

Analysis of the Agreement Reached October 22, 1986
 Between The Minister of Cultural Affairs of Quebec
 and the Motion Picture Export Association
 - Submitted to Telefilm Canada.



Distribution has always been the weak link in the Canadian film industry - the funnel through which monies needed in Canada would be siphoned off to the major American distributors. News that Quebec was to license distributors led to great optimism, but that optimism was dashed as the fine print of the agreement concluded between the provincial government and the Motion Picture Export Association of America came to light. The document which follows is the analysis of that agreement, commissioned by Telefilm Canada.

It should be noted that the federal legislation, announced on Feb. 13 by the minister of Communications Flora MacDonald, proposes to alter the terms of the Quebec regulations in two critical areas. First, it is not a negotiated agreement but a unilateral, legislated policy. And, second, the definitions of "producer" and "world-rights" will be strictly defined.

by Michel Houle

Background

At first reading in the National Assembly, Bill 109 stipulated that only 80%-Canadian-owned companies could operate commercial distribution activities in Quebec.

Section 97 in this way adopts the recommendation put forward by the Commission d'étude sur le cinéma et l'audiovisuel. This recommendation was inspired by provisions enacted in the *Broadcasting Act* (1968) which limited foreign participation in any Canadian broadcasting company to 20% of shares. These provisions resulted in foreign participation in 80 Canadian

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drawing: Marcela Toro

broadcasting companies decreasing by 150 million dollars between 1970 and 1973.

Section 107 of the Bill also gives the Régie du cinéma the power to set the limits within which distributors and exhibitors may negotiate the division of box-office returns.

Parliamentary Hearings and Debate at Second Reading

During the public hearings of the Parliamentary Commission held February 22-25, 1983 and at second reading of the Bill on April 21, 27 and 28, 1983, criticism of Section 97 focused principally in two areas:

a) It was too radical. In practice, it would simply expel the Majors and transfer all commercial distribution in Quebec to Canadian companies. The CMPDA, which represents the Majors' "Canadian" subsidiaries, naturally objected vehemently on the grounds that its members had "acquired rights", since some of them had been operating in Quebec for close to sixty years.

Many felt it was more realistic to try to find a new balance and a fairer way of dividing the market between foreign and Quebec distribution companies.

b) It was deemed inadequate to handle Quebec's specific cultural problems. Many, including the Opposition, pointed out that it was not right to have major programming decisions affecting Quebec's cultural life taken elsewhere, in Los Angeles or New York, and to move that decision-making to Toronto or Vancouver did not solve the problem. To address this effectively, the Bill should thus ensure that a major share of the decisions be made in Quebec by Quebec companies.

Third Reading and Passage of the Bill

Bill 109 was amended following this public debate, a re-examination of the constitutional aspects of the Act and discussions with Quebec and American distributors.

In response to the criticism that the Bill inadequately addressed the specific situation in Quebec, Section 104 proposes that:

■ "only an enterprise having its principal establishment in Quebec may hold a general distributor's license (...) the *principal establishment* is the centre of the decision making and actual direction of the enterprise."

To meet the objection that the Bill was too radical, and in particular to reduce pressure from the American government and the Majors, Section 105 recognized the "acquired rights" of non-Quebec firms holding a distributor's license on December 17, 1982 under Section 30 of the *Licenses Act*.

Such firms could obtain a special distributor's license for any film which they had produced or for which they held world rights. The Régie du cinéma would determine regulations defining

the terms "producer" and "holder of world rights"

In this way, the government retained the idea of a fairer market share and turned over a significant portion of the Majors' activities and business to Quebec companies.

Two new elements were added to the Bill. Section 109 provided for mandatory reinvestment of a portion of the gross distribution income, not to exceed 10%, in Quebec productions. Section 115 stipulated that for equal tender distributors could not grant exclusive rights to the two large Canadian exhibition chains when marketing their films.

These provisions were rejected in total by the Majors who announced publicly, through the Chairman of the CMPDA, that they intended to boycott Quebec if the Bill was passed.

In spite of this pressure, the *Cinema Act* was passed unanimously by the National Assembly on June 22, 1983 and ratified the following day.

Draft Regulations and Memorandum of Understanding

The Régie du cinéma was formed in December 1983 with a mandate to draft the necessary regulations, in particular those required by Sections 105, 109, 114 and 115.

For reasons beyond the scope of this analysis, it took a long time to draft regulations for Section 105 defining the terms "producer" and "holder of world rights". At the same time, the Majors, faced with a ratified Act, stepped up pressure and their offer to negotiate.

It was in this context, after meetings with the Majors in Montreal and Los Angeles, that the Minister of Cultural Affairs set up a special negotiating committee in April 1984, chaired by Guy Fournier, to reach an agreement with the Majors on the eventual implementation of the Act.

As a result of these discussions, chief negotiators Guy Fournier and Millard Roth drew up a draft memorandum of understanding which was presented to the Minister on September 14, 1984.

In relation to Section 105, the memorandum stipulated:

■ "the term *producer* shall refer only to the producer of a film originally produced in the English language and should be applied only to a person possessing a substantial or material interest in this film. Is deemed to possess such an interest, a person who has invested no less than one million dollars U.S. in either of the following manners: as payments in production costs or in consideration of the rights to theatrical distribution in North America."

The term *holder of world rights* would apply:

■ "only to a person possessing the rights of theatrical distribution through the entire world, save and except Iron Curtain or Communist or Eastern Bloc countries or their allies."

Moreover, the draft agreement provided that:

■ "For the purpose of issuing a special distributor's license to a person who on December 17, 1982 held a license issued under section 30 of the *Licenses Act* (R.S.Q., chapter L-3), the Régie shall recognize the business relationship existing between Paramount and Disney until such time as this relationship ceases to exist."

In return, the government was to grant a three-year moratorium from the date of ratification on Sections 109 and 115. Section 114 was rendered virtually meaningless since a minimum of 10% on box-office returns was set for both distributors and exhibitors.

While accepted by the negotiators on both sides, the draft agreement was rejected and denounced by the Régie and the Quebec distributors. The distributors' objection was that the agreement did not guarantee them sufficient profits and left too large a share of the market to American companies.

The Régie opposed the proposed definitions of "producer" and "holder of world rights" mainly on legal grounds. They alternatively suggested that the producer be defined as "the person responsible for making decisions throughout the production of the film" and the holder of world rights as "the person holding distribution rights for a film throughout the entire world". The Régie was also against the moratorium on Sections 109 and 115 and the proposed 10% in Section 114 which would invalidate the clause.

We will come back to the Régie's position later – suffice it to say, the Minister rejected the draft agreement. The Minister requested that the Régie continue drafting regulations, taking into account the discussions with the Majors.

Publication of the Regulations and Public Hearings

In May 1985, the Régie published its draft regulations in the official Gazette, in relation to Section 105:

■ "...*producer* means any person holding at least 50% of the financial interest in a film."

