from non-governmental sources for what has become known as the new international instrument for cultural diversity (NICD).

Section 1 of the Draft Convention on Cultural Diversity,<sup>7</sup> commissioned by the INCD, lists the following as the purposes of the NICD:

- (a) establish a multilateral framework of principles, rules and disciplines for the purposes of preserving and enhancing cultural diversity both within and among nations;
- (b) maintain and strengthen the capacity of sovereign states to preserve and enhance cultural diversity by taking any action, or adopting, maintaining and enforcing any measure that they consider necessary to preserve or enhance cultural diversity;
- (c) secure the rights of individual artists and creators to freedom of expression and to work in security and free from censorship.

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<sup>4</sup> At the time of the Doha Ministerial meeting in 2001, the Department of Foreign Affairs and International Trade issued an information paper on culture and trade that stated: "Canada is keeping all options open on the most appropriate forum for the negotiation of a new international instrument and its content. Pending the development (of) an NIICD, Canada will continue to seek the maximum flexibility in international agreements to pursue its cultural policy objectives."

<sup>5</sup> As of March, 2001, there were 46 member countries of the INCP. Its purpose is "to strengthen cultural policies to enable governments, together with civil society, to create an environment that values diversity, creativity, accessibility and freedom." See [http://64.26.177.19/index\\_e.shtml](http://64.26.177.19/index_e.shtml).

<sup>6</sup> The INCD is an NGO comprised of a world-wide (52 countries) network of artists and cultural groups. It is registered as an NGO with the WTO. Its coordinator, who attended the Fourth Session of the Ministerial Conference, reported his view of the proceedings to the membership: "The Doha meetings were six days of tense negotiations. Because they had prevented a new round from being launched in Seattle, delegates from the South, the developing nations and least developed countries, were bullied and pressured in Doha to make concessions and agree to a new round."

<sup>7</sup> As of May 1, 2002, a copy of the Draft Convention was available at <http://www.incd.net/html/english/res/ccd%20draft.doc>.

The first two of these subsections propose to establish an international framework allowing member countries a free hand in developing national cultural policy. Subsection c) runs counter in spirit to a) and b) in requiring a member country to grant artists and creators freedom of speech and expression and its inclusion thins down the list of qualifying countries. According to the annual survey of freedom of the press by Freedom House, only 72 out of the 187 countries covered had a free press at the end of 2000. Ironically, only 27 of the 46 countries included in the INCP, the political grouping, are judged to have a free press; 10 others are rated as having a partly free press and 9 as “not free.”<sup>8</sup> Freedom House’s measure covers a number of dimensions of press freedom. As no country receives a perfect score, no state would qualify under a strict interpretation of the condition.<sup>9</sup> Subsection c) of the draft refers to individual artists and creators but is presumably not restricted to them.<sup>10</sup>

Our analysis builds on the similarity between multicultural initiatives within a state and the NICD within the international community. The supporting campaigns and debates use the same vocabulary<sup>11</sup> and propose similar rules. We begin our analysis by exploring how multiculturalism policies seek to modify the working constitutions<sup>12</sup> in modern democracies. To delineate the potential impact of multicultural policy on a working constitution of a modern democracy we examine the differing views on political structure of representative schools of liberal and multicultural thought. We locate empirically the extent that embracing multicultural policy might change the working constitution and overall policy portfolio of a modern democracy by applying a two-stage process. We first identify conditions that would most likely support adopting multiculturalism in a modern democracy. Then we identify a country that approximates those conditions and has

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<sup>8</sup> In its “About us” description on its web site, the INCP states that its members “support local and national cultures in an increasingly globalized world where access to information is essential.” Two of its members are China and Cuba. These countries have performed remarkably well in a number of areas but freedom of the press and tolerance of dissenting groups are not among them.

<sup>9</sup> Canada, which scores very highly and is in the group classified as having a free press, had the following negatives noted in the summary account accompanying its score. “A Nova Scotia supreme court in March 2000 barred the Canadian Press from printing articles about an official report on a boat collision that killed a fisherman. In November, the superior court in Toronto ruled against eight media outlets that challenged the police seizure of news film of an anti-poverty protest at the Ontario legislature. Media concentration has become a more urgent issue recently, as a media group sought to acquire ten French dailies in Quebec. In a February study, 45 percent of journalists reported that they censored themselves “occasionally or often” due to fear of reprisals from media owners. Photographers were doused with pepper spray by police while covering a protest against the OAS. Two Canadian Sikh journalists were intimidated after reporting on misconduct by Sikh temple committees. Three journalists were detained in Montreal in May while covering a demonstration and charged with “disturbing the public order.” Charges were later dropped. A journalist with *Le Journal* in Montreal was shot in September after threats related to his crime reporting.

<sup>10</sup> The use of the fatwah in some Muslim countries obviously affects the freedom of expression of artists and creators. The most widely reported example was the Ayotollah’s fatwah, which offered a \$2.5 million reward for killing Salmon Rushdie for blaspheming the Muslim religion.

<sup>11</sup> Some of the key words are diversity, cultural pluralism, and tolerance.

<sup>12</sup> The term “working constitution” incorporates the written constitution as interpreted by the courts, the political institutions of the country and political norms.

embraced multicultural policy domestically. Canada meets the conditions and advertises itself as the first country to adopt multicultural policy. The extent of the impact on its working constitution and cultural policy of adopting multiculturalism serves as our estimate of the upper limit of multiculturalism's impact in a modern democracy. We use this information to inform what might happen if multicultural goals are inserted into the negotiation of a stand-alone international trade regime for the cultural industries among a set of countries that vary in organization from democracies to theocracies and in size from St. Lucia to China.

## **Working constitutions in modern democracies**

### ***Liberal roots***

Many countries had already adopted or were adopting democratic government structures in the post Second World War period. The principles of equality before the law, non-discriminatory access to government services, freedom of speech and association, and constitutional uniformity were a major inspiration of the written or unwritten constitutions of these countries. These liberal values appear in the declarations of intent in written constitutions and are often given special protection in separate declarations of rights. By embedding these values in images of citizenship, liberals hoped to encourage the further development of norms supporting non-discriminatory laws and reducing the reintroduction of discriminatory access to government services by artful administration.

The adjective liberal has been attached to diverse political agendas. Two important issues concerning the individual's relation to the state divide liberals: the raising and education of children and income distribution policies. We collapse the rich spectrum of differences of opinion on these issues into two stylized liberal camps, libertarians and social democrats.<sup>13</sup>

Libertarians argue that parents are solely responsible for raising and educating children until they become adults. Social democrats contend that the state has a significant agency interest in children as future citizens that warrants constraining the decisions of parents. They approve of, for example, legal sanctions against the abuse of children and the right of the state to override a decision by parents to deny their children life-saving medical attention. Social democrats also believe that state's agency extends to the education of children. Children should be required by law to attend a school having a state-approved curriculum until a specified age.<sup>14</sup> This schooling may be provided directly by the state or

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<sup>13</sup> Our coarse aggregation suffices for our purposes in this paper. Political competition in the democracies that emerged from the Second World War and those that joined their ranks in the subsequent two decades encompassed a broad range of liberal parties as well as religious, communist, and neo-fascist populist parties.

<sup>14</sup> John Rawls (1988, 464), for example, advocates a core curriculum including knowledge of constitutional and civic rights. Children must be taught: "that liberty of conscience exists in their society and that apostasy is not a legal crime;" to be "fully cooperating members of society" and "self-supporting;" and encouraged to hold "the political virtues so that they want to honour the fair terms of social cooperation in their relations with the rest of society."

by a non-profit or commercial school certified by the state, chosen by parents and paid for, at least in part, by the state.<sup>15</sup>

The second significant area of dispute among liberals is the redistribution of income. Libertarians judge the state to be less efficient at gathering information about where help is needed than voluntary institutions and to be more susceptible to corruption. The source of the rents that spawn corruption is the state's monopoly power over policy and enforcement. For freedom to be realized the state must establish a rule of law delimiting the scope of individual freedom and constraining the state's exercise of power. With respect to policy, the state must not pursue rationally derived concepts of "social justice" as doing so inevitably produces tyranny (Hayek, 1979). Charity redistributes more effectively than state programmes as it mobilizes dispersed information about need and inspires innovative mechanisms to mitigate free-rider problems.

In contrast, social democrats believe that markets generate an unfair distribution of income, fail frequently, and reinforce racism and prejudice by accommodating the biases of customers, workers, and owners. To counteract these negative effects of capitalism, the state should actively pursue "social justice" by adopting combinations of policies that include, *inter alia*, significant redistribution through the tax system, affirmative action programs, economic regulation, and progressive labour laws.<sup>16</sup> Pursuing regulatory efficiency and distributive goals stabilizes the polity by making capitalism more efficient and just.

John Rawls addressed the conditions that sustain a liberal political constitution (a "reasoned equilibrium") as part of his examination of the philosophical foundations of liberalism. Over time his view on the necessary conditions became more constrained and his views on justice more relativist.<sup>17</sup> In 1997, he revisited the concept of "public reason,"

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<sup>15</sup> In Chapter V (paragraph 13) of *On Liberty* John Stuart Mill wrote: "The objections which are urged with reason against State education, do not apply to the enforcement of education by the State, but to the State's taking upon itself to direct that education: which is a totally different thing. That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating. All that has been said of the importance of individuality of character and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education."

