The real cost of the federal distribution bill

BY MICHAEL BERGMAN

On February 13, 1987 Flora MacDonald announced that she would soon be introducing major legislation on film distribution. Her statement outlined a tough policy which included the licensing of film distributors. Foreign distributors would only get a license to distribute films in which they had a significant financial stake.

As weeks turned to months an impatient industry waited for the minister to make good on her word. Communications Canada heatedly denied that either the department or the government had given way to American pressure to abandon the distribution proposals. Various reasons were given for the delays in presenting the bill: federal/provincial jurisdictional difficulties had to be sorted out; the legislative agenda was crowded leaving little room for the bill; more consultations had to be undertaken with interested parties.

In the summer of 1987, to ease the pressure, a draft copy of the legislation was leaked. The draft was as good as Flora’s word: it was tough legislation which would effectively separate Canada as a distinct film market.

But again nothing happened. The bill seemed to disappear into the never-never land of film bureaucracy. More to the point, free-trade negotiations were coming to the deadline crunch: October 5. The government could not afford to have any irritant disrupt the proceedings.

But even with the trade agreement signed, there was no sign that the legislation would soon be tabled. Once again, the culprit was free trade. Nothing would be done until the agreement had passed through the American Congress the following spring.

Finally, in June 1988, with elections imminent and a government concerned to show that it was keeping its promises, the Minister of Communications tabled draft legislation for a Film Products Importation Act. But between the announcement and the tabling "fell the shadow". The Act had been gutted to make it compatible with the free-trade agreement.

The Act never got beyond a first reading; it died on the order paper when Parliament was dissolved on October 1. All present indicators point to a Tory majority victory in the upcoming elections. It may be that a new Conservative government will reintroduce the Film Products Importation Act.

While some argue that even a weak law is better than no law, our legal columnist, Michael Bergman, makes a forceful case that a bad law is worse than no law at all.

The Film Products Importation Act, introduced for first reading by Federal Communications Minister Flora MacDonald in June of this year, is a piece of legislation that if passed into law will surely bring about the decline of the Canadian film industry, not to mention an encroachment on the civil liberties of all Canadians.

How can one bill so well intended achieve this? Perhaps it is a matter of bad drafting or little forethought or ignorance or contortions made to satisfy all interest groups. Whatever it is, it is only to be hoped that unless the bill is substantially amended it will never see the light of statutory day again.

Even a lay person carefully and thoughtfully reading the Bill can immediately identify its pitfalls:

The Bill purports to set up a regime that separates - segregates a more appropriate word - the Canadian film distribution market from any other in the expectation that all

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distributors competing for the Canadian film market will thereby do so on an equal basis.

Sections 6, 7 and 8 are the focal point, dare I say vortex, of the Bill. They read as follows:

6. No person shall import a film product for distribution in Canada, unless that person had the right to import the film product.

7. No person shall distribute an imported film product in Canada, unless that person had the right to import the film product.

8. No person shall use or dispose of an imported film product in Canada for gain for any purpose of this Act.

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9.

(1) Any person who desires to import a film product for distribution in Canada may file with the Minister an affidavit for the right to import that film product for distribution in Canada.

(2) An affidavit for the right to import a film product for distribution in Canada shall be made in the prescribed form and manner and be accompanied by the prescribed fee or a fee determined in the prescribed manner.

(3) The Minister shall deny a person the right to import a film product, if the Minister is satisfied that the person does not have a business establishment in Canada or does not meet any of the following qualifications:

(a) the person

(i) has entered into an agreement relating to the right to distribute the film product in Canada or any part of Canada, which agreement neither relates to the right to distribute the film product outside Canada nor was entered into in fulfilment of a condition or requirement, determined whether written or oral, to the entering into of an agreement relating to the right to distribute the film product outside Canada, and

(ii) has not entered, nor will not enter, into an agreement relating to the right to distribute the film product outside Canada in fulfilment of a condition or requirement, determined whether written or oral, to the entering into of an agreement relating to the right to distribute the film product outside Canada, and

(iii) has entered into an agreement relating to the right to distribute the film product in Canada or any part of Canada in fulfilment of a condition, whether written or oral, to that person’s entering into an agreement relating to the right to distribute the film product outside Canada, or

(iv) has entered, or will enter, into an agreement relating to the right to distribute the film product outside Canada in fulfilment of a condition or requirement, whether written or oral, to that person’s entering into an agreement for Canada referred to in sub-paragraph (i); (b) the person or any affiliate of the person has or will have the right to distribute the film product in all media throughout the world, other than the country of origin, either at the time of the completion of principal photography of the film product or at the time the film product is to be imported, and no person, other than that person or an affiliate of that person has distributed, is distributing or will have distributed, in the twenty-six months immediately following the date of the first commercial use of the film product, the film product in any medium in any country in which that person or an affiliate of that person carries on the business of distributing film products, including the country or origin if that person or an affiliate of that person has the right to distribute the film product in any medium in that country; or

(c) the person or any affiliate of the person, prior to the making of the first answer print or first master copy of the film product, has made an investment in the film product equal to at least thirty per cent of the production costs of the film product.