■ "...*financial interests* means the investment of money, goods or services."

■ "...*holder of world rights* means any person holding the distribution rights to a film for the country of origin of the film and for the following countries: Canada, the United States, Belgium, Luxembourg, the Netherlands, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Great Britain, Greece, Spain and Portugal."

The Régie also published a "Regulation respecting Minimum Percentages of Gross Revenues Reserved" under Section 114. However, at the request of the government, which wished to delay enforcement, regulations under Section 109 (investment in Quebec production) were not tabled.

These draft regulations again raised concerns for the American Majors and, in August 1985, Jack Valenti appeared on the scene. Until then, discussions had been held directly with the CMPDA representative, Millard Roth, and with representatives of the Majors (Richard Graft, Bill Soady, Barry Reardon...); now the Chairman of the MPEAA decided to intervene. A new round of discussions began, this time with Claude Fournier, the Chairman of the Institut québécois du cinéma, acting as the main spokesman for Quebec.

While these discussions were underway, the Régie held public hearings. The Majors appeared at these hearings and opposed the proposals put forward by the Régie on the grounds that they were vague, confused and incompatible with current trade practices. In fact, their objection was still to reject the principles of the *Cinema Act*. Several Canadian and Quebec institutions (NFB, IQC, SGCQ) and professional associations appeared to voice support for strict enforcement of the Act.

Amended Regulations and Referral

As a result of the public hearings, the Régie reworded the regulations pertaining to Section 105 in the following way:

■ the producer is the person who holds, in whole or in part, the copyright on the film script on the first day of shooting.

■ the holder of world rights to the film is the person who holds the film distribution rights throughout the entire world. (our translation)

Furthermore, the regulation stipulated that a person is deemed to hold the copyright to a script or world distribution rights if its main shareholder holds them.

While the regulations were submitted to various government authorities, the Majors' lawyers argued that the new definition of producer did not constitute a simple modification of the original definition, but rather a fundamental change. They demanded that the new definition be submitted once again to the process of pre-publication and public hearings.

On October 16, 1985 there was a cabinet shuffle and Gérald Godin succeeded Clément Richard as Minister of Cultural Affairs. Mr. Godin resumed discussion with the Majors and, at the same time, submitted the draft regulations to Cabinet for approval. On the eve of a general election, the government decided to delay passage of the regulations.

The October 22, 1986 Memorandum of Understanding

On December 2, 1985 a new government took power in Quebec. Shortly thereafter, Mrs. Lise Bacon was appointed Minister of Cultural Affairs. After re-

"There are very few really big foreign films every year. The U.S. (MPEAA) will get them and we will get what's left."

— Maurice Attias,
Ciné 360 Inc.

"The Majors will put up \$4.5 million for a run-of-the-mill film. This is not exceptional. The independents have only small pictures and the junk that the Americans are dumping here."

— Jean Zaloum,
Les Productions Karim Inc.

"It will stop the invasion. With this agreement we now know who we are dealing with. Independent production is increasing every year in the U.S. and this is to our advantage."

— Richard Goudreau,
Cinéma Plus Inc.

"At best the agreement shows some concern about Quebec culture, a concern inherited from the PQ government... Bacon stood up in defence of the industry but she had no teeth in her mouth... It's all over for the independent distributor."

— George Rlitter,
Domino Film and Television
International Ltd.

"No comment."

— André Monette,
Action Film Ltée.

"As far as I am concerned, this agreement should have been made by the Parti Québécois. If that had been the case Orion would not be here today. There is no way we are going to keep the Majors out. They produce the product people want to see."

— Pierre René,
Compagnie France Film.

viewing the file, she gave Mr. Francis Fox the mandate of negotiating an agreement with the Majors on the most controversial aspect of the *Cinema Act*.

At the end of this last round of negotiations, an agreement was reached on October 22, 1986 between Mr. Jack Valenti, representing the MPEAA, and Mrs. Lise Bacon, representing the Government of Quebec.

It is this agreement that we analyse in the following chapters. For her part, the Minister undertook to delay proclamation of Sections 109 (mandatory reinvestment), 114 (division of box office returns) and 115 (independent exhibitors' access to films).

The agreement can only apply within the legislative framework of the Act: Session 105 must therefore be proclaimed and consequently amended. This was the intent of Bill 157, submitted to the National Assembly on November 13, 1986, to pass before Christmas.

The press release accompanying the Memorandum stated that "the agreement in question only concerns film" and that "the question of video" would be the subject of separate negotiations, which it was hoped would be completed before the end of January 1987.

The General Provisions of the Agreement

The general provisions of the agreement reached by Mrs. Bacon and Mr. Valenti are closer to the draft agreement of September 14, 1984 than to the *Cinema Act*. The principles, the objectives, the concepts and the definitions used are very different from those that inspired Bill 109.

To Whom Does the Agreement Apply?

In the *Cinema Act*, the kind of non-Quebec firms that might obtain special distributor's licenses was clearly spelled out: those who held a distribution license in Quebec at the time the bill was tabled, that is: Columbia, Fox, MGM-UA, Paramount, Universal, Warner.

The underlying principle was clear: to recognize the *acquired rights* of non-Quebec firms whose wholly-owned subsidiaries were distributing films in Quebec and had been doing so for many years.

Under the draft Fournier/Roth agreement, the general principle was respected, but a special privilege was granted to Paramount, which could continue to distribute Disney films until their contract expired. However, this privilege was not granted to Disney per se, since if Disney broke its ties with Paramount it would not have access to a special distributor's license and would have to distribute its films in Quebec through a Quebec company.

Under the Bacon/Valenti agreement, privileges would be granted to all members of the MPEAA as of January 1, 1987 (Section 12). This is something of a

"blind clause" since the parties could not evaluate its scope at the time the agreement was signed. There are two possible interpretations.

No new members join the MPEAA before January 1, 1987.

According to this approach, the agreement would only apply to the six distributors already provided for under the Act, and to: Buena Vista (Disney), DeLaurentis Entertainment Group, and Orion since these three companies are currently members of the MPEAA. Moreover, the agreement includes Tri-Star since this firm is one-third owned by Columbia, a member in line with the MPEAA. In fact, according to Section 9, "Member" means the original signatory, its subsidiaries, the entities under its direct or indirect control, and entities belonging to the same control group.

Although the agreement does not stipulate what rules will be applied with respect to direct or indirect control (the Corporations Act, the Bankruptcy Act, the Securities Commission, Investment Canada...), it appears that Tri-Star might be eligible. At least, this is the unofficial interpretation of the Quebec Ministry of Communications.

Moreover, the agreement grants Paramount the right to distribute Atlantic Releasing's films until the expiry of their contract.

New members join the MPEAA by January 1, 1987.

According to Mr. Francis Fox, discussions are currently underway between the MPEAA and five American distributors with a view to obtaining membership before the date set in the Memorandum. They are: Tri-Star, New World, Atlantic Releasing, and Cannon Lorimar. According to Jack Valenti, the chances of the first three gaining membership by January 1, 1987 are good while chances are less favourable for the last two.

