

The distribution gag

An analysis of the proposed federal film distribution legislation

BY MICHAEL BERGMAN

Ha! Ha! Ha! The new Canadian film distribution policy recently announced by the federal Communications minister Flora MacDonald is certainly worth a good laugh. Even more amusing is the generally favourable response of the Canadian filmmaking community. There is certainly nothing like good slapstick and watching people put bags over their heads so they can't see what's going on around them while they call lemons oranges. Let me share the joke with you.

First the warmup. The Canadian government will spend an extra \$200 million over five years on the film industry. This amount sounds impressive but don't forget it only breaks down to \$40 million a year. Not only that but the \$40 million is divided up into \$15 million per annum for Telefilm's Feature Film Fund, \$3 million per annum for its dubbing and subtitling fund, \$5 million per annum for the National Film Board to coproduce features, \$2 million per annum for the Film and Video Centre of Supply and Services Canada to fund non-theatricals, \$1 million per annum for the new Film Products Importation office and \$17 million per annum for a new Film Distribution Fund to be run by Telefilm.

A drop in the bucket

Think about these figures carefully. The only amount which will directly fund feature film production is the additional \$15 million a year to Telefilm's Feature Film Fund. This amount is a drop in the bucket which could only finance three or four productions assuming that one is high-budget and the rest are low-budget. This amount can in no way replace the lost private investment from the demise of the former federal film tax shelter, nor can it replace reduced American film financing which makes up the bulk of the Canadian industry's monies. Worst of all, it continues the progression of growing dependence of the film community on direct government subsidy. For an industry that's supposed to be commercially driven and competing in the world market largely dominated by private enterprise film ventures, the failure to devise schemes that attract private capital to Canadian film is harmful and can only perpetuate our industry's mediocre commercial success.

Three million dollars a year for dubbing is certainly a valid expense. It will be absolutely

necessary given the Province of Quebec's new but as yet unproclaimed film visa law which prohibits the exhibition of non-French language films unless an equal number of French-dubbed but not subtitled prints are also exhibited.

Canadian filmmakers or distributors who cannot afford the dubbing costs will, with this new law, lose one-quarter of their domestic market.

While the beleaguered and neglected National Film Board will appreciate another \$5 million a year, this amount, although destined for coproduction with independent filmmakers, is more an indirect way of financing the National Film Board than encouraging Canadian feature film production.

Since Canada is distinguished for its documentary and non-commercial films, it's hard to see how \$2 million a year to Supply and Services Canada will mean very much, but what the heck. This amount certainly will not benefit feature film production.

It is hard to see how \$1 million a year for the new Film Products Importation office can be usefully spent especially in light of the criticisms you will read below. It's money to create another level of bureaucracy so that everybody can have more forms to fill out. So much for the current government's commitment to reducing functionaries and red tape.

The capstone of all this funding is the \$17 million a year for Canadian film distributors. Supposedly this money will help Canadian distributors to acquire properties and with the revenue thereby garnered help finance Canadian films. In other words Canadian productions already heavily subsidized by the government will be distributed by distributors heavily subsidized by the government who will re-invest subsidized revenues to make more subsidized Canadian films. What's the point of having a commercial film industry if a substantial part of its operations at all levels is a process of exchanging government funds? There is no question that government assistance should be a means of provoking increased private investment. Direct subsidy discourages the search for legitimate schemes to attract private investment and encourages schemes to attract government money. Far better for the government to subsume the industry through a Crown corporation if it's interested in massive direct investment than to leave the industry in a no-man's land where it's unsuccessfully trying to be both a private venture and a subsidized dependent. At any rate it is difficult to see how \$17 million a year begins to even approach the

kind of financial clout necessary for the several Canadian distributors to compete with not only the majors and the mini-majors but every other country's independent film distributors.

Don't forget the usual hook in all long-term government programmes - they are subject to change. Five years will see at least three governments: the current, the one that will be elected in the upcoming elections, and the one four or so years down the road at the next traditional election time. Given the ups and downs of government direct or indirect financing of the Canadian film industry in the past, it is hard to make long-term strategies for the future regardless of the emphatic commitment of the current minister of Communications.

Investment policy

Now let's begin the joke in substance. There is to be a new Canadian investment policy on foreign investment in Canadian film distribution. Takeovers of Canadian-owned and controlled distributors will not be allowed. Investment in any new distribution business in Canada will be permitted only for the importation and distribution of films for which the importer owns world rights or is a major investor. Direct and indirect takeovers of foreign distributors in Canada will be allowed only if the investor undertakes to reinvest some of its Canadian earnings in accordance with national cultural policies. Finally, all applications to invest in Canada made after February 13, 1987 are subject to the new policy.