<sup>16</sup> We will use terms such as just and progressive contextually reflecting the language of the group under discussion. Brian Barry describes what we call the democratic socialism view and he calls an egalitarian liberal position in *Culture and Equality* (2001) while Hayek's writings over four decades remain the most comprehensive statement of a libertarian (a term he did not like) view. Almost all the authors involved in the debates among multiculturalists and liberals and those within each camp draw attention to the strategic use of language by their opponents. Neither Barry nor Hayek is exceptional in this regard. Chapter 7 of Hayek's *The Fatal Conceit*, 1988, for example, is entitled "Our Poisoned Language."

<sup>17</sup> His "Justice is Fairness" (1958) began a series of articles exploring justice that were integrated in the *Theory of Justice* (1971) in which he states his purpose to be the establishment of an epistemological foundation for justice as fairness. Nine years later, he phrases his primary social task as articulating "a public conception of justice that all can live with who regard their person and their relation to society in a certain way" (1980, 306). By 1985 he notes that in order to effectively take into account the

the preconditions that members of disparate groups, some holding irreconcilable religious, moral or philosophical views, can agree on as necessary for organizing social cooperation based on mutual respect. Public reason had evolved to be the foundation of Rawls's political conception of justice—a set of values that answer political questions and is consistent with basic liberal freedoms (1997, 574 and 585)<sup>18</sup>. Depending on the configuration of religious, moral and philosophical views in a country, there may be a large family of liberal conceptions of political justice and derivative constitutional arrangements or there may be none. Rawls offers examples to illustrate a situation in which a liberal conception of justice does not exist. One is a country in which a religious group considers an existing liberal constitution as a *modus vivendi*, when it cannot have its way, but would dismantle it and impose its religion as the sole state religion, if it had the power to do so. The other is a country in which a religious or non-religious group is “prepared to resist laws that they think undermine their positions” if its doctrine is “losing ground in influence and numbers” (1997, 589).

Finally, what role does diversity have in liberal thought? A template liberal state that is “culture-blind” permits, but does not require diversity, by granting freedom of religion, speech and association under a common set of laws. The emphasis in liberalism is on extending the menu from which individuals can choose. Limiting the opportunities for diversity is wrong as is requiring diversity unless the limitations overcome barriers to individual freedoms including that of association. This qualification and how to govern the transition of children to politically enfranchised individuals divide the reasoning liberals in Rawls's work. His interest is in establishing a political arrangement for a civil determination of policy in these liberally contested areas. In contrast we view constitutions as constantly developing through an accumulation of small changes punctuated by more significant shifts. Ideas, cultural forces, economic interests, and political constitutions are interdependently determined.

### ***Compromise and history***

The “working” constitutions of modern democracies reflect understandings and historical accommodations that often compromise liberal values of either stripe. The compromises typically involve the details of the electoral system, the architecture of electoral systems and legislative institutions, and the degree of dispersion of authority among the political system's functional parts. Some citizens are also privileged by decisions establishing the official languages for use in assemblies, courts and the administration of law and by the granting of privileged positions to their religions. These decisions typically favour members of a few “official” cultures (O cultures). In some countries minority “heritage” cultures (H cultures) are also singled out and treated differently, but not necessarily in a privileged manner, by the working constitution.

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“apparent conflict between freedom and equality” his goal is to establish “the just form of basic institutions within a democratic society under modern conditions.”

<sup>18</sup> A conception of political justice governs discourse among citizens on political issues, within the bureaucracy, and among candidates in elections as well as the political thinking and belief structure of each citizen. It requires reciprocity and civility.

The special position of the O and H cultures is institutionalized through administrative practice, constitutional provision, or treaty commitments. The H cultures are often aboriginal or migratory populations that are in the vulnerable position of depending on the courts of the established political system to interpret their relationship with the state.<sup>19</sup> The identity of O and H cultures in formerly colonized democracies reflected their pre-colonial history, experiences of different groups under colonialism, and the process by which independence was achieved. In these countries, some of the H cultures under colonial rule became O cultures and some cultures that were privileged under colonialism as administrators lost status.<sup>20</sup>

By the 1970s, new political pressures and an accompanying body of thought, multiculturalism, began to impact on the working constitutions of democracies.

### ***Multiculturalism***

Proponents of multiculturalism maintain that democratic structures professing liberal roots suppress important cultural differences and favour the dominant O cultures. The special status of O and H cultures provides *de facto* legal recognition of group as compared to individual rights. A just society requires the recognition of group rights for more cultures (the R cultures) in policy decisions. In the following discussion, we distinguish between two stylized schools of multiculturalism, strong and moderate, that use different criteria for identifying R cultures, have distinct views on the role of the state, and consequently pursue a differentiated set of policies.

#### **Strong multiculturalists**

Strong multiculturalists believe that a broad set of political and legal functions should be devolved from the state and become the responsibility of the O, H and R cultures. Their R partition emphasizes cultures, such as some ethnic and religious communities, that have a thick web of norms, rules and enforcement mechanisms. For these cultures, devolving responsibility for activities like education and at least some aspects of the justice system

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<sup>19</sup> For example, in *Delgamuukw v. British Columbia* [1997], the majority opinion (3 to 2) of the Supreme Court of Canada interpreted that the federal government had the power to extinguish aboriginal title: "Section 91(24) of the *Constitution Act, 1867* (the federal power to legislate in respect of Indians) carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it." The majority also stated that the Canadian provinces could regulate activities under their control that affect those holding aboriginal title as long as the laws are of general application and do not touch on "'Indianness' or the 'core of Indianness'."

<sup>20</sup> Hirschman's discussion (1967) of trait-taking v trait-making in assessing staffing policy of the Nigerian railway in the 1960s illustrates the reversal of status of some cultures on independence. The members of the Ibo tribe disproportionately filled lower administrative positions under British rule and moved up when the expatriate managers left. The "northerners" who were more numerous and had a corresponding weight in the new government initiated "affirmative" action programs to replace Ibos in management with members of their underrepresented tribes. The necessity of working together in management did not mitigate intertribal hostility. As Hirschman's book went into print, the Ibos created a breakaway state, Biafra, following a massacre of Ibo migrants working in the north. The new state of Biafra also contained significant oil fields. A bloody civil war followed and the region was reabsorbed into Nigeria.

is feasible and desirable.<sup>21</sup> When there is a conflict between actions that are important to an R culture and national laws, the “default” position of strong multiculturalists is that national laws should give way. If, for example, a religion illegally restricts the rights of employment of women in certain establishments run by its members, the state should defer and exempt the culture from having to obey the national law.<sup>22</sup> In short, the religion’s “group rights” trump national laws over a broad domain of issues. Strong multiculturalists oppose a mandatory separation of religion from the state.<sup>23</sup> A secular state privileges non-religious values and decreases opportunities for fulfillment to those who do not hold those values in high regard.<sup>24</sup> They accept asymmetries in the state’s relations to different religions.<sup>25</sup>

National policies should be determined by negotiation among the O, H, and R cultures. The mechanism of adjudication among the interests of the different cultures is typically sketched in lightly. Negotiations are disciplined by the right of a country’s H, O and R cultures to opt out of a wide set of national policies and laws. The national state is

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<sup>21</sup> Tahir Mahood writes that “organised religions can make a case for a state-funded school but not an ethnic or ‘racial’ group” and that communities defined by or organised by religion “may turn out to be the only post-immigration groups who are sufficiently distinct to be candidates for corporate representation and collective rights.”

<sup>22</sup> In our polarized representation, strong multiculturalists would not have the state intervene except in rare circumstances. Kukathas (1992, 1996), for example, makes no significant qualifications. His state has no coercive power and recedes in importance. Kukathas’s position seems very similar to that of Hayek in *The Road to Serfdom* (Hayek changes his constitutional prescription and its philosophical foundation in his later writings, e.g., Hayek (1979, 1988)).

<sup>23</sup> “Liberals cannot consistently be dogmatic about their own beliefs and sceptical about all others, or talk about an open-minded dialogue yet both exclude some and conduct the dialogue on their own terms.” (Parekh, 1995, 97)

<sup>24</sup> In contrast, Rawls distinguishes between political justice as a reasonable conception for “the basic structure of a just constitutional regime” and a “comprehensive doctrine.” (1988, 460) Political justice is a basic structure that allows an individual to choose among a comprehensive conception of the good (includes many religions). He admits that “diversity” (not his term but appropriate in this paper) of outcome is affected by the constitution (consistent with the view of political justice) in two ways. Some comprehensive conceptions of the good may be forbidden in the name of political justice; others may be allowed but not survive. The constitution is not neutral in effect but “is unjustly biased against certain comprehensive conceptions only if, say, individualistic ones alone can endure in a liberal society, or they so predominate that associations affirming values of religion or community cannot flourish, and further, if the conditions leading to this outcome are themselves unjust, in view of present and foreseeable circumstances.” (1988, 464)

<sup>25</sup> Bhikhu Parekh (1997, 19), for example, argues that Britain “...now has a sizeable number of religious minorities with their own distinct histories and traditions, about which they feel just as strongly as the rest of Britain’s citizens do about theirs. The minorities are an equal and integral part of British society, and deserve not only equal religious and other rights but also an official acknowledgement of their presence in both the symbols of the state and the dominant definition of national identity. The acknowledgement cannot be equal, not so much because the minority religious communities are numerically unequal as because they have not shaped the British identity as decisively as Christianity has, are not an equally deep and persuasive presence in British political culture, and do not form as integral and central a part of British society as does Christianity.” He considers that altering British law to protect all religions against “blasphemy,” instead of just the established church, “has most to be said in its favour” (1997, 20).

consequently small—restricted to administering the negotiated settlements among the constituent cultures in the country and national policies for those cultures that have not opted out.<sup>26</sup> Cultures are the major players in governance. The state is an administrative centre to facilitate negotiation and administer existing agreements among the cultures. If negotiation breaks down, each culture does its own thing without any “management” of the interactions. There may be no agreement to form a national army, for example. In this case, attack from outside is met by patching together a coalition of cultural militia.<sup>27</sup> Strong multiculturalists believe that peaceful negotiated agreement among cultures within a country is feasible and, if encouraged, promotes a greater diversity of cultures than has been typically experienced historically within the democracies of Europe, North America and Asia.<sup>28</sup>

It is difficult to delimit the type of constitution that would best serve a strong multicultural country. A negotiating set of protocols and precedents would be useful. Councils of representatives from the participating cultures could supervise and arrange the financing of national policies for those cultures that have opted in. The complicated machinery for making political decisions will lie within each culture. For the resulting country to be considered democratic requires that most of the participating cultures use democratic procedures internally but most religious cultures, for example, are not democratic in their governance.