(4) The Minister shall deny a person the right to import a film product, if the Minister is satisfied that the person meets only the qualification described in paragraph (3)(a) and, pursuant to the Investment Canada Act, has given an undertaking to Her Majesty in right of Canada to import for distribution in Canada only film products described in paragraphs (3)(b) or (c).

(5) The Minister may deny a person the right to import a film product, if the Minister is satisfied on reasonable grounds that the person has, in the two years immediately preceding the date of the application, contravened section 6,7,8 or 28; or

(b) is satisfied that any right of the person or an affiliate of the person was revoked pursuant to paragraph 26(1)(a).

(6) The Minister may deny a motion picture exhibitor or an affiliate of a motion picture exhibitor the right to import a film product, if the Minister is satisfied, on reasonable grounds, that the motion picture exhibitor

(a) is unfairly refusing to exhibit in theatres operated by the motion picture exhibitor film products that are distributed by any person that is not an affiliate of the motion picture exhibitor, for the purpose of preventing any person from acquiring rights to distribute film products in Canada, or

(b) is, taking in account the normal practices of the industry with regard to the exhibition of a film, including but not limited to, the selection and number of theatres and screens in which such a film is shown, the financial terms and the dates and length of playing periods, unfairly and without reasonable business justification systematically denying access to those theatres to imported film products or Canadian film products that are distributed in Canada by any person that is not an affiliate of the motion picture exhibitor;

and the Minister may establish a committee to advise on the compliance of the industry with the provisions of paragraphs (a) and (b).

(7) In this section, "motion picture exhibitor" means any person who operates five or more theatres and, for the purposes of this section, any theatre operated by an affiliate of a person shall be deemed to be operated by that person;

"theatre" means any theatre or other premises in Canada for the theatrical exhibition of film products to the public.

Excerpts from the Film Products Importation Bill

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"theatre" means any theatre or other premises in Canada for the theatrical exhibition of film products to the public."
Whatever you the reader may make of Section 9 and its impact on civil liberties, there is no question that this section is enacted will bring about the decline of the Canadian film industry.

Section 9 tells us that anyone who wants to import film products for distribution in Canada must file an affidavit with the appropriate Minister in the appropriate form together with the required fee (naturally it costs money to get rights which you had but for government interference).

The Minister then has 20 working days to decide whether or not to deny the person the right to import a film product. Subsection 3 is imperative. It says: "The Minister shall deny..." The Minister faced with any one of the circumstances enumerated in Subsection 9 has no choice but to deny a person the right to import a film product. The imperativeness nature of Subsection 9 is that of Section 6 of Section 9 where referring to motion picture exhibitors it states: "the Minister may deny..." Subsection 6 is facultative. The curious thing about Subsection 3 is that it is expressed in the negative. The Minister's power is one of denial. He is not granting rights. In effect, the right to import a film product is dependent on the Minister and whether one says he denies permission or gives permission, the real effect is that he is the grantor of the right to import a film product. Nevertheless, the fact that Subsection 9 is expressed in the negative produces some possibly unintended results.

Simply stated, Subsection 3 says that the Minister shall deny a person the right to import a film if:

(a.) The person does not have a business establishment in Canada or fails to meet any of the following qualifications;

(b.) Canadian distribution rights are not contingent on other distribution rights; or

(c.) The person has world rights or the person has invested fifty percent (50%) of the production costs of the film.

This reading of Subsection 3 is false because it assumes that the proviso is worded positively rather than negatively. If the subsection was worded in the positive then anyone meeting any one of the criteria would be entitled to import a film product. However, because Subsection 3 is expressed in the negative the correct interpretation is that the Minister must deny the right to import a film product if the applying person does not meet any one of the criteria. In other words, the fact that an importer has a business establishment in Canada is not sufficient if he cannot show that his right to import a film product is not contingent on foreign distribution and will not be, or, if he cannot show that he has invested fifty per cent of the production costs or alternatively, if he cannot show that he has invested fifty per cent of the production costs or alternatively, if he cannot show that he has invested fifty per cent of the production costs.

As if all of this was not bad enough, Section 9 also tells us that the Minister must deny the right to import a film product for distribution unless the person importing or using the film product is to be noted that the bill does not contain the words "import" or "export". A person cannot then enter into a distribution agreement for Europe wherein the fact of existing and previous Canadian distribution of the film affects the European distribution agreement. (It is rather typically Canadian that inherent in this is the notion that even after distribution in Canada, Canadian distribution fees will somehow be diminished and not increased by distribution elsewhere).