Given the provisions of the agreement, it is clear that *acquired rights* are no longer an underlying principle, since at least one-third and possibly close to one-half of the companies eligible for a special distributor's license were not directly involved in distribution in Quebec at the time Bill 109 was tabled.

This will obviously have a negative impact on the original objective of the Act, which was the immediate transfer of a significant share of the market from the Majors to Quebec distributors. In this regard, the first paragraph of Section 105 was crucial.

Another consequence is the strong reaction of Canadian (non-Quebec) distribution companies. They had supported the *Cinema Act*, because the underlying principle of *acquired rights* was fair, even though most of them would not be eligible for special licenses. Any non-Quebec company — whether American, Canadian or European — that did not hold a distribution license on December 17, 1982, could

not obtain a permit. Canadian distributors feel that the agreement specifically discriminates against them, since it now grants privileges to American companies that do not hold such licenses, and possibly to American firms that until recently had distributed their films through Canadian companies (DeLaurentis and Atlantic Releasing), and even to American companies that do not currently have distribution rights in Canada. Furthermore, it appears as almost an invitation to new foreign distribution companies to establish themselves in Canada in spite of the recommendations of the Task Force on the Canadian Film Industry and the original objectives of the *Cinema Act*.

We can therefore expect political and legal opposition from Canadian distributors.

Distinction Based on the Language in Which the Film Is Shot

Like the Fournier/Roth agreement, the Bacon/Valenti agreement is based on a distinction between English-language and other-language films.

The Americans have always wanted this distinction and at the first round of discussions in the winter of 1982 and the spring of 1983, offered first to abstain from distributing films shot in French, then from distributing films shot in any language other than English.

This proposal was viewed by the Minister as "clearly inadequate" and: "Moreover, it is based on a linguistic cleavage, which is a misinterpretation of the problem we face and the objectives we are pursuing" (June 1983).

In concrete terms, the objective, oft repeated by the government, was to ensure Quebec distributors direct access mainly to European films and to independent American productions. Among European films, French and British films were particularly important, since they each constituted 42%, a total of 84%, of all European films distributed by the Majors in Quebec between 1978-1982.

Furthermore, the legislator had asked the Régie to draft a regulation defining the term "producer" and not the expression "film producer". The Act only provides regulation for the person who may hold a distributor's license and not for the nature of the product to be distributed.

The provisions of the Act did not authorize the Régie to regulate different conditions for English-language films and other-language films. In fact, the Régie used this to oppose the Fournier/Roth draft agreement.

But under pressure from the Americans, the two "political" agreements retained this position. The only new element in the Bacon/Valenti agreement is a step back with respect to previous American proposals. Whereas the Majors had first proposed to withdraw completely from the distribution of other-language films in the Fournier/Roth draft agreement, Section 2 now provides two loopholes to this.

The first is that members may distribute films shot in a language other than English if they have invested "100 % of the production costs ("negative costs") of the film"; this would enable the Majors, for example, to distribute Le-louch's *Un homme et une femme: vingt ans déjà*.

The second is that special licenses may be issued at the Minister's discretion if "the size of the Member's investment" warrants it. Since the scope of investment is not specified (does it refer to "production costs" or to Section 7 which defines "the total value of the funds invested"?), nor the size of the investment, it is difficult to predict the impact of Section 2(ii). However, the Quebec negotiator states that recourse to this section would be quite exceptional and that it is unlikely the Minister will grant exceptions.

Importantly, Sections 1 and 2 refer to the language of the original version and that they do not cover the distribution of French versions of English-language originals.

Definition of "Producer"

The agreement defines a producer as the person who intends to invest 50 % of the total value of the funds invested in the film, or the sum of \$4.5 million Canadian (Section 3(ii)). "Total value of funds invested" means "the costs of producing, distributing, duplicating, advertising and promoting the film" (Section 7).

At first glance, it appears that the only element of the Bacon/Valenti agreement that represents a gain for Quebec over the September 1984 draft agreement is the fact that the investment required for an eligible distributor has gone from \$1 million U.S. to \$4.5 million Canadian.

In practice, even this improvement is not so obvious. While the Fournier/Roth agreement applied these amounts to direct investment in production and the acquisition of distribution rights in North America, the current agreement broadens this to include the acquisition rights for the entire world and costs incurred for duplicating, advertising and promoting in North America and elsewhere the distributor might have rights, without any limitations in time or space.

Since the Majors and the mini-Majors spend \$3 to \$10 million U.S. on duplicating, advertising and promotion alone for the North American launching of any film they distribute, to which they may add exhibition costs elsewhere plus acquisition rights and possibly investment in production, it is clear that this provision is not an obstacle and will not prevent any Major from distributing in Quebec the English-language films it distributes in the U.S.

This conclusion was not contested by the Ministry representative, the Quebec negotiator, or any Canadian distributors who were asked.

The only films likely to escape the Majors' control are films they do not

distribute in the U.S. (as confirmed in Section 4) or films distributed in the U.S. by a Classics Division of the Majors in certain large urban centres. We will return to this in the next chapter.

It's worth mentioning that this definition violates both common sense and current trade practices. As we have just seen, legally, persons whose sole activities are related to distribution (distributing, duplicating, advertising and promoting), without any involvement in production whatsoever, may be recognized as *producers*. In other words, the definition states that a producer is... a distributor.

Clearly, given its mandate under the Act, the Régie could not put forward a regulation with such a provision. As the public agency responsible for regulatory matters, it could not accept a definition contrary to common sense and current practice in the industry. As such, the Régie could not have respected both the legislator's intention and the general provisions of the Act, in defining a producer as an exhibitor or a distributor.

To be even minimally acceptable, the definition should have stipulated that the \$4.5 million, or the 50 % of funds, invested, must necessarily be applied, at least in part, to production costs ("negative costs") in order to establish that the applicant was a producer. Section 7 does not do this.

Lastly, by setting a criterion based on a fixed sum (\$4.5 million), the agreement actually establishes a distinction based on the commercial value of a film. English-language films with an average or high commercial value within North America, whatever their origin and whether or not the Majors were involved in their production, may be distributed by American companies. Only films with low or negligible commercial value might be transferred to Quebec companies. Clearly, this is a contradictory principle on which to base a new division of the market between these two categories of companies.

Definition of "Holder of World Rights"

Since the distribution rights for the U.S. and Quebec (as required by Section 4) is enough to qualify a member under Section 3(ii), the section on the defini-

tion of world rights has little further impact.

Simply stated, this definition, contrary to those previously proposed, excludes the film's country of origin, which is undoubtedly the most significant distinguishing element. In practice, the producer often grants a national distributor the exhibition rights in the country of origin and sells a Major the rights for other countries.

However, since the distributor can qualify on costs incurred solely in North America, any additional country only makes it easier to qualify. Section 3(i) can only be advantageous to American distributors, who can resort to it when they have a so-called universal covenant (world rights) which will simplify the procedure.