Multiculturalists of both schools emphasise that diversity is a goal, a result to be valued,<sup>29</sup> in comparison to liberals who extol the freedom to choose over a diverse menu. The two multiculturalism schools differ in the degree of diversity that they support. Strong multiculturalists recommend that diversity not be constrained while moderate multiculturalists accept limits to diversity.

### **Moderate multiculturalists**

Moderate multiculturalists welcome exceptions from national laws or devolutions of

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<sup>26</sup> If cultures were territorially concentrated, separate political entities would be feasible and opting in would occur over specified activities such as a regional trade agreement. Another model recognises the federation as the state but there is extensive devolution to “junior” governments as in the Swiss federation. The wicked problems for multiculturalism occur when territorial concentration is incomplete as is the case between the Flemish and French cultures in Belgium. Barry (2001, 312-13) comments on the Belgium case: “But the endless process of haggling that is Belgian politics is so nauseating to all concerned that it is widely thought that the country would already have broken up if it were not for the problem posed by Brussels—a Francophone enclave in Flemish territory that is too big a prize for either side to be willing to relinquish.”

<sup>27</sup> Uncoordinated policies by each culture can generate conflict. The probability of violence among the militias of the affected cultures is high. For security reasons cultures will cluster territorially and this physical segregations increases the chance of political separation.

<sup>28</sup> For example, Bhikhu Parekh (1995, 97) writes: “Unless a theory of man recognizes the legitimacy of deep differences and gives them an ontological status, it cannot avoid setting up narrow norms and throwing up inegalitarian and even imperialist impulses. Obviously, we cannot tolerate all differences, but the determining principle should be dialogically derived and consensually grounded, not arbitrarily imposed by a narrowly defined liberalism.”

<sup>29</sup> Diversity plays a similar role in the multicultural lexicon as freedom does in the liberal.

authority to R cultures that are approved by democratic processes. They favour a working constitution and supporting norms that allow the negotiation of political deals among O, H, and R cultures and other interest groups within the legislative system. They presumably recognize but do not emphasise that requests for exceptions or devolutions that offend basic values of the O cultures have little chance of being enacted. Proponents of moderate multiculturalism also support state policies to promote better communication among cultures within the country as a means of reducing social and employment discrimination. In their opinion, the state should encourage better ways of resolving the set of “real” conflicts among groups and promote a national identity that celebrates the diversity of cultures within the country. Their “teaching” emphasis extends to informing the O cultures of the situation and contributions of the R cultures and encouraging them to respond “appropriately” in political life. Their views on policy add complications—mostly symbolic or minor exceptions in law, adaptations in the practices of common institutions and the funding of teaching civics out of school—to the core of policies that would have been.

Moderate multiculturalists define R cultures more in terms of skin colour, gender, and identity than religion.<sup>30</sup> They support a large and complex role for the state. Their political agenda includes affirmative action programs and public teaching campaigns that focus on racism and gender prejudice as well as more targeted initiatives that inform disadvantaged groups, e.g., recent immigrants, about how to articulate and participate effectively within the political-legal system. In general moderate multiculturalists respect separate spaces for state and religion but support some distinctions in policy related to different religions and sensitivity in designing protocols (holidays, dress codes, etc.) in state schools.<sup>31</sup> The recommended constitution is hierarchal. O and H cultures represent nations of people and have a historical claim plus an inner imperative to control a number of political activities that affect their “nationals.” Immigrant cultures on the other hand do not have a legitimate claim for the degree of self-government granted to O cultures and to a lesser extent to H cultures.

### ***Initial conditions and the evolution of working constitutions***

Working constitutions are what they are because of historical compromises. They evolve through further bargaining among the O, H and R cultures within the country and the influence of new ideas. This evolution is influenced by the reinterpretation of the constitution that occurs simultaneously with the determination of specific policies within it. Stanley Fish has addressed this nexus—the simultaneous reaching of a conclusion on an issue and the definition of the process in a variety of competitive processes. One that he discusses at some length governs what is “in” and “out” in the mainstream

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<sup>30</sup> For example, “people of colour,” women, and identity groups such as gays who share a concern about discrimination but are not linked by the same thick web of relationships and institutions as a religion.

<sup>31</sup> As an example, a moderate multiculturalist might argue for an exception to dress codes of a police force prohibiting beards and turbans should be created for Sikhs because they are symbols of Sikh nationality but against an exception for the wearing of another Sikh religious symbol, the Kirpan, a small sword or dagger (In its examples of usage of the word kirpan, the Oxford English Dictionary includes “1971 *Daily Tel.* 11 June 3 (*caption*) Sant Mann Singh,...a visiting Sikh religious leader who has agreed not to carry his kirpan, a sword, in public.”).

methodology of a discipline.<sup>32</sup>

It is true that there is nowhere to go, no locus of judgment to which disputants can appeal for an authoritative announcement. But this doesn't mean that they must throw up their hands or toss the dice; it means that they must argue, thrash it out, present bodies of evidence to one another and to relevant audiences, try to change one another's mind. To be sure, the process is not guided by any unchallengeable authority, but authority, not unchallengeable but temporarily regnant, is what is fashioned in the course of it. That is to say, authority does not *preside* over the debate from a position outside it but is the prize for which the debaters vie. (1994, 10-11)

The processes of distinguishing among political theories, determining the influence of different cultures in the governance of a country, and influencing the policy agenda are similar in his mind to that of shaping what is taught in English literature classes. In Fish's words: "(D)emocracy is simply a name for the canon-making process" (1994, 47).<sup>33</sup> This process describes what economists might call a "marketplace for ideas" in which rhetorical entrepreneurs compete to win over relevant audiences. Each side manipulates the categories of debate and the meaning of terms to their advantage; accuses the other side of so doing; and denies its own culpability.<sup>34</sup>

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<sup>32</sup> Toni Morrison expresses a similar view on relativism and that all discourse is value-laden. One interpretation of her views on university teaching is that this part of the "marketplace of ideas" should be regulated. Teachers should disclose bias in a manner similar to regulations requiring food manufacturers to provide information about ingredients on labels: "We teach values by having them. Whether or not we drive or seduce or persuade others to share them, whether or not we are indifferent to or accommodating to the ethics of others, whether we are amused by the concept of value being teachable, whether we are open to being argued into supporting values contrary to those we have held—all of these possibilities and strategies matter. The innate feature of the university is that not only does it examine, it also produces power-laden and value-ridden discourse. Much scholarship is often, even habitually, entangled in or regulated by ideology. Since, as humanists we know that that is the case, acknowledgment is preferable to the mask of disinterest." Lecture on the teaching of values in the university, given at Princeton University on April 27, 2000. Unfortunately biases cannot be determined with the precision of chemical analyses. Professor Morrison makes no explicit acknowledgement of her own biases and on reflection we don't see how she or anyone else might credibly do so. Regulation in this marketplace has to be limited to third party determination that some content is out of bounds as is done in "hate laws" and in censorship based on "community values." We interpret her remarks not to be a call for disclosure by professors but as affirming Fish's view that all discourse is unavoidably value-laden.

<sup>33</sup> The canon is the evolving professional consensus about what are the "great books" of a culture.

<sup>34</sup> Fish argues that entry to audiences is always controlled in one way or another. He approves of the terms of access to audiences in English literature, a debating forum in which he has had great success. He was also a participant in a broader discourse with the public on what ought to be taught in English programs and affirmative action hiring policies. On this front his positions were not having the same success. Consequently, his rhetorical attention shifted from the issue to the difficulty that sound ideas had in receiving a fair hearing in this debate. He accuses his ideological opponents—labelled as neoconservatives—of maintaining as given that there is fair competition among expressions of ideas "without regard to content" in this "marketplace for ideas" (1994, 17). His condemnation of the use of the term "marketplace for ideas" by his debating opponents provides a vivid example of this two-pronged rhetorical competition by a master player. To him, many of the phrases used by the other side are encoded, e.g., "'Race-neutral' and 'color-blind' are just two more of the coded phrases by means of which Martin Luther King's legacy is not honored but betrayed" (1994, 100). Like the enigma machine the decoder is only applied to the enemy's messages.