Well, isn't this terrific? But also too late. First of all there probably aren't any Canadian distributors that foreign investors would be interested in taking over. There probably won't be too much demand to take over Canadian distributors in the future since there is no reason at present to believe that their situation will be much improved from what it was in the past. Since most foreign distributors, particularly American, see to it that in most cases they either own world rights in a picture or are the major investor, it is unlikely that the new rules will prevent a proliferation of new foreign distribution in Canada. But then again since most if not all of the distributors that count already have offices in Canada, it's hard to see what this new rule prevents; unless of course it's Canadian companies entering into agreements with other distributors. If the regulations are not carefully worded the new policy may prevent Canadian distributors from acting as representatives for foreign distributors or entering into joint

ventures with them.

Most pointedly of all, is that the new foreign investment policy for distributors probably violates the Free Trade Treaty. Readers who have read my essay on the Treaty and cultural industries (*Cinema Canada* No. 149) will know that there is good reason to believe that the cultural industries are not as exempt from the treaty as claimed. In any event it is difficult to imagine how in the spirit of free trade the Canadian government could refuse an American takeover of a Canadian distributor.

Creating a separate market

Now for the punchline. No one will be able to distribute a film, video or made-for-TV movie in Canada unless they hold world rights or produced the film or have filed an affidavit with the new Film Importation office attesting that the Canadian distribution rights were acquired in separate negotiations and in a separate contract for a specific fee for the Canadian market.

Now this is surely ridiculous! Whether or not Canadian distribution rights are contained in one agreement, two agreements, 10 agreements or on a thousand bits of paper that fit together like a jigsaw puzzle has nothing to do with American domination of film distribution in this country. It certainly won't create a separate Canadian distribution market. Supporters of Ms MacDonald's new policy obviously don't understand why Canadian distribution rights are almost invariably lumped in with the American domestic market.

American distributors control the North American market and a large part of the world market because they own or control their own domestic product, a product which is in exceptionally high demand. With their financial clout and resources, they are able to offer independent or unaffiliated filmmakers one-stop-shopping. While an independent filmmaker may have to compromise certain markets when giving an American distributor world rights, he is nevertheless assured of American penetration and access to numerous marketing facilities which more than balance out any negatives. Besides, it's much easier to deal with one reputable giant than monitor several lesser lights.

Up until the last 10 to 15 years Canada did not really produce any feature films of its own. The primary source of films watched by the moviegoing public were American, mostly produced by the majors. This situation permitted the Americans to dominate Canadian distributio

Michael N. Bergman is a Barrister and Solicitor of the provinces of Quebec, Ontario and Alberta with offices in Montreal and Toronto.

since they were marketing their own product. Given the proximity of Canada to the United States, not having a film industry of its own but having a population watching and wanting to watch American films, it's quite easy to see how Canada became part of the American domestic market. The advent of a Canadian feature film industry presents the problem of how to convince the dominant American distributors to properly market Canadian films which may have limited appeal in the American market. This emphasis on the American market has made Canadian producers think in terms of films destined for that market. Since Canadian filmmakers have proven poor copiers of the American style, their films have met with little success in the States (or in Canada for that matter). This has engendered the debate which pits the notion that better Canadian films would be more successful whoever the distributor is versus the claim that American distributors are not interested in properly marketing Canadian films whatever their quality.

It is often said that distributors finance films. There is much truth to this, except that they're often financing films which their production arms are producing or in which they are the major investors. There is no guarantee that an independent Canadian distributor will behave the same way especially if the Canadian product is not commercially viable. For Canadian distributors to grow strong they must have access to foreign products while Canadian products become, one hopes, more consistently viable.

Intent of the new proposal

So what does the proposed new film law do? First of all it ensconces the Americans in their effectively exclusive right to distribute films they produce. This is perfectly legitimate. Then it preserves their rights to films that have world rights. Since most films which the Americans distribute are licensed worldwide, producers of commercially viable films are attracted to giving them world rights. It is exceptionally difficult to find a distributor to distribute in the U.S. without giving that distributor world rights. The proposed law locks up most commercially viable films for the American distributors.