Concrete Effects of the Agreement

In an attempt to establish the impact of the agreement in terms of the percentage of titles and volume of business that might be transferred from American to Quebec distribution companies, we took as reference the last two complete years for which precise data could be found, that is October 1, 1984 to September 30, 1986.

We analysed how many titles would have changed hands if the agreement had been in effect on October 1, 1984. We identified the films distributed by MPEAA members in Quebec from the lists of films published monthly by the Régie du cinéma.

Films Originally Produced in a Language Other than English

For films made in languages other than English, we went back to 1980 in order to take into account the Classics Divisions which played a role in the original adoption of the *Cinema Act*.

Table I shows the number of other-language original films distributed by the Majors in Quebec between October 1, 1979 and September 30, 1986.

Note that 76 % of all original non-English films distributed by the Majors during this period in Quebec were distri-

Table I: Films made in languages other than English and distributed in Quebec by members of the MPEAA between 1980 & 1986

Year	French	German	Italian	Spanish	Japanese	Hebrew	Turkish	Total
1980	2	1		1				4
1981	8	1	3	1	1			14
1982	13	1	2					16
1983	2	2	1	2			1	8
1984	2							2
1985		1			1	1		3
1986	2		1					3
Total	29	6	7	4	2	1	1	50

Source: Régie du cinéma

"Nothing has changed. Hopefully video distribution will be stronger."

- A. Henri Cozian,
Dima Films Inc.

"The Canadian industry is not big enough, does not represent a big enough share of the gross national product to justify our politicians going to war with the Majors."

- Pierre René,
Compagnie France Film.

"It does nothing for the small independent distributor. It gave the U.S. (MPEAA) exactly what it wanted, with no gains for Quebec."

- Maurice Attias,
Ciné 360 Inc.

"With this agreement there can be no progress for independent distributors. We will handle the small films that don't make that much money anyway just to go through the exercise of putting them on the screen."

- Jean Zaloum,
Les Productions Karim Inc.

"It is a step forward. It limits the number of participants in distribution and will show its effect in the future. However, had the government signed the agreement two years ago we would be better off now."

- André Link,
president, Association québécoise des distributeurs et exportateurs de films, de TV et de vidéo.

"I feel that it is a good and courageous document presented in a realistic way. The \$4.5 million is a weak stipulation and should be redefined to include the cost of acquisition only and not printing and ads."

- Victor Loewy,
Vivafilm Ltée

buted during 1981, 1982 and 1983, or in the heyday of the Classics Divisions established in 1979-1980 by Columbia, Universal, MGM/UA, Fox and Orion. Moreover the Majors' enthusiasm for the Classics was shortlived since in 1984, 1985 and 1986 the figures fall below the 1980 levels. In fact in 1984 and 1985, Universal Classics and TLC (Tender Loving Care) Films - Fox's Classics subsidiary - were dismantled, and MGM/UA Classics and Triumph's activities were considerably reduced. Columbia-Triumph was abandoned in 1986.

The Classics Divisions failed mainly for economic and managerial reasons. Distribution of these films in the United States generated less income than anticipated, while requiring more staff and specific expertise which the large studios, accustomed to distributing higher-cost films on a wider scale, did not have.

Political forces also had some bearing. The passage of the *Cinema Act* in Quebec, and successive steps taken by federal Communications ministers, led the MPEAA to request its members not to throw oil on the fire by unduly increasing their share of the Canadian market, which was already very large.

In any case, during the last two years, only six non-English-language films (three per year) were distributed by the eight members of the MPEAA operating in Quebec.

Of these, the maximum possible recovery by Quebec distributors is five titles, since *Un homme et une femme: 20 ans déjà* by Claude Lelouch is covered under Section 2(i).

Assuming that no MPEAA member would request a Minister's special permit, under Section 2(ii), the films that would have transferred to Quebec companies in 1985 and 1986 would have been:

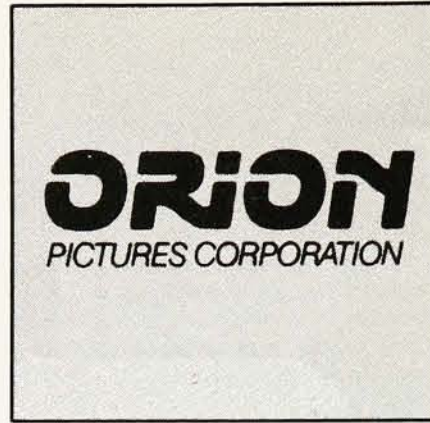
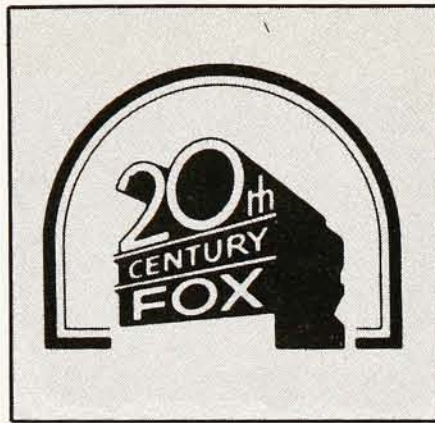
- In 1985 (October 1, 1984 - September 30, 1985): *Beyond the Walls*, Israel, 1983, original Hebrew version, Dir.: Uri Barbash, Distr.: Warner; *Parsifal*, England/France, 1982, original German version, Dir.: H.J. Syberberg, Distr.: Columbia; *Mishima*, U.S.A., 1985, original Japanese version, Dir.: Paul Schrader, Distr.: Warner.

- In 1986 (October 1, 1985 - September 30, 1986): *La Cage aux folles 3 - elles se marient*, Italy/France, 1985, original French version, Dir.: Georges Lautner, Distr.: Columbia; *Sotto... Sotto... Strapazzato da Anomala Passione*, Italy, 1984, original Italian version, Dir.: Lina Wertmüller, Distr.: Columbia.

Films Originally Produced in English

As shown in the last chapter, the distribution costs incurred by a Major on a Mini-Major for distribution in North America were enough in themselves to qualify a company for a special license under Section 3(ii). The only films likely to change hands are:

a) films that would not be distributed in the U.S. by a member of the MPEAA (Section 4);



b) films distributed in the USA by a Classics Division.

Tables 2 and 3 indicate, for 1985 and 1986, which companies distributed films in the U.S. that were distributed in Quebec by members of the MPEAA.

Note that in 1985, 102 of the 125 English-language films and in 1986, 112 of the 140 English-language films distributed in Quebec by the Majors were distributed by the same company in the United States. These films would therefore be eligible for a special permit. Moreover, the 28 films (14 in 1985, 14 in 1986) distributed by Tri-Star in the U.S. and by Columbia in Quebec would also have been eligible under Section 9. The 5 films distributed in the U.S. by Atlantic Releasing in 1986 could have been distributed in Quebec by Paramount under Section 5.