The formation of public opinion on issues in a democracy may be similar to the canon-making process but the influence of that opinion on policies depends on the existing working constitution and a country's history. Since the working constitutions of most, if not all, democracies favour some O cultures and provide H cultures with special political or legal rights, the starting point for introducing multicultural policies is not an idealized liberal state but a muddled compromise. In this setting, introducing some multicultural measures may have a beneficial effect viewed from a liberal perspective.<sup>35</sup>

The theoretical debates among supporters of different schools of liberalism and multiculturalism have undoubtedly influenced the evolution of working constitutions in many countries as democratic politicians search for new ideas to offer voters. In our configuration, libertarians and strong multiculturalists both favour negotiated arrangements and a limited state while social democrats and modest multiculturalists support a strong state and disagree on the constitutional limitations to be imposed on it. Just as the canon evolves relatively slowly and its path is affected by its current state, so it is for the working constitution. Another commonality in the two processes is that those participating in the determination of change—English professors and legislators—often have a direct interest in the outcome. The constraints on the decision-makers differ as legislators are elected to represent a constituency. The influence of different constituencies—members of the O, H and R cultures—is mediated through the working constitution. The existing working constitution, cultural mixes, nature of the economy, and historical experiences govern the response of the working constitution to a shock from a freshly articulated political view. How would we expect these factors to influence the impact of multiculturalist advocates on the working constitution?

Currently, the starting situation in most democracies is a state that actively participates in the organized economy, regulates general economic and social interactions and redistributes income. The state is not small nor a mere administrator of cultural treaties. Government employees, those working in government-financed activities like education and a host of private interests complementary to state activities are a collective force in a modern democracy. They are as unenthusiastic about a minimalist state as they are enthusiastic about new state initiatives. The ease of adding or subtracting multicultural elements to a working constitution depends on the complexity of political deals that it supports, its structure, the mix of different cultures, and historical experience.

Consider the political situation of an ethnic or religious culture that is not an O or H culture but is significant enough in size to be among the R cultures recognized by moderate multiculturalists. A host of general and some particular national policies affect

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<sup>35</sup> The granting of establishment status to a church of an O culture is equivalent to subsidizing its expansion. Recognizing some other churches as part of the national religious establishment may establish a pattern of affiliation that is “closer to” that which would rule in a “pure” liberal constitution just as introducing subsidies on other products may improve traditionally measured economic welfare if a particular product is already being subsidized. The classic reference in economics is Lipsey and Lancaster, 1956-7.

its members and their group.<sup>36</sup> Pursuing a particular piece of legislation—an exception or devolution—is often less politically attractive than joining with other groups to lobby for favourable shifts in general policies. The relative attraction of spending political capital on general policies is reinforced by the difficulty of obtaining support for an exception or devolution from other R cultures.<sup>37</sup> The R culture’s chance of obtaining an exception in law or a devolution of responsibility is further reduced if it threatens the existing rights of the O cultures or reduces the political potency of the H cultures.

In contrast, multicultural policies that complement the interests of the O cultures are much more likely to be accepted. For example, if the O cultures in the country actively support and promote immigration, they are also likely to support policies that make the adjustment of immigrant groups into the society and in particular the economy less traumatic without unduly threatening the role of the existing official languages or the O cultures’ representational guarantees in governing bodies. If existing immigrant communities are considered to be involved in criminal activities, such as the drug trade or gang activities, some multicultural initiatives may complement law enforcement. Policies that publicize the positive achievements of ethnic communities will often be part of such initiatives. They provide evidence to the ethnic group of approbation from other groups within the country. Such policies of “recognition” also earn support from members of the O cultures that value cosmopolitanism (food, art, ideas, ...), but fear that exceptions and devolutions may ultimately threaten the stability of current political relations.

Who initiates complementary multicultural policies is not important, if the potential support is unaffected by the source of the proposal. The qualifying clause often fails to hold. Political entrepreneurs in the O cultures are perhaps more likely to be the initiators because voters in the O cultures will find the claims of benefits for them more credible when it is advocated by “their” politicians. Multicultural policies of recognition that are clearly bounded and unlikely to be the “thin edge of the wedge” of strong multiculturalism have a “warm glow” attraction to the O cultures and are most likely to be adopted.

The impact of national multicultural policy on the cultural industries is of particular importance to this paper. How would one expect multicultural policy to affect regulatory decisions—the allocation of rights to over-the-air television and radio stations or for specialty channels, allocations of subsidy funds, definitions of national content for quotas, and the like. We expect the same forces to play in this area of policy as in the more general policy arena. An R culture will be competitive with other R cultures for exceptions or devolutions particular to itself. Little will happen that is not complementary to the interests of the O cultures. Overall, the policies that have a multicultural aspect to them that are likely to be implemented have to be in the interest of the O cultures. Most

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<sup>36</sup> An exception about school ages granted to an Anabaptist sect, for example, will be important to that community, but so will sanitary rules, environmental and other laws governing farming, the building of roads that allow farm products to be marketed, conscription, and in some cases laws governing cooperatives.

<sup>37</sup> A Hindu minority is unlikely to expend its political capital on having a holy day in Islam recognized as a national holiday.

of these would be implemented under the working constitution in the absence of an official embrace of multiculturalism policy.

We estimate the limits of the impact of multiculturalist policies on the policies of a democratic state by looking at the experiences of Canada. Canada is our choice for the following reasons. It was the first developed democracy to declare officially a policy of multiculturalism in 1971. Similar policies have been introduced at the provincial and municipal level. It also has the characteristics that make a particular blend of multicultural policies attractive. For the past three decades, Canada has actively encouraged immigration. It has also been evangelical about multiculturalist policy and of its approach to negotiating the meaning of aboriginal rights with its indigenous peoples in international fora.<sup>38</sup> In the next section, we briefly describe and assess what Canada has done on the multicultural front, while adding some observations from other experiences.

## **Canadian multiculturalism—an upper bound?**

In 1971 the Canadian government announced that it was adopting a multicultural policy. At the time of the announcement, there was no developed multicultural policy agenda ready to be implemented. The announcement was rather a political signal to those that were not privileged by the introduction of official bilingualism two years earlier that the government would do something for them.<sup>39</sup> Government officials subsequently filled the policy void by:

- a. developing special programs to integrate immigrants and their children
- b. modifying practices in common institutions to be more tolerant of diversity in customs
- c. introducing affirmative action employment programs in universities and other government funded institutions
- d. promoting sensitivity to different holy days in educational institutions and other government agencies
- e. encouraging anti-racial initiatives in general and in the schools and the workplace in particular
- f. establishing diversity training programs for police and those delivering health services
- g. regulating broadcasters to avoid ethnic stereotypes
- h. altering literature and history curricula to recognize the contribution of H and R

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<sup>38</sup> Kymlicka (1998, 1), who has written widely on multiculturalism and strongly supports the Canadian policies, notes that Canada's per capita rate of immigration is much higher than that of the United States and its proportion of foreign-born people is 16%, twice that of the United States. He writes that "Canada is now seen as a model by many other countries" (1998, 3) and that Australia and New Zealand followed Canada's lead in adopting official multicultural policies that were "explicitly modelled on Canada's" (1998, 56). With respect to its Aboriginal peoples Kymlicka reports that "(t)he provisions relating to Aboriginal peoples in Canada's 1982 constitution—both those sections affirming the existence of Aboriginal rights and the section requiring the government to negotiate the meaning of these rights with the Aboriginal people themselves—are virtually unique in the world" (1998, 1).

<sup>39</sup> See the *Official Languages Act* introduced in that year. Representative multicultural initiatives of the federal government are listed at [http://www.canadianheritage.gc.ca/multi/main\\_e.shtml](http://www.canadianheritage.gc.ca/multi/main_e.shtml).

- cultures
- i. funding of ethnic festivals and study programs<sup>40</sup>

Multicultural policies were given statutory sanction in 1988 with the passing of the *Multiculturalism Act*. It begins with a preamble of “whereas” clauses listing the liberal values that government policy already in place embraced.<sup>41</sup> Other “whereas” clauses add to this list by noting specific commitments that Canada is committed to:

- ensure “that every individual should have an equal opportunity with other individuals to make the life that the individual is able and wishes to have” under the *Canadian Human Rights Act*
- “redress any proscribed discrimination, including discrimination on the basis of race, national or ethnic origin or colour” by being a party to the *International Convention on the Elimination of All Forms of Racial Discrimination*
- provide “that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion or to use their own language” by its adherence to the *International Covenant on Civil and Political Rights*.

Another preamble clause restates the 1971 commitment of adding to this extensive set of protections by adopting a multicultural policy that “recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society” subject to “working to achieve the equality of all Canadians in the economic, social, cultural and political life of Canada.”

The Act then outlines the scope of Canadian multiculturalism policy in a series of subsections. Some call for the government to respect existing rights and provide services in a way that is “respectful and inclusive of Canada's multicultural character” but most require it to recognize, encourage and promote the diversity of the achievements and expressions of different cultures within Canada. One subsection that promises to “preserve and enhance the use of languages other than English and French” might be substantive if it were not for the qualifying clause that immediately follows it—“ while strengthening the status and use of the official languages of Canada.” The next subsection reinforces that qualifying clause by assuring the Canadian O cultures that

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<sup>40</sup> The list is gleaned from reports on multiculturalism available on the Canadian Heritage web site. Kymlicka (1998, 42-43) lists thirteen multicultural policies that reflect “the sorts of issues that are raised in the public debate over multiculturalism, and have been adopted or at least seriously proposed by government parliamentary reports or royal commissions.” He notes that his list includes policies that were not included in federal multicultural policy.

<sup>41</sup> The commitments listed include: equality before and under the law, equal protection and benefit of the law without discrimination, and freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and an equal opportunity with other individuals to make the life that the individual is able and wishes to have. Other whereas clauses note that Canada was already a member of

multiculturalism will be advanced “in harmony with the national commitment to the official languages of Canada.”