This leaves a small slice of the pie consisting of independent (often non-commercial) products which the proposed law supposedly makes accessible to everyone by requiring separate negotiations, separate contracts and separate fees for Canadian rights. This is surely a physical impossibility. Every attempt to negotiate world distribution rights necessarily involves Canadian rights. Since usually world rights are discussed first, *ipso facto* Canadian rights will be negotiated within that context. Besides no prudent businessman would negotiate any rights for any territory in abstraction and without relation to other territories. Even in the best case there's a simple way for a non-Canadian distributor to acquire Canadian rights under the proposed law: negotiate the Canadian rights first and make sure

they fail, then negotiate the American rights and either make a tougher deal or let them fail. An independent producer will soon catch on that he won't get American rights in the States without giving Canadian rights too.

Let's say a foreign independent producer tries to deal with a Canadian distributor. What can the Canadian offer him? The Canadian market? Well that's fine. Anything beyond Canada? Usually not. Big league marketing efforts? Questionable, especially when you don't have the money.

Let's say that Canadian distributors do acquire more product under the new law. They will certainly earn more money, but not that much more. Although many lay people point to the success of independent productions like *Crocodile Dundee*, these are more often than not the rare exceptions. At any rate, foreign producers who produce numerous box-office successes will soon prefer dealing with one world distributor than several.

Embodying Canadian rights in a separate contract should make a couple of lawyers happy since they will be the only ones to really benefit.

In short the intent of the proposed law is defeated at every turn. The real effect of the proposed law is to fence in Canadian distributors trapping them with a shaky peripheral role.

As to the monitoring system of filing affidavits. Come, come. Who can prove the content of negotiations between foreigners in a foreign country? What kind of police force could dig up the foreign evidence? And besides, can you imagine the cost of flying in foreign witnesses for prosecution? If foreign independent producers have to become so concerned about Canadian law just to negotiate a distribution deal, wouldn't they rather forget about the Canadian market altogether? Or maybe they would be induced to devising schemes to avoid the law. On a purely legal level, how can a Canadian law be made to apply to negotiations between foreigners in a foreign country concluding a foreign contract?

The odd thing about the proposed law is that the real losers are Canadian producers and distributors because they will be unable to conclude deals without negotiating Canadian rights separately. Canadians will be unable to offer the sweetener of the Canadian market to acquire rights elsewhere. It will be much easier to prove Canadians are violating the law since they are right here at home.

Let's also be mindful of Constitutional issues. After all, the proposed law constrains Canadians from using every negotiating tactic to acquire cultural properties. Could this not be construed as a restriction on freedom of speech?

Canadian distributors must compete

The new film distribution policy would be scrapped but not in favour of the draft Bill leaked some time ago which provided a licensing system. In my opinion, the growth and enhancement of the Canadian film industry and its distribution arm will in no way be served by

the expropriation directly or indirectly of the operations of American distributors in Canada. The growth of Canadian distributors is entirely dependent on their ability to compete. To compete they must be properly capitalized, organized and be able to provide a range of marketing services. Canadian distributors cannot limit themselves to the Canadian domestic market. Successful distribution is an international effort. Canadian distributors must develop links, joint ventures and subsidiaries abroad. Only then will they be able to develop the ability to offer the kinds of distribution services that will attract producers. There is no question that Canadian distributors must have a solid base at home but that base must be the reward of hard competition and no government fiat. The new policy will achieve none of this. What would be a triad: incentive for private investment, international government cooperation, and joint ventures, even with the Americans.

Government assistance to Canadian distributors must be in a form which induces private investment and ultimately reduces government subsidy. Whether this be in the form of tax incentives, loan guarantees or funding to assist public offerings, the objective must be the

same. Only private capital will encourage the devices necessary for expansion.

If there is one spark of possibility in the new distribution policy it is the vague hope that other governments will similarly legislate market independence. If, through international government cooperation, a sufficient number of key countries were to adopt such a plan, the hold of multi-national distributors may be broken in favour of national distributors. This initiative should be explored and followed. If the American distributors resist the new Canadian distribution policy, I imagine it will be on this one point, the fear that other governments will follow suit with stiffer legislation.

In order to foster a broader range of activity there is no question that links and joint ventures with other distributors must be encouraged, even joint ventures with Americans. Certainly a whole range of government incentives in this regard can be utilized.

Frankly, this country would be better off with no distribution law than the one that is proposed. I suspect Canadians would be better served by the existing system than the proposed law which permanently relegates Canadian distributors to the periphery. ●

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