Lastly, the 4 films distributed in 1985 by Buena Vista in the U.S. and by Para-

mount in Quebec, as well as the 7 films distributed in 1986 by DeLaurentiis Entertainment Group in the U.S. and by Paramount in Quebec, would also have been eligible under Section 6, which provides that any member may distribute the films of another member.

Since all of the 265 English-language films distributed by the Majors in Quebec in 1985 and 1986 were distributed by a current member of the MPEAA in the U.S. or by Atlantic Releasing (covered under Section 5), the provision does not eliminate anyone. This leaves the films distributed in the U.S. by the Classics Divisions (MGM-UA Classics, Orion Classics and the now defunct TLC Films), that is, 5 films in 1985 and 2 films in 1986.

Those films were:

- In 1985: *Paris, Texas*, Germany/France, 1984, orig. Eng., Dir.: Wim Wenders, U.S. Distr.: TLC Films, Quebec Distr.: Fox; *Almost You*, U.S., 1984,

orig. Eng. Dir.: Adam Brooks, U.S. Distr.: TLC Films, Quebec Distr.: Fox; *Joshua Then and Now*, Canada, 1985, orig. Eng., Dir.: Ted Kotcheff, U.S. Distr.: TLC Films, Quebec Distr.: Fox; *Wetherby*, Great Britain, 1984, orig. Eng., Dir.: David Hare, U.S. Distr.: MGM/UA Classics, Quebec Distr.: United Artists; *Another Country*, Great Britain, 1984, orig. Eng., Dir.: Marek Kaniévski, U.S. Distr.: Orion Classics, Quebec Distr.: Orion.

- In 1986: *Eureka*, Great Britain/U.S., 198 , orig. Eng., Dir.: Nicolas Roeg, U.S. Distr.: MGM/UA Classics, Quebec Distr.: United Artists; *Kipperbang*, Great Britain, 1982, orig. Eng., Dir.: Michael Apted, U.S. Distr.: MGM/UA Classics, Quebec Distr.: United Artists.

It is possible that the distribution of these films did not incur costs (equivalent to \$4.5 million Canadian) for duplication, advertising and promoting for their North-American launching. Their eligibility would then depend on the number of countries for which the Majors had acquired distribution rights, since all past or future expenses for all countries can be used in calculating the \$4.5 million, as well as money spent for acquisition rights and/or direct investment.

Lastly, it must be remembered that in order to qualify the company must intend to invest \$4.5 million Canadian or 50 % of the money invested in the film. Since these are independent productions and, for the most part, non-American productions, the average budget is much lower than for American films. In Canada, the average budget for a full-length film is \$3 million, in France \$2.8 million Canadian, and in Israel \$800,000 Canadian. The amounts that must be invested in acquisition and distribution rights to qualify are much less than \$4.5 million Canadian.

Given these facts, and according to the experienced distributors we consulted, it appears that all of these films might qualify for a special license. However, since we do not have exact data on which to base this assertion, we will assume that with the exception of *Paris, Texas* and *Joshua Then and Now*, which would undoubtedly qualify, the films distributed by the Classics Divisions would have changed hands to the benefit of Quebec distributors.

This is the optimum transfer scenario.

Synthesis

Table 4 summarizes the data collected on English-language and other-language films.

It appears that a total of eight American distribution companies operating in Quebec would have lost 10 films (6 in 1985, 4 in 1986) to Quebec companies if the agreement had been in effect on October 1, 1984, that is, an average of 3.7 % of the films they distribute in Quebec.

It is difficult to assess exactly what such a transfer would represent in terms of percentage of business. An extremely conservative estimate suggests

Table 2: 1985 English-language films distributed in Quebec by members of the MPEAA, broken down by U.S. distributor

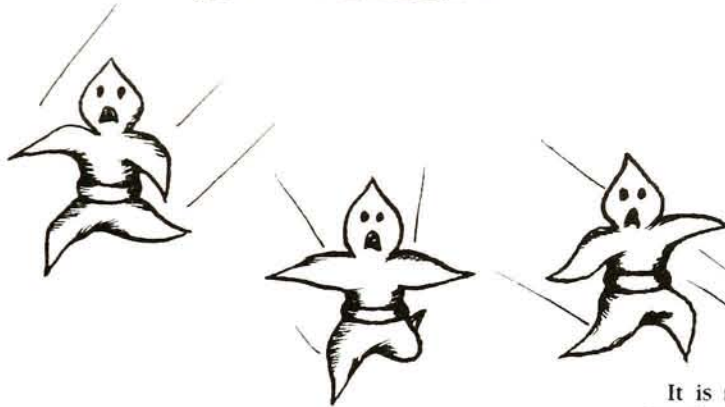
Distributor in Quebec	Same	Distributor in U.S.					Total
		Tri-Star	TLC Films	MGM/UA Classics	Orion Classics	Buena Vista	
Buena Vista	-	-	-	-	-	-	-
Columbia	17	14	-	-	-	-	31
Fox	13	-	3	-	-	-	16
MGM/UA	14	-	-	1	-	-	15
Orion	11	-	-	-	1	-	12
Paramount	14	-	-	-	-	4	18
Universal	15	-	-	-	-	-	15
Warner	18	-	-	-	-	-	18
Total	102	14	3	1	1	4	125

Sources: Régie du cinéma & Variety

Table 3: 1986 English-language films distributed in Quebec by members of the MPEAA, broken down by U.S. distributor

Distributor in Quebec	Same	Tri-Star	MGM/UA Classics	DEG	Atlantic Releasing	Total
Columbia	15	14	-	-	-	29
Fox	17	-	-	-	-	17
MGM/UA	11	-	2	-	-	13
Orion	8	-	-	-	-	8
Paramount	17	-	-	7	5	29
Universal	17	-	-	-	-	17
Warner	19	-	-	-	-	19
Total	112	14	2	7	5	140

Sources: Régie du cinéma & Variety



drawing: Marcela Toro

that the distribution income from these 10 films is at least 20 times less than that of the 10 major films distributed in Quebec by the same companies.

We therefore estimate that, at best, the agreement would have meant a transfer of 0.1 to 0.2% of the Majors' volume of business to Quebec companies.

The evidence leads to the conclusion that the Bacon/Valenti agreement does very little to further the initial objective

of the *Cinema Act*, that is, a fairer division of the market between American and Quebec distribution companies. Furthermore, as we have seen, this small transfer is calculated on the assumption that only current members of the MPEAA are eligible. If new members such as Cannon, which is growing rapidly, and New World were added to the list of eligible members on January 1, 1987, and if Tri-Star and Atlantic Releasing became full members, the impact of the agreement would not be the maintenance of the status quo but rather an increase in American distribution activities in Quebec and in their share of the market.

It is noteworthy that in 1986, films distributed by these four companies grossed 13.9% of the North-American box office and the nine current members of the MPEAA controlled 82.6% of the same box-office, for a total of 96.5%.