The Act then instructs federal institutions to:

- a) ensure that Canadians of all origins have an equal opportunity to obtain employment and advancement in those institutions;
- b) promote policies, programs and practices that enhance the ability of individuals and communities of all origins to contribute to the continuing evolution of Canada;
- c) promote policies, programs and practices that enhance the understanding of and respect for the diversity of the members of Canadian society
- d) collect statistical data in order to enable the development of policies, programs and practices that are sensitive and responsive to the multicultural reality of Canada
- e) make use, as appropriate, of the language skills and cultural understanding of individuals of all origins
- f) generally, carry on their activities in a manner that is sensitive and responsive to the multicultural reality of Canada.<sup>42</sup>

If the federal institutions were not following a) they were culpable under existing Canadian law and policy. If the government was not following subsections d), e) and f), it was guilty of bad management. This leaves b) and c). These clauses instruct the government to promote recognition of Canadian diversity and to enhance the ability of everyone in Canada to contribute to its continuing evolution. The first is an educational order; a statute is hardly necessary. The second has the substance of puff pastry.

Statutes can be imprecisely related to the policies that they sanction. Perhaps Canadian multicultural policy in practice has not limited itself to exhorting the value of multiculturalism, aiding immigrant communities to participate in the Canadian political system, and improving their ability to adjust to Canadian society but been more intrusive. An examination of a sample of projects funded under Canadian Multicultural policy posted on the Canadian Heritage website provides information about how it has been spending the multicultural budget. The projects are grouped under three headings: national (12 projects), regional (19 projects) and international (2 projects). The titles of the national projects are listed in Table 1.

The Department classifies each program as contributing to—elimination of racism and discrimination, participation, and awareness and understanding or some combination of these. A reading of the more detailed description of each of the national programs reveals that none of these policies grant exemptions from law or devolutions of responsibility. Some support social democratic values of anti-racism, equal access, and alleviation of poverty or provide R cultures with information on parenting or participating in the labour

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<sup>42</sup> These are subsections (a) to (f) of section 3(2) of the *Canadian Multiculturalism Act*.

market<sup>43</sup> that complement the interests and values of Canadian O cultures. Two of these projects involved the cultural industries. In the project, *The Colour of your Money*, the Canadian Advertising Foundation, two large media companies, the Department of Canadian Heritage, a private consulting firm and a university researcher, John Samuels, “undertook a series of research projects and produced an information package to encourage and expand the inclusion of Canadians of diverse origins, and especially people of colour, in advertising.” The partners in the *The Colour of your Money* initiative includes important mainstream (O-culture) commercial players and associations. The second *Cultural Diversity and Museums* aimed “to increase the capacity of museums to work with diverse cultural communities and, at the same time, to increase public awareness and appreciation for Canada's growing pluralism and changing identity.”

**Table 1**

National projects as selected for display by Heritage Canada			
Title	Categories*		
	A	B	C
<b>The Colour of Your Money</b>			X
<b>Working Group on Racial Equality in the Legal Profession</b>	X		
<b>Seminar on Dissemination of Hate in Canada via Computer Technology</b>	X		
<b>Cultural Diversity and Museums</b>		X	X
<b>Parenting in Canada</b>		X	X
<b>Ethnocultural Diversity: A Source of Competitive Advantage</b>			X
<b>March 21 Campaign</b>	X		X
<b>Demographic Profiles of Black communities in Canada</b>		X	X
<b>Demographic Contours of Poverty among Canadian Ethnic Groups</b>		X	X
<b>Citizenship Participation Initiative: Introduction to the Canadian justice system</b>		X	X
<b>The Canadian Languages Network</b>			X
<b>Research project: "The economic and Ideological Bases of Racism towards Recent Chinese Immigrants to Vancouver"</b>	X		X

\* Canadian Heritage classifies each project into one or more of three categories. We have encoded them as: A: Elimination of racism and discrimination, B: Participation, and C: Awareness and understanding.

**Source:** [http://www.canadianheritage.gc.ca/multi/program/projects\\_e.shtml](http://www.canadianheritage.gc.ca/multi/program/projects_e.shtml)

The 17 regional programs had a similar orientation to the national set but were more often designed to defuse a specific problem of interest to both the H culture involved and the O cultures.<sup>44</sup> Three of the regional projects involved cultural activities. *Between*

<sup>43</sup> The project *Ethnocultural Diversity: A Source of Competitive Advantage*, for example, gathered over 100 businesses, including some of Canada’s largest firms, trade and industry associations, the Conference Board of Canada, and the Canadian Ethnocultural Council “to identify mechanisms through which Canadian organizations can recognize and use Canada's linguistic and cultural diversity to best advantage both at home and abroad.”

<sup>44</sup> For example, the project *Promoting good relations in the Markham and Richmond Hill areas* addresses racial tension in these two towns on the outskirts of Toronto, “which have experienced a large influx of Chinese immigrants from Hong Kong in the past few years. To help promote cross-cultural

*Culture Arts Dialogue 1996*, organized a “series of readings, exhibitions, performances and workshops in music, dance, literature, visual arts, storytelling, theatre, photography, radio art and public art involving artists from many diverse cultures” in London, Ontario. In another project *Publication and Teacher’s Guide to Combat Racism*, a Manitoba educator/illustrator, Bob Haverluck, prepared a 24-page anti-racism comic book. The third project, *Teslin Tlingit Theatre Troop*, was a cooperative project with the Department of Education of the Yukon. Students at two community schools of the Teslin Tlingit, an Indian tribe (H culture), “undertook the writing and production of a play that discussed race relations issues affecting their community” and performed their works at the Festival of Yukon Youth Theatre.

The two international initiatives organized and funded university chairs, centres of excellence at selected universities, and conferences related to multiculturalism. Neither involved the cultural industries.

All of these projects could have been funded and administered under existing agencies and statutory authorizations without an official multicultural policy. The relatively few projects that involved the arts and creative activities were not competitive with mainstream commercial interests and would not exercise the core of the official cultures. The museum initiative spoke to the administrators of government and not-for-profit organizations about the characteristics of their country. The advertising project would arguably make commercial messages more effective with a group of growing economic importance.

The federal government’s estimates of spending on grants to non-profit organizations, universities, institutions and individuals for promoting multiculturalism in the fiscal year 2002-2003 is \$14,383,224<sup>45</sup>, which represents a 10% reduction from the previous fiscal year. To put this figure in perspective, Canadian Heritage’s total estimate of two programs supporting the use of the two official languages (O-culture support) in non-federal administration and other quasi-public institutions was \$233,479,036<sup>46</sup> and its estimate for contributions to various aboriginal (H group) centers, societies and

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understanding and harmonious race relations, the Chinese Canadian National Council - Toronto Chapter undertook a series of activities, including a) an exhibition of Chinese Canadian history in Canada during a major event to celebrate Chinese New Year, b) several discussion opportunities in various schools to increase the students' awareness of the race relations issues affecting the community in general and Chinese Canadians in particular, and c) exhibitions and other activities in two shopping malls to promote dialogue among different communities.”

<sup>45</sup> The dollars are Canadian unless indicated otherwise. The Canadian dollar at the end of the day on May 9, 2002 was worth US\$.64.

<sup>46</sup> This figure is the sum of estimates for two items: contributions to programs relating to the use of official languages in areas of provincial and territorial competence; including programs of summer language bursaries and assistance to independent schools and to associations of independent schools of \$217,841,716 and contributions to organizations representing official language minority communities, non-federal public administrations and other organizations for the purpose of furthering the use, acquisition and promotion of the official languages of \$15,637,320.

associations was \$50,003,386<sup>47</sup>.

Turning to the cultural industries, was their regulation significantly affected by multicultural policy in Canada? In other words, did multiculturalism affect decisions at the many nodes of discretion in cultural policy? The broadcasting regulator held public hearings and issued statements of its multilingual and ethnic broadcasting policy in 1985 and again in 1999. A number of radio, television and specialty/pay television channels were licensed under these guidelines. The conditions of licence included stipulating a minimum number of ethnic groups that each radio and television station must serve and a minimum number of languages for the programming.

Allocations of rights to broadcast and privileged position in gaining access to cable systems were contested vigorously in the pre-digital broadcasting era. The CRTC granted licences to a multicultural television channel in Toronto,<sup>48</sup> CFMT, in 1978 and made corollary decisions that made its signal available to over 70% of the province of Ontario. Multicultural over-the-air channels like CFMT compete with specialized ethnic cable channels to be included on desirable tiers on cable systems. Telelatino, which broadcasts in Spanish and Italian, and Chinavision, which primarily broadcasts to a Chinese audience, were among the first set of national specialty channels licensed in 1984.<sup>49</sup> The CRTC allowed the channels to carry a percentage of non-ethnic programming in English or French. Advertising on this portion of their airtime generated revenues that cross-subsidised ethnic programming. Over their history, these services have experienced frequent periods of financial stress.

The CRTC uses a 60-40 formula—60% of programming must be ethnic programming while the rest can be in either English or French—as a guideline in regulating multicultural channels. The 40% English or French language “right” is the major source of rents for subsidising the 60% ethnic programming.<sup>50</sup> Conventional stations and

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<sup>47</sup> The line item reads: Contributions to Aboriginal associations, Aboriginal women’s groups, Aboriginal community groups, Aboriginal communication societies, Aboriginal friendship centres and associations specifically representing Aboriginal friendship centers.