The Minister or his functionaries reviews the affidavit to determine whether or not to deny the person the right to import a film product. Subsection 3 is imperative. It says: "The Minister shall deny..." The Minister faced with any one of the circumstances enumerated in Subsection 9 has no choice but to deny a person the right to import a film product. The imperativeness nature of Subsection 9 is that of Section 6 of Section 9 where referring to motion picture exhibitors it states: "the Minister may deny..." Subsection 6 is facultative. The curious thing about Subsection 3 is that it is expressed in the negative. The Minister's power is one of denial. He is not granting rights. In effect, the right to import a film product is dependent on the Minister and whether one says he denies permission or gives permission, the real effect is that he is the grantor of the right to import a film product. Nevertheless, the fact that Subsection 9 is expressed in the negative produces some possibly unintended results.

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A FILM PRODUCT IF THE MINISTER
THinks THAT THE EXHIBITOR IS
IMPROPERLY USING OTHERWISE
NORMAL AND REASONABLE BUSINESS
PRACTICES TO PREVENT OTHER
PERSONS FROM ACQUIRING RIGHTS
to distribute film products in
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(a.) The government will become rich on the
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(b.) The government will look the other way;
(c.) Fewer films will be imported into Canada.

The bill effectively prevents them from
entering into any deals with foreign distributors
since of necessity the only reason why a foreign
distributor would deal with a Canadian is
because the Canadian in the overall context of
the world market of the film offers something
useful in the Canadian market.

Other unintended but serious consequences
may arise from the bill. For example, if a
Canadian production house shoots a film
outside of Canada using entirely Canadian
funds and an all-Canadian cast and crew but
has the answer print made outside of Canada,
other film made elsewhere.

Getting the Minister not to deny the right to
import the product, an apparent achievement in
itself especially if you are a Canadian, still leaves
one with a precarious existence: The Minister
may at any time within two years revoke the
product if the Minister thinks that the exhibitor
is improperly using otherwise normal and
reasonable business practices to prevent other
persons from acquiring rights to distribute
film products in Canada or is denying importers
access to its theatres to exhibit imported or
Canadian film products. (I did not know that
imported films were receiving insufficient
screen time by exhibitors in Canada). It should
be noted that the provisions governing
exhibitors are independent of Subsection 3 of
Section 9 described above. This tends to
reinforce the notion that having a business
establishment in Canada does not itself entitle
the importer and certainly not the exhibitor
to the right to import, distribute or use a film
product. While it may be argued that the
principal exhibitors have now or in the past
given nominal screen time to Canadian films,
it is a far different matter to say that they or their
affiliates (who are, of course, the distributors)
cannot import films into Canada. By the same
token, the same measure applies to a Canadian
theatre chain wholly owned in Canada. Since
imported films are now and for the foreseeable
future a mainstay of exhibitors, it is difficult
to understand how they can be held to such
a requirement. It will certainly be disadvantages
for the small Canadian exhibitor who although
unaffiliated with a foreign major, will still need
to comply with this part of Section 9.

For that matter, the way Section 9 is drafted
and taking into account Section 7 and 8, it would seem that both the distributor and the exhibitor
must keep separate affidavits with the Minister
and both need the wave of his hand.

The Minister may require additional
information to supplement that supplied in
the affidavit. If the additional information is
not supplied within 60 days of a request for it,
the Minister must deny the right to import the film.

Where the Minister denies the right to import
a film product, he must give reasons. Where
the Minister revokes the right to import a film
product, he must give the person affected
an opportunity to be heard.

Where the Minister denies or revokes the right
to import a film product, the person affected
may appeal to a review board composed of three
two persons selected from a 15 member panel
appointed by the government. Members of the
review boards are to have experience in all
aspects of filmmaking. The Minister selects one
person from the panel, the complainant selects
another person and the two people thus
appointed select a third. The review board is
supposed to act within 15 days. It does
not operate as a court and is not bound by technical
or legal rules of evidence. It does allow people
to be heard and cross-examined. The review board
can uphold the Minister's decision or grant the
right to import the film product.

Given the realities of the industry, I suspect
this board will be quite busy.

The Bill creates a new level of bureaucracy to
deal with its application and enforcement in the
person of the Films Products Secretary. He or
she will keep a register of affidavits and permits
granted. Customs officials will be required to
advise the Minister of the importation of film
products. Persons who contravene Sections 7, 8
and 9 of the Act are liable to a fine not exceeding
$200,000. Officers, directors and agents of
importing corporations can also be liable to the
same fine.

The Bill gives to the Minister the ability to
demand that any person he believes does not
have the right to import a film product cease
doing so or show cause that he is not. Where
that person refuses to comply the Minister can
seek a Court Order against that person ordering
him not to import the product or fining him
$25,000 per day of contravention.

Since the Bill sets unrealistic requirements to
obtain the right to import a film product, one of
three possibilities will occur:

The government will become rich on the
taxes.
The government will look the other way;
Fewer films will be imported into Canada.