The Quebec Distributors' Position

The major thrust of the Bacon/Valenti agreement does not respect the provisions of the *Cinema Act*, it contributes very little to the cultural and economic objectives of the Act, and it is a step backwards from the Fournier/Roth draft agreement, which was rejected at the time by Quebec distributors.

Given these facts, one might wonder why Quebec distributors supported, some with enthusiasm, this agreement.

New Political Context, Reduced Expectations

It is clear that the power relationship between the Quebec government and the MPEAA changed dramatically between 1983 and 1986.

When the National Assembly unanimously passed the *Cinema Act*, in spite of pressure from the American government and the Majors, Quebec's position was a strong one. Quebec distributors still believed in 1984 that the Act would be enforced within the parameters set by the legislator. That is why they rejected a "political" agreement that softened certain aspects of the Act: they hoped to obtain more.

Many factors contributed to upset the situation in favour of the MPEAA: delays and the passage of time; numerous ne-

gotiations with the Majors and inconsistency as a result of numerous changes in ministers and negotiators; hesitations and deliberations by the Quebec government and its decision to delay passage of the regulations in November 1985; no intervention by the federal government and its decision to delay the adoption of a distribution bill.

More generally, the beginning of free-trade discussions between the U.S. and Canada and the Quebec Premier's stated intention of launching a second James Bay project convinced Quebec distributors that the governments would prefer a negotiated settlement with the Majors to avoid causing an irritant to the American government.

It was clear that the desire to reach a negotiated agreement at all costs, one accepted by both parties, could only mean limited gains for Quebec distributors. Only unilateral action on the part of the governments could lead to substantial gains for Canadian and Quebec companies. And the governments were far from expressing any desire for unilateral action.

Increased American Activities in Canada and Quebec

Since the *Cinema Act* was passed, two new "mini-Majors" have established themselves in Quebec: Buena Vista (Disney) and Orion. Cineplex Odeon, the main exhibition chain in Canada, came under the "indirect control" of MCA-Universal and then bought France Film, the only major Quebec exhibition network owned by Quebec interests. Thanks to increasing rivalry between Famous Players and Cineplex Odeon, Paramount was able to buy the Canadian distribution rights for the films of the DeLaurentis Entertainment Group and Atlantic Releasing, which until then had been distributed in Canada and Quebec by Canadian and Quebec companies. Furthermore, several foreign companies have established themselves in recent years in the video distribution sector.

While the governments hesitated, American companies were strengthening their hold on the Canadian and Quebec film and video distribution and film exhibition markets.

This encouraged the MPEAA to be more confident and demanding than it was at the time of the Fournier/Roth agreement, but its aim remained the same: to protect the interests of members established in Canada. However, it happens that its members are more active and more numerous than they were three years ago.

Moreover, the distribution industry in the United States has been particularly active in the last few years. There have been numerous takeovers by financial groups wishing to enter the rapidly growing cultural and entertainment industries sector. DeLaurentis's purchase of Embassy, Cannon's rapid growth, the attack to be launched by Vestron (the second largest video dis-

Table 4: Number and percentage of films distributed by members of the MPEAA that might have been turned over to Quebec companies if the Memorandum had been in effect on October 1, 1984.

Distributor	Number of films distributed			Maximum transfer possibility		
	1985	1986	Total	1985	1986	Total
Buena Vista	—	8	8	—	—	—
Columbia	32	31	63	1	2	3
Fox	16	17	33	1	—	1
MGM/UA	15	13	28	1	2	3
Orion	12	8	20	1	—	1
Paramount	18	29	47	—	—	—
Universal	15	17	32	—	—	—
Warner	20	20	40	2	—	2
Total	128	143	271	6	4	10
% of titles				4.7%	2.8%	3.7%
% of business (estimated)				0.2%	0.1%	0.2%



WALT DISNEY TELECOMMUNICATIONS
AND NON-THEATRICAL COMPANY

tribution company in the U.S.) on the film exhibition market, have given Quebec distributors reason to fear that their current situation is going to deteriorate rapidly over the short and medium term, as the Quebec market is completely opened to foreign companies.

In this context, the priority is not to make major and immediate gains, which are impossible because of political unwillingness to take unilateral action, but to preserve what has been acquired, to somehow "guarantee" the status quo, and to ensure that the *Cinema Act* is brought into force as quickly as possible, albeit in a less radical form. Quebec distributors simply hope to cease losing ground and to arm themselves against as yet intangible, but foreseeable, threats.

Advantages of the Agreement

The October 22 agreement on film distribution has certain preventive and symbolic advantages for Quebec distributors.

Application of Section 105

The conclusion of an agreement between the MPEAA and the Minister of Cultural Affairs would make it possible to amend the Act (Bill 157) and implement Section 105.

In this way, non-Quebec firms other than those stipulated in the agreement could not carry out distribution activities in Quebec. This closes the door to American companies which were not members of the MPEAA on January 1, 1987, but which might have grown large enough to become members in the next five years, as well as to any European company. As a preventive measure, this is important for Quebec distributors because of the rapid growth of independent American distributors involved in mergers with or takeovers by large financial groups. The MPEAA is like the National Hockey League: the age of the six-member clubs is definitely over. New mini-majors have appeared and others may be born shortly, but they will not be able to establish themselves in Quebec.

Also, the planned amendments to Bill 157 will close the door to Canadian (non-Quebec) distribution companies.

Preventing the Return of the Classics Divisions

Although the immediate gain for non-English-language films is insignificant, Sections 1 and 2 of the agreement at

least guarantee that the Majors cannot reinstate the European film acquisition operations (the Classics) that so seriously affected Quebec distributors in 1981 and 1982.

Symbolic Gains and Gains for Video

Finally, the Quebec distributors hope that the fifth provision of the Memorandum, "that the parties recognize that the Memorandum aims to ensure Quebec film distributors better access to films from all parts of the world", will set a precedent that will facilitate negotiations for a video agreement; will pave the way for a renegotiation of the film agreement in 1991 and that it will be used by the federal government to justify Canadianization of film distribution.

However, it is most particularly in video that the Quebec distributors hope to make appreciable gains.

The Future

Draft Agreement on Video

We mentioned earlier that according to the press release, the October 22, 1986 agreement dealt only with film distribution and that negotiations were to take place between November 21 and the end of January with respect to portions of the Act relating to video.

However, nothing in the text of the agreement, or in Bill 157, states that the word "film" has a more limited meaning than the one given by the Act in Section 1:

■ "a work produced by technical means that results in a cinematographic effect, regardless of the medium employed."

Until we have a memorandum of understanding on video which specifically stipulates which video distribution companies are eligible for a special license, then, the October 22 agreement will prevail. This gives the Quebec negotiator a trump in video discussions with the MPEAA.

Quebec distributors are in fact hoping that only members mentioned in the October 22 agreement will be authorized to distribute video tapes in Quebec.