<sup>48</sup> Toronto is Canada’s largest and most ethnically diverse city. In it’s a call for comments in preparing its 1999 statement of policy the CRTC noted “Approximately 33% of Toronto residents report the exclusive use in the home of a language other than French or English.” Public Notice CRTC 1998-135, Ottawa, 22 December 1998.

<sup>49</sup> They are licensed as a category of specialty channel that may but need not be included in a cable company’s basic services. Chinavision did not begin as a national channel as it was not allowed to offer its service in British Columbia. Shortly after its launch it was given permission to do so. It then became competitive with Cathay International, which had been licensed (only in BC) to broadcast in Mandarin, Cantonese, Hindi, Vietnamese, and Thai in 1982. The two were brought under common ownership in 1993.

<sup>50</sup> In discussing the 60-40 guideline, the CRTC stated: “This approach ensures that ethnic stations primarily serve ethnic communities. However, it allows an ethnic station to establish a business model under which 40% of its schedule may be non-ethnic programming in order to generate revenues required to support its ethnic programming.” Public Notice CRTC 1999-117, Ottawa, 16 July 1999. There is a hierarchy of cross-subsidies within the system (In 1987 CFMT described the flow as coming “from conventional English-language programming and programming to major cultural groups as the Italians, Portuguese, Greek and Asians” “to - cross-subsidize programming to smaller ethnic communities

networks and other ethnic services intervene in licensing procedures or complain to the CRTC in separate actions about the intrusion into their advertising turf, positioning in the cable service tiers, and the like. The profit potential of the existing ethnic channels has been rising with the growth of their communities and falling with the significant decrease in scarcity as digital over-the-air, cable, and Internet broadcasting expands.<sup>51</sup> In addition, the CRTC moderates profit and losses by altering an ethnic station's Canadian content requirement. These requirements were originally quite low as the domestic capacity to provide programming in many languages was in its infancy but they have since steadily risen. The CRTC's Canadian content guidelines for the ethnic services are currently the same as for conventional broadcasters, although some relaxation typically occurs in the licensing process depending on the perceived economic situation of the service.<sup>52</sup>

The ownership of ethnic services is not explicitly restricted to members or companies controlled by members of the communities served. For example, Rogers Broadcasting Limited, a subsidiary of Canada's largest cable and media company, acquired controlling interest of CFMT in 1986. Subsequently, decisions on permitting retransmission sites and inclusion in attractive cable tiers have extended its audience significantly. In its recent licence renewal decision, the CRTC noted that it was the only profitable Canadian over-the-air ethnic television station (Decision CRTC 2000-772 Ottawa, 21 December 2000). Allowing transfer of the constrained licences of ethnic stations to owners that can better serve their audiences would be unobjectionable to most economists but presents the Canadian policy makers with a dilemma. Foreign ownership is prohibited in this sector. Among the rationales offered for this policy is that Canadian management reinforces content constraints in providing "Canadian" material. The logic of this argument requires that the owners of ethnic stations should come from the cultures that they serve. Andrew Cardozo, a CRTC commissioner, appealed to that logic in his dissenting opinion on the licence renewal of CFMT in 2000:

Owning CFMT-TV also gives Rogers a multilingual image in the Greater Toronto Area which is becoming increasingly multicultural and multilingual, even while the upper echelons of Rogers do not reflect this diversity. (Decision CRTC 2000-772 Ottawa, 21 December 2000)

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including Spanish, Ukrainian, Korean, Arabic, Black and Japanese." (Decision CRTC 87-739, Ottawa, 10 September 1987)), the simpler generalization aggregates these flows.

<sup>51</sup> At the beginning of 2000, the CRTC announced that digital specialty channels not required to be carried by cable companies would be licensed on a more open-entry basis. More specifically all such applications that met basic licensing criteria would be licensed even if competitive services existed (CRTC Public Notice 2000-6, Ottawa, 13 January 2000).

<sup>52</sup> In its restatement of ethnic broadcasting policy in 1999 the CRTC noted: "The Commission will continue to require that ethnic television stations broadcast the same minimum Canadian content levels as non-ethnic private television stations (60% Canadian content overall, 50% during the evening broadcast period) (Public Notice CRTC 1999-117 Ottawa, 16 July 1999). These requirements may, however, be varied by the Commission for any ethnic television station by condition of licence." In its licence renewal of CFMT in the next year, the Commission increased the Canadian content requirements by 5% over five years but the increased level remains below the guideline after consideration of "the licensee's commitments, the economic circumstances of the market it serves and the availability of funds to support ethnic television production" (Decision CRTC 2000-772 Ottawa, 21 December 2000).

With respect to the other major area of discretion, the allocation of subsidies, multiculturalism has had little impact. The estimated 2002-2003 budgets for key cultural institutions serving the O cultures are the Canadian Broadcasting Corporation (\$1,040,200,000), the National Film Board (\$61,100,000), the National Gallery of Canada (\$38,455,000), and the National Arts Centre (\$24,800,000). These dwarf the allocation to the multicultural program. On the grant side, the major programmes are the Canadian Television Fund (CTF) (\$241,000,000 allocated in 2000-01), Telefilm's feature film fund (FFF) (\$96,403,000 allocated in 2000-01), the Canadian Magazine Fund (\$45,000,000 estimate 2002-03), and the Book Publishing Industry Development Program (BMIDP) (\$30.7 million allocated in 2000-01).<sup>53</sup> With minor exceptions these funds support projects in the two official and aboriginal languages.<sup>54</sup> A preoccupation of the administrators of these programs is the split between the two official languages and in the case of CTF and FFF the regional distribution of support within Canada. These programs provide significant support to commercial firms in the cultural industries. In contrast, the modest multicultural budget cannot support "profit-making activities for commercial gain" nor support "the ongoing production of regular newsletters, newspapers, magazines, journals, and radio and television broadcasts."

There is little or no use of the vocabulary of multiculturalism in the annual reports of these funding agencies. A word search for variants of "multicultural" and "diversity" of the CTF's and the BPIDP's annual reports for 2000-2001 turned up the following incidence: For the CTF, "diversity" occurs once referring to regions<sup>55</sup> while "diverse" occurs twice, once referring to domestic and global markets<sup>56</sup> and once to Canada's regions and variety of languages<sup>57</sup>. The words multicultural and multiculturalism do not

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<sup>53</sup> We will work with the latest available annual reports of these programs rather than the estimates in order to use their complementary information. The magazine fund report provides no complementary information.

<sup>54</sup> The CTF, for example, funds only projects in English, French and aboriginal languages. In 2000-01 1% of the budget was spent on aboriginal language, 34% on French, and 65% on English programs. The BPIDP reports its statistics in terms of English and French language publishers and titles, e.g., "BPIDP publishers created 5,708 new titles in 2000-2001: 59% of these were published by French-language publishers and 41% by English-language publishers" (Book Publishing Industry Activity Report 2000-2001). An official in Canadian Heritage clarified that there was no formal requirement that publishing be in official languages and there were some foreign-language publications included in the portfolios of some publishers (Spanish language was the example given). Telefilm Canada reported in its 2000-01 Annual Report: "Over the past 15 years, the Feature Film Fund has played a decisive cultural and industrial role by supporting some 350 feature films, in English and in French, stemming from all regions of the country and representing a broad panorama of Canadian realities and viewpoints."

<sup>55</sup> "Regional producers provide Canadian audiences with programming that reflects the diversity of perspectives from across the country. The CTF, recognizing the particular difficulties facing regional producers in completing production financing, provides incentives to stimulate regional production."

<sup>56</sup> "In an increasingly diverse and competitive global and national market, Telefilm's cultural mandate is vitally important. More Canadian stories are being told in both official languages and are more accessible on the internet, in movie theatres and of course, on television, especially with the rapidly evolving broadcasting system in Canada." Canadian Television Fund Annual Report 2000-2001, p. 9.

<sup>57</sup> "This focus on regional and linguistic representation from Victoria to St. John's is vital to capturing and presenting a true to life vision of this country's rich and diverse cultural landscape."

appear. In the activity report of the BPIDP, “diversity” appears four times. Two of these occur in phrases not referring to culture--“diversity of titles” (p. 14) and “diversity of genres” (p. 24). The other two refer to Canadian Heritage’s concern with cultural diversity.<sup>58</sup>

During the last decade, opponents of Canadian multicultural policies have been more vociferous and a public debate has and is occurring.<sup>59</sup> The most effective argument of the opponents of multiculturalism has been that Canadian multiculturalism was the thin edge of the wedge for strong multiculturalism. In response to this criticism, the government and defenders of current policy began to put more emphasis on clarifying the limits to multicultural policy.<sup>60</sup> With respect to cultural activities, Kymlicka (1998, 45) reports that “(s)ome of the most virulent critiques of multiculturalism have been directed at the ethnic festivals” and “many people seem to equate multiculturalism with such funding, even though it accounts for only a small fraction of the overall multiculturalism budget.” In 2002, festivals, camps, religious activities, and celebrations of foreign national days are among the items *not* eligible for funding in the multicultural program.

In our reading, Canadian multicultural policy has evolved to the limited role of supporting the integration of immigrant cultures through educational and anti-racist programs aimed at those communities, members of the O cultures, and those working in public institutions. Budget allocations to multicultural initiatives are small. In addition, multiculturalism has had little impact on the generous and Byzantine allocations of rights and funds that nurture the Canadian cultural industries. In short, Canada’s current policies, advertised to be at the cutting edge of multicultural initiatives, have hardly broken the skin of the working constitution. There are no indications that stronger multicultural policy would be supported politically in Canada nor are the moderate and in the Canadian context reasonable policies currently in place likely to be rolled back.

We now turn to the task of assessing the degree to which multicultural initiatives are likely to be effectively included in international agreements.

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<sup>58</sup> “A central priority of the Department of Canadian Heritage is to promote an inclusive society and a shared sense of citizenship that builds on and values Canada’s linguistic duality and cultural diversity.” and “More specifically, the purpose of the BPIDP is to ensure choice of and access to books written by Canadian authors, which reflect Canada’s cultural diversity and linguistic duality in Canada and abroad.” P. 9.

<sup>59</sup> Neil Bissoondath, a versatile writer who immigrated to Canada from Trinidad, attacked Canada’s multicultural policies in his 1994 book *Selling Illusions: the Cult of Multiculturalism in Canada* as did Richard Gwyn, a veteran Canadian journalist and author, a year later in *Nationalism Without Walls: The Unbearable Lightness of Being Canadian*. Will Kymlicka (1998), a philosopher and political theorist at Queen’s University, responded to these criticisms (and described the debate) in his 1998 book *Finding Our Way*, which is based on five papers that he had earlier written for Canadian Heritage.

<sup>60</sup> Kymlicka (1998), for example, devotes a chapter to “The Limits of Tolerance” and gently takes the government to task for not making these limits clearer to the public.

## International trade negotiations

Of the three major international institutions, the World Bank, the WTO and the IMF, the WTO is the only one that involves all its members in periodic negotiations. Unlike the World Bank or the IMF, the WTO does not have discretionary authority to allocate funds or support to a particular member. It administers and acts as a secretariat for the processes agreed to by the members. As compared to the constitutions of the IMF and World Bank, almost all current members of the WTO participated in the negotiation of its constitution, which bears little resemblance to that governing GATT in 1947. International trade agreements are also tightly disciplined by the ability to opt out, not just to autarchy, but to bilateral and regional trade agreements. Regional arrangements have generally proliferated in the post World War II period<sup>61</sup> but rather than threatening the WTO's existence they have facilitated negotiation in the WTO, e.g., the resolution of internal differences within the EC preceded its participation in WTO negotiations, and provided learning "experiments"<sup>62</sup> for extensions of its domain. An exception is the dense web of coproduction treaties in audiovisual trade that has not provided a stepping stone to a multilateral system.

As the scope of activities governed by the WTO has widened and member countries have become more familiar with its bargaining procedures, the gains from negotiation for its members have increased. There is more potential leeway for adjusting individual offers to reflect distinctions among countries with respect to their concern over the cultural impact of imports. The degree of play depends on the bargaining protocol and what aspect of trade is under consideration. With respect to trade in goods, the GATT adopted linear tariff cuts in some rounds because of the increasing complexity of tariff schedules and to make offers easier to compare. Exceptions were allowed and if the original structure of the tariff reflected cultural values, the linear cuts maintained the relative evaluations. A more complex protocol was developed in addressing non-tariff barriers. When services were addressed in the GATS, countries exchanged offers to commit services for national treatment and market access with respect to four different modes of supply. Qualified commitments within these categories could also be offered. Tradeoffs were possible among offers on services and offers of commitments in other areas such as the **Agreement on Trade-related Aspects of Intellectual Property Rights** and the **Agreement on Trade-related Investment Measures**.

Areas of trade that were difficult to fit into the negotiating structure or that could be better addressed by other means, e.g., agriculture and textiles, were left out of the process. For these areas a patchwork set of accommodations governed until events or the negotiating sequence had reached a point where the area could be addressed and either integrated into the overall system or the patchwork tidied up and recognized as stand-

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<sup>61</sup> Preferences based on prior colonial connections such as Commonwealth preferences and French commercial relations with previous colonies are an exception in that they have receded in importance.

<sup>62</sup> Agreements covering a few countries with close affinities permit experiments with deeper integration. If successful, they provide insights into unanticipated problems, successful mechanisms and the like that encourage "export" of the ideas to broader configurations among more differentiated members. For a historical account, see Oye, 1992.

alone complements. The audiovisual sector, for example, was on the table in the Uruguay Round but no agreement was reached. Few countries made any commitments to granting market access and most reserved co-production treaties from the MFN provision in GATS.

The GATS commits member countries to successive rounds of negotiations to further liberalize trade in services. The deadline for the first round was the year 2000. By March 2001, the Services Council had established the following negotiating guidelines and procedures: a member cannot exclude a priori any service sector or mode of supply from the negotiations; the negotiations shall be transparent and open; and members may negotiate bilaterally, regionally or multilaterally. Less developed countries may offer to open fewer sectors, liberalize fewer types of transactions, and phase in market access concessions. In addition, under Article IV(1)(b) developed countries are obliged *inter alia* to improve the access of developing countries to distribution channels and information networks.<sup>63</sup> Negotiations on the audiovisual and other sectors of the cultural industries would proceed as part of the GATS negotiations in the context of parallel streams of negotiating in the Doha round. Alternatively, the WTO and its members could establish a special negotiating protocol for the cultural industries or more narrowly for the audiovisual sector to govern an additional negotiating stream in the Doha round.

**Table 2: Sample of preamble statements in NICD**

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<i>Desiring</i> to maintain and strengthen the capacity of all sovereign states to preserve and enhance cultural diversity, and to ensure their capacity to develop and implement measures to support diversity of artistic and cultural expression within and among nations; and taking into account the potential impediments to these goals that may arise from international trade, investment and services disciplines
<i>Recognizing</i> the need to increase the exchange of ideas, information and artistic creations around the world
<i>Acknowledging</i> that support for artistic expression and cultural production can be an important tool of sustainable economic development
<i>Endorsing</i> the right of artists and creators to freedom of expression and freedom from censorship
<i>Confirming</i> that there is a special need to preserve the cultures and traditional knowledge of indigenous peoples
<i>Emphasizing</i> the need to ensure that the implementation and enforcement of international disciplines concerning trade in goods, investment, services and intellectual property, not occur in a manner that may undermine, or derogate from the rights and obligations of Parties to this Convention

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<sup>63</sup> Article IV(1) of GATS in full reads as follows: The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to: a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis; b) the improvement of their access to distribution channels and information networks; and c) the availability of services technology.

How might negotiations proceed under the NICD? After the statement of purposes discussed in the Introduction of this paper, the preamble to the NICD draft resolution has 15 statements “approved by the membership of the INCD” that begin with desiring (3), recognizing (6), acknowledging (2) endorsing (1) confirming (2) and emphasizing (1).<sup>64</sup> To illustrate that they provide little guidance for structuring a negotiation, we briefly discuss the first of each type of statement as listed in Table 2.

The *endorsing* clause does not add to part c) of the NICD’s purposes, mentioned in the introduction, which states “secure the rights of individual artists and creators to freedom of expression and to work in security and free from censorship.” The premise in the *desiring* clause is that sovereign states with a strong capacity to preserve and enhance cultural diversity will pursue that goal rather than its opposite. The example of the destruction of the giant Buddhas of Bamiyan in March 2001 provides a vivid and recent example of a state destroying rather than fostering. Clearly the Taliban government had the capacity to preserve but destroyed instead. With respect to the *recognizing* clause, we agree that there are benefits from a greater exchange of ideas, information and artistic creations around the world but disagree that the NICD will promote, rather than curb, this exchange by leading to a proliferation of restraints on trade, movements of artists, and financing restrictions. With respect to indigenous peoples, UNESCO already *confirms* their special needs to its member states.<sup>65</sup>

The *emphasizing* point is the most puzzling. By signing this agreement a country does not excuse itself from obligations under the WTO. Suppose Canada were a signatory to the NICD and took a measure against the United States that was judged by a WTO panel to contravene its obligations. The authors of the NICD draft argue that if the NICD approves of the action, the United States cannot act under international law. Since the United States would surely act, either their interpretation of international law is incorrect or international law has the same status as the Ten Commandments and far less moral authority. Put in another way, this statement claims that a country signing a trade agreement is not obliged to obey its restrictions but can enjoy its benefits. Since this is true for every party, the agreement consists of gratuitous promises. Such commitments are generally not enforceable under contract law but the courts of some countries will make exceptions and order performance.<sup>66</sup> International agreements are not embedded in

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<sup>64</sup> The number of statements beginning with the preceding word is given in parentheses.

<sup>65</sup> UNESCO “encourages the: adoption of national cultural policies that enhance indigenous cultural resources; recognition of indigenous people's cultural rights; protection of indigenous heritage, especially the intangible heritage; active participation of indigenous communities in the management of sites, especially World Heritage Sites and sacred sites; implementation of bilingual, intercultural education programmes; appreciation of the value of the traditional knowledge at the heart of indigenous lifestyles and, the establishment of links between indigenous and non-indigenous scientific knowledge with a view to sustainable development; participation of community members in democratic bodies at local and national levels; development of media and means of communication suited to the needs of indigenous people.”

<sup>66</sup> In Anglo-American law, a contract, for example, is an exchange of promises among individuals or organizations with legal standing and is *normally* null and void in the absence of consideration. This doctrine has been firmly established in Canadian and British law for over two hundred years (see, e.g., Fridman, 1994, 81-2). Posner (1977) presents an economic argument of why some gratuitous promises

the same deep web of law governing contracts.