Table 5: Number of video tape titles distributed in Canada in 1985, broken down by distribution company (Source: Nordicity Group)

Distributor	Titles	%
1. Majors		
Warner Home Video	477	
CBS Fox Video (Canada) Limited	411	
RCA/Columbia Pictures Home Video	294	
MCA Videocassette Canada	282	
MGM/UA Video Enterprises Inc.	196	
Paramount Home Video	168	
Walt Disney Home Video	127	
	<u>1 925</u>	38.5
2. Other Important American Companies		
Vestron Video	287	
Media Home Entertainment	228	
Thorn-Emi (Cannon)	76	1.5
Embassy Home Entertainment	216	
	<u>807</u>	16.2
3. Major Canadian Companies		
Astral Video	173	
Pan-Canadian	67	
	<u>240</u>	4.8
Total	2 972	59.5
Other distributors	2 024	40.5
Total available titles	4 996	100

On the other hand, it is to be expected that the MPEAA will wish to protect all the major American companies directly or indirectly distributing videos in Quebec.

The Canadian market is divided differently for video distribution than for movie theatre distribution.

Table 5 indicates the number of video tape titles distributed by the major players in Canada in 1985. These companies control close to 60% (59.5%) of the available titles. The other 40% is shared by a number of American, Canadian and Quebec companies, (we were unable to determine the precise share of the market held by each).

As the table indicates, the Majors' subsidiaries, which would be eligible under Section 9 of the October 22 agreement, distributed 38.5% of the titles available on the Canadian market in 1985. Four other major American companies (the list is not exhaustive) controlled 16.2% of the market. Only one company, Thorn-Emi, has ties with a mini-Major and it was bought by Cannon in 1986. However, it is not certain that Cannon will be a member of the MPEAA on January 1, 1987.

These figures apply to the Canadian market and not to the Quebec market, but the fact remains that if the October 22 agreement also applies to the eligibility of non-Quebec video distribution companies, (and therefore excludes Vestron Video, Media Home Entertainment, Embassy Home Entertainment,

possibly Thorn-Emi, Prism Entertainment and some others involved in video distribution in Quebec,) then Quebec distributors might have something to gain by it.

A company such as Astral Video, which enthusiastically supported the agreement, would benefit in many ways. First of all, it is one of the few "Toronto companies based in Quebec" and it is therefore eligible for a general license, which would give it an advantage over its competitors - especially Pan-Canadian - when negotiating rights for all of Canada. Astral also reproduces video cassettes and any potential gain in video distribution or sub-distribution rights would generate important revenue in that area. A Quebec firm such as René Malo that already has agreements with American corporations for Pan-Canadian distribution, or the distribution of French versions, would be in a good position to consolidate itself on the Canadian market and attain a critical mass that would help its long-term expansion.

In short, the potential gains for video appear to be significant,¹ especially since income from video cassette distribution (about 55%) is greater than from movie house distribution (45%).

Needless to say, these gains will not be realized unless Quebec stands firm in the negotiations that are beginning with the MPEAA and Home Video Board, and does not grant privileges to all the American companies already established in Canada, or that might

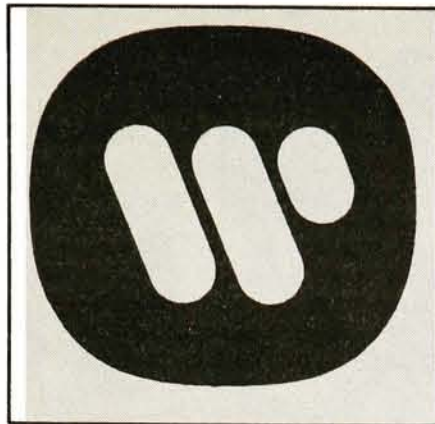
want to set up in Canada, as it did in movie house distribution. This is the bet the Quebec distributors are making and it appears that the support they gave to the October 22 agreement was conditional on the government remaining firm in its video negotiations.

Effects on Canadian Distribution Policy

It appears that the October 22 agreement will have a negative effect on the adoption of a Canadian distribution policy.

Most observers emphasize that the agreement demonstrates it is possible to reach a negotiated solution with the Majors. This is true, but it demonstrates at the same time that any negotiated agreement accepted by both parties can only mean negligible gains for Canadian companies.

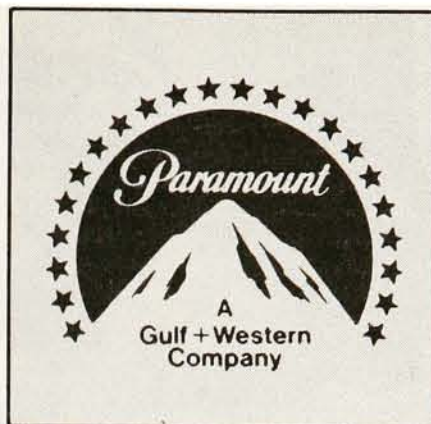
As many analysts pointed out, including Michael Spencer in his report "American Influence on the Canadian Film Industry 1922-1983", only unilateral action by the government can redress the balance between foreign companies and Canadian distribution companies. For 60 years, negotiations have only served American firms and the sta-



tus quo.

Perhaps the video agreement will reverse this finding, but that has yet to be determined. The only agreement in effect has hardly any impact on the division of the market and the Government of Quebec might have to take unilateral action if it wishes to meet Quebec distributors' objectives with respect to video.

Moreover, the signing of this agreement, which grants American companies not yet established in Canada the right to distribute in Quebec, goes against the conclusions of the Task Force on the Canadian Film Industry and will certainly not make Investment Canada's task of refusing access to new foreign distribution companies any easier.



In abandoning the principle of acquired rights contained in the Act to the exclusive benefit of foreign companies that are members of the MPEAA, the agreement opens the door to legal opposition from Canadian (non-Quebec) companies. This will impede consensus on a Canadian distribution policy within the industry and may render the Act and the agreement inoperative over the long term.

Lastly, the agreement does not provide any useful or functional concept that might be used in the federal distribution bill. The proposed definition of "producer" is illogical (producer = distributor) and is so broad that it would not stop any Major from distributing the films it does already in Canada. The no-

tion of a fixed sum (\$4.5 million Canadian) will mean that the distribution of all profitable English-language films will go to foreign companies with the "left-overs" going to Canadian companies. This will hardly contribute to a fairer sharing of the market between foreign and Canadian companies, and it sanctions Paramount's trade practices.

In conclusion, let us emphasize that this rather meaningless agreement was only possible because a legislative framework had been unanimously adopted by the National Assembly and that the federal government does not currently have such a framework.

The Government of Canada is still at square one: it must formulate a Canadian distribution policy and the appropriate legislative framework if it wishes to attain its objectives.

In fact, as we pointed out previously, the only positive point in the agreement is that the MPEAA recognizes the legitimacy of government action in favour of national distributors.

1. To be certain, one would have to know the volume of business rather than the volume of titles handled by video distribution companies in Quebec. Our research was not able to uncover this.