If a dispute arises among parties and there is no effective enforcement mechanism the outcome depends on power relations between the two parties. In particular, there is no international law that spells out when a gratuitous promise can be enforced. A promise by a wealthy government to give x million in aid to a poor country is in the language of contract law a gratuitous promise. If the wealthy country fails to transfer the money, the poor country cannot seek performance or damages in a world court because there is no international law with the informed “texture” of national law, no court that would hear it, and no way of enforcing the edict of such a court, if it existed. The Berne Convention governing copyright, for example, did not have an effective adjudication and punishment system. This resulted in asymmetric enforcement. Large and powerful countries, such as the United States, or powerful industry associations, such as the MPA, frequently took unilateral actions against offending countries—options that were unlikely to be effective if taken by a small country or its industry associations. Embedding the Berne Convention in the WTO made its dispute resolution mechanism available to all members large and small. Asymmetries were reduced.

International agreements have to rely on creating their own internal law and mechanisms of enforcement. The WTO sets up rules sanctioning measured responses to a member not complying with its responsibilities so that unstable retaliatory cycles are avoided. How does the NICD deal with this issue? One prerequisite for the crafting of an enforcement mechanism is that membership be valuable. The NICD draft convention (Section 4) lists a set of general commitments that are in line with its anarchic preamble. In general, the “commitments” are not constraints but licences to do almost anything the member wants to do. For example, each country can impose whatever import controls, export and production subsidies, exceptions or special stipulations under competition law, controls on foreign investment, government purchasing rules, discriminatory arrangements, public monopolies, tariffs, and policies that serve cultural diversity.<sup>67</sup> The Draft Convention allows the “sovereign authorities” to define terms used in the commitments sections (Article 2) and make distinctions among cultural goods, products and services that may compete commercially but are “unlike” in other (presumably diversity) respects.<sup>68</sup>

Even if the NICD generates a set of mutual constraints that induce more cultural exchange among its members the gains are unlikely to be large. Many of the countries that are members of the INCP are net importers of audio-visual content. If all buyers in say the oil market agree only to trade among themselves, they are unlikely to generate many benefits. From this perspective as well the NICD is not a credible alternative.

Even if there are significant potential gains, the value of membership depends on

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should be enforced and finds some matching between his conditions and the exceptions to the rule in American courts.

<sup>67</sup> See Articles 8, 9, 10, 13, 14, 15, and 17.

<sup>68</sup> See Articles 5 and 14 in particular and interspersed remarks in the other articles discussing “commitments.”

realising them, which in turn requires an effective enforcement mechanism. Perhaps because the prerequisite is not met, the NICD draft agreement does not attempt to construct a credible process of matching violations of the agreement with denials of benefits. Instead it mentions different agencies from which it might borrow enforcement processes.<sup>69</sup> The section of the draft containing that discussion ends with a claim that there may be no need for an enforcement mechanism as enforcement may somehow flow from domestic institutions.<sup>70</sup>

Factoring in the response of the United States weakens the case further. Although the United States has non-government members in the INCD, it is not a member of the INCP. The US government is not likely to sign an agreement that grants other countries the right to discriminate against its exports with impunity. In the case that the NICD became a reality, the US government would, for example, almost certainly heed the current campaign by its guilds and professional groups to offset or retaliate against the Canadian policies that they claim are inducing “runaway” audiovisual productions and retaliate unilaterally or under NAFTA by withdrawing access to its market in other areas. A number of significant producers of American style audiovisual product—Australia, Canada, and the UK—could well increase their exports of audiovisual products to countries previously supplied by the United States and increase trade among themselves. Since Canada already has active co-production treaties with France, the UK, and Australia in audiovisual products the net stimulus would have to come from displacing US exports in the markets of other INCP countries. This is unlikely to compensate for reduced access to American markets, as US reaction will be geared to the damages inflicted upon it and will target activities that cannot be sustained without access to its market. Publicly traded Canadian film and television production companies report a high percentage of their revenues from foreign, especially the US market.<sup>71</sup> In our opinion, if the NICD ever came close to becoming a reality, Canadian audio-visual producers are likely to become vocal, and the Canadian unions *sotto voce*, opponents of the proposal.

Our examination of the extent that a modern democracy has the will to accommodate multicultural initiatives reveals that it is small under the most supportive circumstances. We also speculate from studying the multicultural issue and examining recent experiences in Canada and Australia that the liberal principle of equality of treatment becomes more attractive with the complexity and development of a country. This tendency arises from the difficulty of making complex compacts with different cultures

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<sup>69</sup> It muses, for example, that “(p)erhaps the side agreements to NAFTA provide a useful prototype for resolving such corporate disputes.”

<sup>70</sup> “It is not clear from the Lucerne declaration that the INCD has settled on the need for an international enforcement regime to be established by the Convention itself. For instance, enforcement of the Convention might be invested entirely in domestic, rather than international institutions.” NICD draft resolution.

<sup>71</sup> Alliance Atlantis, by far Canada’s largest film and television program producer, reports 40% of its revenues from foreign sources split equally between the US and other countries; Lions Gate Entertainment Corporation, another publicly traded Canadian audiovisual production and distribution company, reports that 20% of its revenues came from Canadian sources compared with 63% from the US and 17% from other foreign sources.

and altering them in a rapidly changing world. This speculative claim for the attractiveness of the equal opportunity tenet of liberalism is similar to that made for tit-for-tat strategies in many contexts (Axelrod, 1984). It is simple, tolerant, and appeals to a sense of fairness.

In a modern democracy the state can and has opposed with force decisions by a culture within its borders to opt out of mandated moral or religious measures. If the group resists a civil war begins. Civil wars fought over morally charged or religious issues are among the bloodiest conflicts in history. Consider American history:

An estimated 623,000 men died in the Civil War. One out of eleven men of service age was killed between 1861 and 1865. . . . Comparisons with Americans killed in other wars bring the horror home. In World War I, the number killed was 117,000. In World War II, 405,000 died. In the Korean War, the death toll was 54,000. In the war in Vietnam, the number of Americans killed was 58,000. Deaths in the Civil War almost equal the number killed in all subsequent wars. (White, 2002, 111)

Among the reasons that Lincoln fought to prevent the secession of the confederate states was his government's opposition to the continuation of slavery. Moral and religious conflicts play out differently in an international setting because of the absence of the closer cultural links within a state and the absence of an army controlled by a world government. It is arguable that South African apartheid raised a similar degree of indignation among citizens in modern democracies as slavery did among the states within the United States in 1860. The governments of modern democracies did not respond to apartheid by declaring war on the South African government that had imposed it. Many did nothing while others organized trade boycotts against that regime.<sup>72</sup> International governance differs from national governance.

The international institutional structure cannot enforce the same degree of conformity across countries as can a nation state within its borders. For that reason, international arrangements permit more diversity than would be the case if the world had a single government. Some aspects of this diversity—child labour, poverty, environmental degradation, human rights abuses—are offensive to many citizens of developed democracies. Other aspects of diversity are generally viewed as adding to the quality of life. Within an international agreement there may be such value created that it can require that the generally offensive practices be curbed. The instrument will then encourage less diversity than in the absence of such conditions for entry. If the agreement offers no gains to members diversity or any other characteristic of the international economy is unaffected.

The NICD permits members to restrict the availability of content at will and takes a cultural laissez-faire approach. The WTO approach in contrast provides a framework in which a rules-based structure for the movement of artists and performers, access to cultural services, exchanges of cultural goods and finance can be developed. Like the rule

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<sup>72</sup> Boycotts and trade sanctions are controversial instruments in this context as they may further hurt the group that they are intended to help. As well as their economic effects, they effectively signal a moral consensus within a number of countries in opposition to the policies of the target country.

of law within a country, it is an initial step in encouraging additional exchanges among cultures without a thick history of interactions. Developing the complex environment for cultural activities that typify modern democracies at an international level is beyond our reach.

One of the achievements of modern democracies has been to reduce conflicts by creating a public sphere that allowed cooperation in some dimensions and space to differ on others, such as religious belief. It is arguable that the dialogical processes and inclusiveness of democratic politics generates more tolerance for differences within and among ethnic and religious communities. Although bloody conflicts over moral issues are more likely within a state, democratic processes provide mechanisms that over a period of time can reduce the sources of conflict. The development of legal systems and policy frameworks that have contributed to this end has taken time and experimentation. In the international sphere effective cooperation among countries has been limited to a few areas. Experience within international agreements and adjudication bodies can make that cooperation more effective and promote its expansion but the process of experimentation, learning and adaptation takes time.

Governments currently face an alternative of being members of a club that offers an enforceable rules-based environment for trade and investment or a world in which each country would make its own web of deals. Countries that are not members of the WTO are not encumbered by its rules and discipline from realizing multicultural and diversity goals. North Korea, Iraq, and Iran are among the most prominent countries not to belong to the WTO.<sup>73</sup> Their governments have not used their freedom from WTO entanglements to tolerate, not to say encourage, diversity at home. None of these countries has joined the INCP, nor are groups or individuals from these countries members of the INCD. Perhaps they cannot identify any gain from joining a club with no rules as compared to going it alone.

We were struck by the resemblance between international agreements and the situation of a country embracing our stylized representation of strong multiculturalism. All cultures in that state can opt out of any agreement. The state is left as an administrative centre for the self-enforcing agreements that can be negotiated. The international sphere differs from that within the strong multicultural state because states and not cultures negotiate the agreements. Experience has revealed that in this context there are only a few areas in which a broadly based cooperative process can be maintained. To date trade has been arguably the most successful of these areas. In our opinion, cultural activities have generally flourished and their customers and audiences benefited from the flow of ideas, expressions, and products in a more open world. Wouldn't it be a shame to jeopardize the life of this resilient flower because it is not a garden?

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<sup>73</sup> Saudi Arabia is not a member but has observer status at the WTO.

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