WHITE'S SPOTLIGHT ON...

**WARREN CARR,
PRODUCTIONS MANAGER**

Since 1985, Warren Carr has been production manager on various TV and theatrical films in western Canada. Although he didn't always know he was going to be a productions manager.

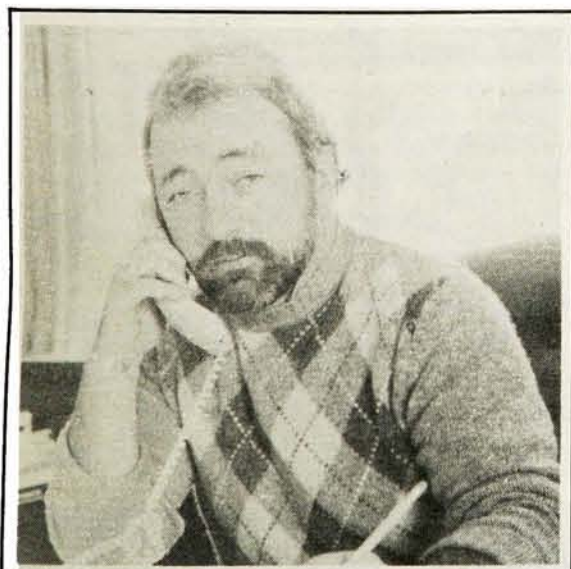


Photo and text: Ted Hackborn

In 1971, while working in the electronics industry, Warren decided it was time for a change. He studied broadcast communications, and went on to work for nine years for the provincial educational media centre, a government run TV studio where he managed programming and facilities and directed documentaries.

In 1981, he was enticed into the motion picture business by various freelance people he hired while working at the TV station and soon found himself on various films and TV movies: as locations manager on *Space Hunter: Adventures In The Forbidden Zone*, as 2nd a.d. on *The Glitter Dome*, *Iceman* and *The Clan Of The Cave Bear*, and a memorable experience on Michael Cimino's *Year Of The Dragon* for the Canadian unit.

It wasn't until the winter of 1984, while scouting various locations and preparing a workable budget for the film *Going For The Gold... The Bill Johnson Story*, that he offered to set up interviews for the position of production manager with the producer of that film. The producer told Warren that it wouldn't be necessary because he had already found their man. And to his surprise, he found out that he was the one they wanted to do the job. From there he says it was a "combination of luck and good fortune and the support of his crews" that enabled Warren to go onto the Lorimar film *The Boy Who could Fly* then a low budget feature called *The Stepfather* and a nine month stint with Columbia Pictures including his latest project, which completed principle photography late Oct. '86, the Steve Martin film *Roxanne*.

He remarks, "the american dollar coming into Canada has given a lot of canadians the opportunity to better their craft. We should be thankful, particularly in BC where there is little or no indigenous industry to help us along". He is presently putting a budget together for a new movie entitled *Red Harvest* which he hopes will begin production in 1987. Warren's comment on the film business "it can be completely consuming, it can tear you apart and drive you insane but once bitten, the scars never heal".



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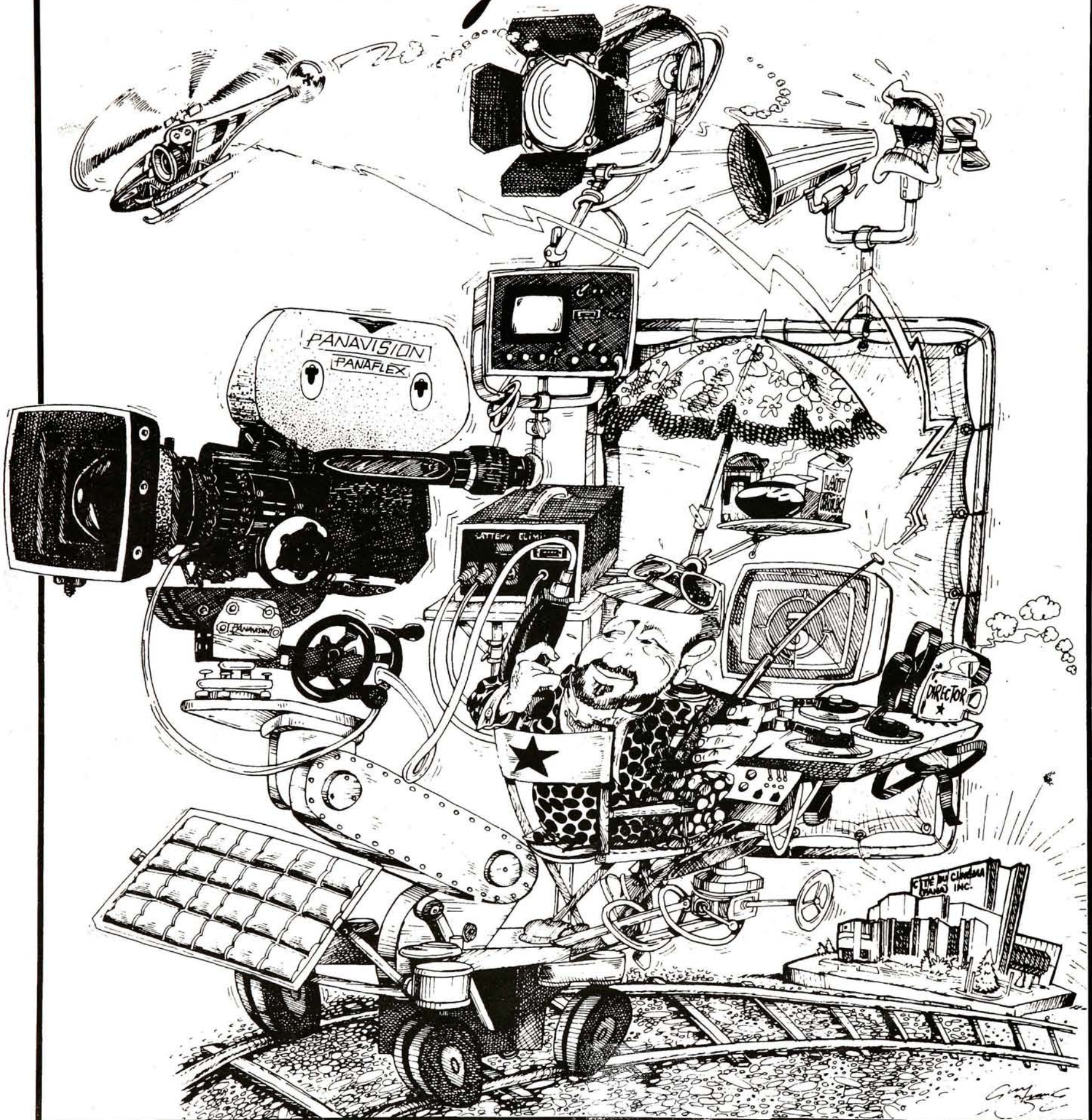
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